GENERAL STANDARDS FOR EXCLUSIONARY CONDUCT

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I. Introduction

It is well-established that a firm with monopoly power violates section 2 only by engaging in "anticompetitive conduct."[1] Although many different kinds of conduct have been found to violate section 2, "[d]efining the contours of this element . . . has been one of the most vexing questions in antitrust law."[2]

The basic challenge lies in distinguishing between aggressive competition and anticompetitive, exclusionary conduct. As the U.S. Court of Appeals for the District of Columbia Circuit explained in *Microsoft*,[3]

> Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which

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[*] The views expressed are those of the author and Policy Studies' staff and do not necessarily reflect the views of the Commission or any individual Commissioner. The paper derives from early drafts developed in the context of the FTC/Department of Justice Joint Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition. Any language that overlaps with other commentaries on the hearings reflects its origin in the common drafts.

[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis omitted) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

[2] 1 ABA SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 241 (6th ed. 2007); *see also* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 81 (2007), *available at* http://www.amc.gov/report_recommendations/amc_final_report.pdf ("How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law."); Sherman Act Section 2 Joint Hearing: Loyalty Discounts Hr'g Tr. 110, Nov. 29, 2006 [hereinafter Nov. 29 Hr'g Tr.] (Muris) (stating that "the scope and meaning of exclusionary behavior remains . . . very poorly defined").

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

increase it.[4]

The *Microsoft* court adopted a "rule of reason" framework similar to that used in section 1 cases as that "general rule."[5] A number of commentators, however, have criticized the rule of reason approach, and proposed other types of unitary tests which they contend are more objective and administrable, both for the courts and for businesses.[6] Others have urged that specific tests[7] or safe harbors[8] be developed for particular types of conduct. As one panelist colorfully put it, "[T]here is a holy war raging over the appropriate liability standard under

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4 *Id.* at 58.

5 *Id.* at 58–59.

6 *See* Einer Elhauge, *Defining Better Monopolization Standard*s, 56 STAN. L. REV. 253, 330 (2003) (advocating rules of per se legality and illegality based on whether the sole effect of the conduct is to improve the monopolist's efficiency); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L. J. 413 (2006) (advocating the no-economic-sense test); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct–Are There Unifying Principles*?, 73 ANTITRUST L.J. 375, 403 (2006) (advocating the sacrifice test); Mark R. Patterson, *The Sacrifice of Profits in Non-Price Predation*, 18 ANTITRUST 37, 43 (Fall 2003) (stating that "the sacrifice-of-profits test provides a desirable approach both for litigation and business planning"); *see also* Kenneth L. Glazer & Brian R. Henry, *Coercive vs. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, ANTITRUST, Fall 2008, at 45, 51 (proposing "a framework for analyzing vertical monopolization cases based on whether the conduct at issue is coercive or incentivizing"); Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension*, ANTITRUST, Summer 2008, at 50, 55 (proposing "that antitrust distinguish between conduct that is purely extractive" and "conduct that enables a firm to extend its market power by rendering its rivals' competitive restraints less effective . . . .").

7 *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L. J. 435, 466, 481 (2006) (contending that "Section 2 is not 'one size fits all'" and urging the courts to adopt "a manageable set of baseline legal tests that presumptively apply" to particular types of conduct). *But cf.* Melamed, *supra* note 6, at 384 (arguing that different rules for different types of conduct "would be problematic in practice" since "different rules . . . would inevitably invite disputes about how the conduct at issue should be categorized").

8 *See* Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 95–96, Feb. 13, 2007 (Stern); Sherman Act Section 2 Joint Hearing: International Issues Hr'g Tr. 130 [hereinafter Sept. 12 Hr'g Tr.] (Rill).

section 2 generally."[9]

These differing opinions reflect, in part, different views regarding the expected costs of "false positives" (cases in which liability is imposed on conduct that is procompetitive) and "false negatives" (cases in which liability is not imposed on conduct that is anticompetitive). If the standards used to assess legality generate significant false positives, beneficial, procompetitive business conduct may be chilled. At the same time, if they generate false negatives, consumers may be hurt by harmful conduct that escapes liability.

This paper first examines the development of section 2 conduct standards in the courts, focusing primarily on Supreme Court precedent. It then describes and analyzes the leading tests that commentators have proposed or endorsed for evaluating conduct under section 2, namely: (1) the *Microsoft* ***rule-of-reason*** framework, which examines both anticompetitive effects and procompetitive justifications within a structured, burden-shifting framework, and a variant, the ***disproportionality*** test, under which conduct that creates or maintains monopoly power is condemned only if it produces harms disproportionate to the resulting benefits; (2) the ***no-economic-sense*** and ***profit-sacrifice tests***, which focus on whether the challenged conduct made economic sense for the monopolist but for its potential exclusionary effect; (3) the ***equally-efficient-competitor*** test, which focuses on whether the challenged conduct would exclude an equally efficient rival; and (4) the ***impairing-rivals'-efficiencies*** test, which focuses on whether the suspect conduct solely created efficiencies for the monopolist or whether it also impaired the efficiencies of rivals.

The paper concludes that, while the proposed unitary tests are all useful for certain purposes, none can be used as a single bright-line rule for all of the many types of conduct subject to scrutiny under section 2, and that the *Microsoft* rule-of-reason framework should be utilized as the basic approach for analyzing the legality of single-firm conduct under section 2 of the Sherman Act.

II. Background: The Courts' Search for a Workable Conduct Standard

A. The Early Supreme Court Cases: From *Standard Oil* to *Grinnell*

Nearly a century ago, the Supreme Court in *Standard Oil* decided that the Sherman Act does not include "any direct prohibition against monopolization in the concrete,"[10] and concluded that the criterion to be used in determining whether particular conduct violated

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9 Sherman Act Section 2 Joint Hearing: Tying Hr'g Tr. 59, Nov. 1, 2006 (Popofsky); *see also* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L. J. 311–312 (2006) ("There is currently great intellectual ferment over the proper antitrust liability standard governing allegedly exclusionary conduct under Section 2 in the United States and Article 82 in Europe.").

10 Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).

section 2 as well as section 1 is "the rule of reason."[11] The Supreme Court subsequently decided a number of monopolization cases but did not further elucidate how the "rule of reason" was to be applied in assessing conduct under section 2.[12]

The seminal *Alcoa* case,[13] decided in 1945, built upon *Standard Oil's* distinction between mere possession of monopoly—which was not unlawful—and monopolization, which was. Writing for the Second Circuit, Judge Learned Hand observed, "[Alcoa] may not have achieved monopoly; monopoly may have been thrust upon it."[14] The court reasoned that where "[a] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry," punishment of that producer would run counter to the spirit of the antitrust laws: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[15]

Despite these observations, the court found that *Alcoa*'s alleged exclusionary conduct (the adding of productive capacity in response to increased demand) was not "inevitable" and hence was unlawful. Framing the key question as whether Alcoa's conduct "falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market,"[16] the court concluded that

> It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.[17]

Thus, under *Alcoa*, almost any conduct actively undertaken by a monopolist to create a competitive advantage for itself appeared to be problematical.

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11 *Id*.

12 *See generally* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 605–10 (3d ed. 2008) (discussing early monopolization cases).

13 United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945).

14 *Id.* at 429.

15 *Id.* at 430.

16 *Id*. at 431.

17 *Id.*

The Supreme Court quickly endorsed *Alcoa* and, in a number of subsequent cases, articulated an extremely expansive view of what types of conduct could be deemed unlawful under section 2.[18] Finally, in 1966, the Supreme Court set out in *Grinnell*[19] what remains the classic formulation of conduct prohibited under section 2. Drawing from *Alcoa*, the Court defined it as "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[20] As commentators have noted, however, the *Grinnell* standard provides little concrete guidance, either to the lower courts or to businesses attempting to conform their conduct to the requirements of section 2.[21]

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18 *See, e.g.*, United States v. Griffith, 334 U.S. 100, 107 (1948) (stating that "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised" and that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful"); Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1948) ("Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.").

19 United States v. Grinnell Corp., 384 U.S. 563 (1966).

20 *Id.* at 570–71.

21 *See, e.g.*, ABA SECTION OF ANTITRUST LAW, *supra* note 2, at 242 ("Courts have not been able to agree . . . on any general standard beyond the highly abstract *Grinnell* language, which has been criticized as not helpful in deciding concrete cases."); Elhauge, *supra* note 6, at 261 (noting that the *Grinnell* standard is difficult to apply because "[i]t seems obvious that often firms willfully acquire or maintain monopoly power precisely through business acumen or developing a superior product" and it is difficult to conceive of cases "where a firm really has a monopoly thrust upon it without the aid of any willful conduct"); *see also* Thomas E. Kauper, *Section 2 of the Sherman Act: The Search for Standards*, 93 GEORGETOWN L.J. 1623, 1623 (2005) (describing a standard based on whether conduct is "anticompetitive and exclusionary" as "of little utility in specific cases"); Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 695 (2000) ("Instead of focusing on willfulness, or the closely corresponding concept of intent, in monopolization cases courts focus on conduct. . . . Much of the monopolization case law struggles with the question of when conduct is, or is not, exclusionary."); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 14 (2004) ("By attaching the label 'willful acquisition or maintenance,' the courts have sought to draw a distinction between merits and non-merits-based competition that excludes.").

B. The Court's Provision of More Specific Guidance: From *Copperweld* to *Weyerhaeuser*

Since *Grinnell*, the Supreme Court has not articulated any alternative general standard for unlawful conduct under section 2. It has, however, in recent years enunciated some key principles and adopted certain conduct-specific tests that have provided additional guidance.

1. *Copperweld*: The Difference Between Section 1 and Section 2

After *Grinnell*, the Court did not again consider section 2 standards until its 1984 decision in *Copperweld.*[22] *Copperweld* focused on whether a parent corporation and its wholly owned subsidiary could be found liable for conspiring under section 1 of the Sherman Act. But in the course of its analysis, the Court also distinguished between sections 1 and 2, observing that under section 2 "[i]t is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression."[23]

The Court reasoned that because in the single-firm context "robust competition" and "conduct with long-run anti-competitive effects" may be difficult to distinguish, Congress had authorized "Sherman Act scrutiny of single firms" only when they "pose a danger of monopolization."[24] This limit on section 2 liability, the Court observed, "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[25] According to the Court, "Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct" for the "sound reason[]" that "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."[26] Thus, said the Court, "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2."[27]

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22 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), although an important section 2 case, did not address standards for exclusionary conduct.

23 *Copperweld*, 467 U.S. at 767.

24 *Id.* at 767–68.

25 *Id.* at 768.

26 *Id.* at 775; *see also id.* at 768–69 ("The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.").

27 *Id.* at 768.

2. *Aspen Skiing* and *Kodak*: An Emerging Focus on Consumer Welfare and Efficiencies

A year after *Copperweld*, the Court in *Aspen Skiing*[28] suggested a more comprehensive framework for evaluating the legality of exclusionary conduct in the context of a dominant firm's refusal to continue dealing with its smaller rival. There the Court found that a dominant firm operating three of four mountain ski areas in Aspen, Colorado, had violated section 2 by refusing to continue cooperating with a smaller rival in offering a combined four-area ski pass.

The Court held that the determination as to whether conduct is "exclusionary" under section 2 ultimately depends not only on its effect on the excluded rival but also on "its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way."[29] It structured its inquiry by examining the effect of the dominant firm's conduct on its rival, on customers of the combined ski pass, and on the dominant firm itself.[30] As part of that inquiry it examined whether there were valid business reasons for the dominant firm's refusal to continue cooperating with its smaller competitor in offering the combined ski pass. It explained that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[31] Finding that the defendant/monopolist's refusal to continue cooperating with its rival had harmed consumers, and further that "the evidence support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on it smaller rival,"[32] the Court upheld the jury verdict for the plaintiff.

Seven years later, in *Kodak*[33] the Court again focused on the importance of the

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28 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

29 *Id.* at 605.

30 *Id.* at 605–11.

31 *Id.* at 605.

32 *Id.* at 610–11. The Court focused in particular on the defendant's refusal to sell its rival any lift tickets, even at retail price, or to accept retail price coupons for its mountains issued by its rival, even though the coupons would have provided the defendant "with immediate benefits, and would have satisfied its potential customers." *Id.* at 610.

33 Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). Although at the Supreme Court level *Kodak* was primarily a section 1 tying case, it also included a section 2 claim that Kodak had unlawfully monopolized and attempted to monopolize service and parts for Kodak machines by limiting the availability of parts to independent service organizations and adopting other policies making it difficult for those organizations to compete. On remand, the case focused on the section 2 claim, which was premised on Kodak's using its monopoly over Kodak photocopiers and parts to

defendant/monopolist's business justifications in determining whether its conduct was unlawful. In denying Kodak's motion for summary judgment, the Court stated that "[l]iability turns . . . on whether 'valid business reasons' can explain Kodak's actions,"[34] and concluded that factual questions about the validity and sufficiency of the justifications offered by Kodak precluded summary judgment.

Aspen Skiing and *Kodak* together established that the existence or lack of legitimate business justifications, defined in terms of efficiencies, is a principal factor affecting the legality of conduct challenged under Section 2.[35] However, as discussed below, some have questioned the administrability of this approach, and there is a further question whether an efficiency justification represents an "all-or-nothing proposition" where "the case is over" if there is a legitimate efficiency justification, or whether the efficiency justification must then be balanced against the anticompetitive effects.[36]

Kodak, decided over fifteen years ago, is the last section 2 case in which the Supreme Court has ruled for the plaintiff. The Supreme Court's post-*Kodak* decisions have articulated a demanding new test for certain types of pricing conduct, and have also stressed the importance of employing standards that avoid false positives and inadvertent chilling of procompetitive conduct.

3. *Brooke Group*: The Adoption of a Conduct-Specific Test for Predatory Pricing

The year after deciding *Kodak*, the Supreme Court crafted a test tailored to one specific

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create a second monopoly in services. The jury entered a verdict for the plaintiff, and the Ninth Circuit affirmed. Although it concluded that when a legitimate business justification supports the impugned conduct, there can be no section 2 violation, it found that there was sufficient evidence that Kodak's justifications were pretextual and therefore upheld the jury verdict. *See* Image Technical Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1201, 1212–14, 1219–20 (9th Cir. 1997).

[34] *Kodak*, 504 U.S. at 483.

[35] ABA Section of Antitrust Law, *supra* note 2, at 243–44 ("One of the most important factors in determining whether the challenged conduct is to be condemned is a defendant's proffered business justifications, together with its significance or magnitude, its relation to the specific conduct in question, and the availability of less restrictive means to achieve the same goals.").

[36] *See* Kauper, *supra* note 21, at 1625 & n.18 (contending that *Aspen* and *Kodak* envision an "all or nothing proposition" and that neither decision envisions balancing the adverse effects of exclusion against efficiency gains).

type of section 2 conduct—predatory pricing. *Brooke Group*[37] set out a demanding two-pronged test for evaluating predatory-pricing claims. The Court held that to prevail on a predatory-pricing claim, plaintiff must show *both* that the defendant's prices are below an appropriate measure of its costs *and* that the defendant "had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices."[38]

The Court acknowledged that plaintiffs would find this test difficult to satisfy, but concluded that it was nevertheless appropriate because the costs of an erroneous finding of liability for alleged predatory pricing are so high: "[B]ecause 'cutting prices in order to increase business often is the essence of competition . . . mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[39] It also explained that "[a]s a general rule, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting."[40]

The *Brooke Group* test has indeed proven to be very difficult for plaintiffs to satisfy.[41] As the survey discussed in a companion paper suggests, relatively few predatory pricing cases are now filed and adjudicated, and almost none are won.[42]

4. *Spectrum Sports*: The Standards for Attempted Monopolization

In 1993 the Supreme Court also decided *Spectrum Sports*,[43] issuing one of its few opinions that have addressed attempted monopolization. In *Spectrum Sports*, the Court held that a firm cannot be held liable for attempted monopolization absent proof of a dangerous probability that it would achieve a monopoly in a relevant market through the challenged

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37 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

38 *Id.* at 224.

39 *Id.* at 226 (citations omitted).

40 *Id.* at 223.

41 *See, e.g.*, Gavil, *supra* note 21, at 16–17 ("Although the *Matsushita/Brooke Group* test has been criticized as unduly permissive of the scope of above-cost pricing conduct that excludes, it is now well-entrenched, and has proven to be very difficult to satisfy.").

42 *See generally* William F. Adkinson, Jr., Karen L. Grimm, and Christopher N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, Section II.D. and App. Tbl. 2, FTC Staff Working Paper, *available at* http://www.ftc.gov/os/section2hearings/index.shtm.

43 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

conduct: "§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[44]

The Court again focused on the distinction between harm to competition and harm to competitors, as well as the danger of chilling procompetitive conduct. As it explained,

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market . . . . The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. . . . Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.[45]

Citing *Copperweld*, the Court then went on to observe that "It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which 'inherently is fraught with anticompetitive risk.'"[46]

5. ***Trinko*: The Impact of an Alternative Regulatory Structure on Section 2 Standards**

In its 2004 *Trinko* opinion,[47] the Court decided against articulating more specific standards to govern unilateral refusals to deal in particular or section 2 conduct in general. *Trinko* involved allegations that Verizon had failed to provide rivals with interconnection services of the quality required by the Telecommunications Act of 1996. In an amicus brief supporting Verizon, the Department of Justice and the Federal Trade Commission ("the Agencies") recommended that the Court use a profit-sacrifice/no-economic-sense test in evaluating Verizon's conduct.[48] In doing so, they emphasized the danger of chilling procompetitive conduct and urged that claims involving refusals to deal with rivals required the

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44 *Id.* at 459.

45 *Id.* at 458.

46 *Id.* at 458–59.

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

48 Brief for the United States *et al.* as Amici Curiae Supporting Petitioner at 16, *Trinko,* 540 U.S. 398 (2004) ("conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power"); *id.* at 19 ("If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful.").

"sharper focus" provided by the no-economic-sense test.[49] Additionally, the Agencies proposed that in other cases, in the absence of a conduct-specific rule, a disproportionality standard be employed. Under that standard, conduct would be deemed anticompetitive under section 2 when it results in "harm to competition" that is "disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition").[50]

The Court held for Verizon. It characterized *Aspen Skiing* as an exception to a general no-duty-to-deal rule, resting "at or near the outer boundary of § 2 liability,"[51] and distinguished that case on the ground that it involved both a profit sacrifice and termination of a prior voluntary course of dealing with a rival. Perhaps more importantly, the Court also emphasized that Verizon's conduct, unlike that at issue in *Aspen Skiing*, was subject to detailed regulatory control:

> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy competitive harm. . . . Just as regulatory context may in other cases serve as a basis for implied immunity . . . it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.[52]

The Court did not adopt the profit-sacrifice/no-economic-sense test as the Agencies had urged. Nor did it address their disproportionality standard or clearly establish any alternative test governing unilateral refusals to deal with rivals or single-firm conduct more generally.[53] Indeed, the Court did not take issue with *Aspen's* formulations of the governing standards. In *dicta*, however, the Court articulated some of the same concerns with false positives, administrability issues, and institutional limitations that the Agencies had emphasized in their brief. Thus, the Court explained,

> Against the slight benefits of antitrust intervention here, we must weigh a realistic

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49 *Id.* at 15 ("Where, as here, the plaintiff asserts that the defendant was under a duty *to assist a rival*, the inquiry into whether conduct is 'exclusionary' or 'predatory' requires a sharper focus. In that context, conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.").

50 *Id.* at 14.

51 *Trinko*, 540 U.S. at 409.

52 *Id.* at 412.

53 *See* Kauper, *supra* note 21, at 1628 (suggesting that "it will be difficult to move the Court to articulate and follow standards of more general applicability").

> assessment of its costs . . . . Mistaken inferences and the resulting false condemnations are "especially costly because they chill the very conduct the antitrust laws are designed to protect." The cost of false positives counsels against an undue expansion of § 2 liability.[54]

Additionally, said the Court, "Even if the problem of false positives did not exist," the type of conduct here at issue "may be as we have concluded with respect to above-cost predatory pricing schemes, 'beyond the practical ability of a judicial tribunal to control,'"[55] because "[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree,"[56] and "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations."[57]

Trinko was a controversial decision. While some have read the decision narrowly,[58] others have read it more broadly as reflecting a basic doctrinal shift with major implications for the types of conduct standards that should be employed in section 2 cases.[59]

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54 *Trinko*, 540 U.S. at 414 (internal quotation omitted) (citations omitted).

55 *Id.*

56 *Id.* at 414–15.

57 *Id.* at 415.

58 *See, e.g.*, Kauper, *supra* note 21, at 1636 (observing that "*Trinko* is more about the interplay between antitrust and regulation than it is about antitrust as such"); Jonathan L. Rubin, *The Truth About Trinko*, 50 ANTITRUST BULL. 725, 725 (2005) (arguing that "although some see the *Trinko* case as a watershed event, in which monopolization law as embodied in section 2 of the Sherman Act was significantly rolled back, the truth is that *Trinko* is largely a restatement of the status quo ante of monopolization doctrine").

59 *See, e.g.*, Werden, *supra* note 6, at 429–30 ("The potential social harm from erroneously condemning procompetitive conduct is obvious with allegedly predatory pricing . . . But in *Trinko* the Court made abundantly clear that this critical tenet of Section 2 law has broader application."); Eleanor M. Fox, *Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153, 169 (2005) ("*Trinko* has . . . opened wide the door to argument in every Section 2 case that the starting point is skepticism about Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient"); Marina Lao, *Aspen Skiing and Trinko: Antitrust Intent and Sacrifice*, 73 ANTITRUST L.J. 171, 173 (2005) ("*Trinko* suggests that evidence of a monopolist's sacrifice of short-term profits is a *necessary*, but insufficient, condition for exclusionary conduct.").

6. *Weyerhaeuser*: Extension of the *Brooke Group* Test to Predatory Bidding

In its most recent decision pertaining to section 2 standards, the Court in *Weyerhaeuser* [60] concluded that predatory pricing and predatory bidding claims are similar and therefore extended *Brooke Group's* two-pronged predatory-pricing test to predatory bidding. In so doing, the Court once again emphasized the importance of crafting administrable rules of decision that reduce the danger of false positives. It explained that, as with predatory pricing, "actions taken in a predatory-bidding scheme are often 'the very essence of competition,'"[61] and concluded that, while higher bidding may potentially have exclusionary effects even when it does not result in below-cost output pricing, such effects are "'beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate' procompetitive conduct."[62]

Thus, the Supreme Court has now firmly established that two categories of pricing conduct are subject to a demanding two-part test. However, considerable controversy and uncertainty remain regarding the standard (or standards) that should be applied to other types of single-firm conduct. One candidate is the rule-of-reason framework first suggested in *Standard Oil* and recently employed in the landmark *Microsoft* case decided by the District of Columbia Court of Appeals in 2001.

C. *Microsoft* and the Rule-of-Reason Framework

In *Microsoft*,[63] which is widely regarded as the leading recent appellate opinion on section 2 conduct standards, the U.S. Court of Appeals for the D.C. Circuit explicitly adopted a rule-of- reason framework for determining whether to condemn specific types of conduct under section 2. In the trial court, the United States had urged application of a standard that would ascribe liability to conduct that makes "no business sense" but for its tendency to exclude competition.[64] The trial court, employing a similar standard, condemned almost all the

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60 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007).

61 *Id.* at 1077.

62 *Id.* at 1078 (citations omitted).

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

64 *See* Plaintiffs' Joint Proposed Conclusions of Law at 27, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) ("These actions . . . made no business sense for Microsoft except as a means of removing [Netscape] Navigator as a platform threat and thereby protecting the Windows monopoly.").

challenged conduct.[65]

On appeal, however, the D.C. Circuit adopted and used a rule-of-reason framework. Under that framework, the plaintiff must first establish a *prima facie* case by showing that the challenged conduct had or was likely to have an adverse effect on competition. This means that the challenged conduct must "harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice."[66] The defendant may counter by establishing a procompetitive justification for its conduct. Plaintiff then must either rebut defendant's showing or, if it does not, demonstrate that the anticompetitive harm outweighs the procompetitive benefit.[67] As the court observed, this framework is similar to the rule of reason long applied in evaluating conduct under section 1.[68]

In evaluating Microsoft's conduct using this approach, the Court of Appeals systematically examined each of the many types of conduct the plaintiffs alleged to be anticompetitive, asking first whether the plaintiffs had met their burden of showing anticompetitive effect, and, if so, whether Microsoft had offered a non-pretextual procompetitive business justification for its conduct. Although some now refer to the court's framework as the "balancing test," the court actually avoided having to balance anticompetitive harm and procompetitive benefits. Rather, when the court imposed liability, it generally did so based on plaintiffs' showing of anticompetitive effect, coupled with Microsoft's inability to offer any legitimate procompetitive justification.[69] And when the court rejected liability, it did so based primarily on plaintiffs' failure to show anticompetitive effects or their failure to rebut

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65 *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 44 (D.D.C. 2000) (ruling that "[b]ecause Microsoft's business practices 'would not be considered profit maximizing except for the expectation that . . . the entry of potential rivals' . . . will be 'blocked or delayed,'" Microsoft's actions must be deemed predatory).

66 *Microsoft*, 253 F.3d at 58 (emphasis in original).

67 *Id.* at 59.

68 *Id.* ("In cases arising under §1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric 'rule of reason'. . . . [In *Standard Oil*] . . . the Supreme Court used that term to describe the proper inquiry under both sections of the Act. . . . As the Fifth Circuit more recently explained, 'it is clear . . . that the analysis under Section 2 is similar to that under Section 1 regardless [of] whether the rule of reason label is applied . . . .'") (citations omitted).

69 *See id.* at 60–78.

Microsoft's efficiency justifications.[70] Except for one instance,[71] the court did not engage in any balancing.

As discussed below, many have concluded that the *Microsoft* rule-of-reason framework is the optimal approach for evaluating conduct under section 2 (subject to specific tests or safe harbors such as those for predatory pricing and buying that the Supreme Court has adopted). Others strongly disagree and have proposed a number of alternative bright-line tests, which, they contend, are more administrable and more in keeping with the Supreme Court's recent jurisprudence emphasizing the danger of false positives. In the next section we consider both the *Microsoft* rule-of-reason and the leading alternatives that have been proposed to that approach.

III. Proposed Tests

A. The *Microsoft* Rule-of-Reason Framework

A significant number of commentators and panelists have advocated using the *Microsoft* rule-of-reason burden-shifting framework for determining whether a challenged practice is unlawful under section 2.[72] As explained above, under that framework, the plaintiff must first

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70 *See id.* at 63, 67–68, 71, 74–75.

71 *See id.* at 63 ("We agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic alteration of Microsoft's copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process.").

72 *See, e.g.*, Sherman Act Section 2 Joint Hearing: Concluding Session Hr'g Tr. 15–16, May 8, 2007 [hereinafter May 8 Hr'g Tr.] (Pitofsky) (defining key question as whether to adopt a rule-of-reason balancing test or a unitary profit-sacrifice test, and expressing strong support for the rule of reason); *id.* at 24 (Creighton) (urging use of the *Microsoft* test as "our default unless and until we can conclude with respect to particular types of behavior that there is another type of test . . . that more specifically advances the balance of maximizing consumer welfare to that particular type of conduct"); Sherman Act Section 2 Joint Hearing: Policy Issues Hr'g Tr. 61, 154, May 1, 2007 [hereinafter May 1 Hr'g Tr.] (Jacobson) (stating that consumer welfare is the appropriate standard and the rule of reason is "the presumptive way of getting there," and advocating *Microsoft*'s structured rule of reason as a default rule); *id.* at 17, 57–60 (Kolasky) (advocating the rule-of-reason standard derived from *Standard Oil* and *Microsoft*); *id.* at 29–30 (Baker) (proposing that the Agencies endorse the *Microsoft* rule-of-reason approach); s*ee also* Gavil, *supra* note 21, at 52–56, 74–78 (recommending a general framework based on *Microsoft's* burden-shifting approach); Salop, *supra* note 9, at 333–34 (arguing for a consumer welfare standard which "was adopted explicitly in *Microsoft*"); William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22

establish that the monopolist's conduct had an anticompetitive effect—*i.e.*, the conduct must be shown to harm the competitive process and therefore consumers.[73] The burden then shifts to the defendant to show a procompetitive business justification for its conduct, *i.e.*, "a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[74] If the defendant makes this showing, the plaintiff must either rebut the claim of procompetitive benefits, or, if unrebutted, show that the anticompetitive harm nevertheless outweighs those benefits.[75]

A variant of this approach—the so-called disproportionality" standard—would likewise consider both anticompetitive effects and procompetitive benefits in a structured manner. However, it would explicitly acknowledge that the last step of the analysis—any balancing of anticompetitive effects and procompetitive benefits that may be required—should not be entirely neutral. Instead, it would require that the anticompetitive effects be "disproportionate" to the procompetitive benefits before condemning the practice under section 2. The disproportionality standard was first suggested in a leading antitrust treatise,[76] and, as noted above, the Department of Justice and the Federal Trade Commission also suggested in their *Trinko* brief that disproportionality is the appropriate default standard.

Proponents of the rule-of-reason approach contend that it, unlike the profit-sacrifice and no-economic-sense tests, focuses directly on the key issue—consumer welfare—rather on the monopolist's profitability, which they view as at most tangentially relevant.[77] They argue that,

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ANTITRUST 85 (Spring 2008), at 89 (contending that "the rule of reason almost certainly provides the best analytical framework for enforcing Section 2, as well as Section 1," and recommending that a "major effort should . . . be devoted to extending that framework to single-firm conduct under Section 2").

73 *Microsoft*, 253 F.3d at 58–59.

74 *Id.* at 59.

75 *Id.*

76 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651a at 72 (2d ed. 2002) (defining "exclusionary conduct" as "acts that (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms *disproportionate* to the resulting benefits") (emphasis added); *see also* Sherman Act Section 2 Joint Hearing: Welcome and Overview Hr'g Tr. 41, June 20, 2006 (Hovenkamp) (explaining that the test was "designed to be a basic principle to be used in conjunction with specific rules for specific types of antitrust cases").

77 *See, e.g.*, Sherman Act Section 2 Joint Hearing: Refusals to Deal Hr'g Tr. 19–20, July 18, 2006 [hereinafter July 18 Hr'g Tr] (Kolasky); Salop, *supra* note 9, at 331 ("What is

unlike the other tests, the burden-shifting rule of reason provides a structured, yet flexible, analytical approach that can be used to assess the broad range of single-firm conduct [78] in a manner that is neutral, rather than skewed toward either the plaintiff or the defendant.[79]

Critics, however, contend that the rule of reason is too difficult to administer, that businesses cannot use it to plan their conduct, and that the resulting uncertainty makes businesses reluctant to undertake conduct that would be procompetitive and beneficial to consumers.[80] Thus,

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important is that this test focuses on the effect of the conduct on the market, that is, consumers and the competitive process. In contrast, the other standards – profit sacrifice, no economic sense, equally efficient competitor – are focused instead on the impact of the conduct on the alleged miscreant. This is the key reason why the other standards are flawed.").

78 *See* Kolasky, *supra* note 72, at 89 (arguing that "the rule of reason provides a superior analytical framework for applying Section 2, as well as Section 1," in part because it focuses attention on "determining the seriousness of the exclusionary effects" and "provides a mechanism for adjusting the degree of scrutiny of the defendant's proffered justifications and any potential less-anticompetitive alternatives depending on the nature of the conduct and the strength of the showing of competitive injury"); *cf*. Sherman Act Section 2 Joint Hearing: Monopoly Power Hr'g Tr. 172, Mar. 7, 2007 [hereinafter Mar. 7 Hr'g Tr.] (Sims) (noting that "there is no end to possible options for section 2 approaches, but there is also clearly no consensus on any particular approach, with the possible exception that we really ought to pay attention to the facts").

79 *See* May 1 Hr'g Tr. at 29 (Baker) (urging adoption of rule-of-reason approach rather than "thumb on the scales" tests such as no economic sense).

80 *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 93 ("Opponents criticize this test as too complex and difficult to administer. They argue that, because businesses will be uncertain of how their course of conduct might be judged, they will be reluctant to undertake procompetitive conduct."); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1258 (2005) ("[T]he [sacrifice] test rests on the judgment that market-wide balancing tests, which in theory could condemn all welfare-reducing conduct, will in practice prove to be an inferior legal standard because of their greater difficulty in administration and their perverse incentive effects."); July 18 Hr'g Tr. at 32 (Pate) ("[W]hile a general balancing test is flexible . . . it is inherently lacking in any objective content that businesses can apply in a predictable manner to make their decisions."); Werden, *supra* note 6, at 431 (contending that the consumer welfare test is "not a workable policy"); *see also* May 8 Hr'g Tr. at 35 (Rule) (noting the difficulties in applying rule of reason where the impact on consumer welfare is more indirect than in Section 1).

the critics warn, application of the rule of reason will lead to false positives and overdeterrence.[81] Furthermore, they argue, balancing is difficult, and generalist courts and juries may not be up to the task.[82]

In response, the proponents observe that the balancing step is almost never required,[83] as illustrated by the D.C. Circuit's *Microsoft* opinion.[84] As one proponent of the rule-of-reason framework explains,

> [D]espite nearly a century of devotion to the "balancing" concept, in fact there is a remarkable dearth of examples of courts actually engaging in any kind of balancing. For the most part, litigated cases turn on the absence of sufficient evidence of anticompetitive effects (inefficiencies) or of business justification (efficiencies).[85]

Thus, rule-of-reason proponents contend that concern with administrability is overstated and that,

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81 *See* Melamed, *supra* note 6 at 383 (noting the "likelihood of enforcement errors").

82 *See* Melamed, *supra* note 80, at 1254 (describing "market-wide balancing tests" as "intractable for courts and antitrust agencies, and even more so for firms trying to decide in real time what conduct is permitted and what is prohibited"); Werden, *supra* note 6, at 432 ("[T]he litigation system is not up to the formidable task posed by the consumer welfare test.").

83 *See, e.g.,* Mar. 7 Hr'g Tr. at 52–53 (Gavil) (indicating that decided cases do not balance competitive effects against efficiencies; the issue is credibility and persuasiveness of the evidence not net dollar value of effects versus efficiency); May 1 Hr'g Tr. at 81 (Calkins) (stating that the rule of reason is not really a balancing test because you never get to the final step, which involves balancing); July 18 Hr'g Tr. at 17 (Kolasky) (expressing reluctance to label rule of reason a balancing test because the last step in the analysis is rarely reached); *id.* at 85–86 (Pitofsky) (noting that courts almost never reach the balancing step).

84 *See, e.g.*, Sherman Act Section 2 Joint Hearing: Academic Testimony Hr'g Tr. 118–19, Jan. 31, 2007 [hereinafter Jan. 31 Hr'g Tr.] (Gilbert) (observing that the *Microsoft* court never got to the balancing step; thus, the practical effect of the court's analysis is that if there was some reason for the innovation conduct, there is no liability); May 8 Hr'g Tr. at 94 (Creighton) (agreeing that, under *Microsoft*, if there is a plausible efficiency justification, that should end the inquiry); Salop, *supra* note 9, at 334 n.89 ("In *Microsoft*, the court did little explicit balancing because there generally was nothing to balance.").

85 Gavil, *supra* note 21, at 73.

in any event, the sacrifice tests (discussed below) are more difficult to apply.[86] Furthermore, say the proponents, skepticism about administrability and judicial competence is unfounded because section 1 jurisprudence has accommodated the rule of reason's asserted complexity for decades.[87]

The disproportionality standard, unlike the basic rule-of-reason approach, was not discussed extensively at the hearings. Like the basic rule of reason, the disproportionality test focuses directly on consumer welfare, and requires scrutiny first of the anticompetitive effects of the challenged conduct and then of any efficiency justifications. However, in the rare cases when balancing is actually required, the test would impose a somewhat more demanding standard of liability than under section 1. This arguably would be more in keeping with the Supreme Court's recent emphasis on the dangers of false positives. On the other hand, no court is known to have endorsed a disproportionality standard, and, as noted above, the Supreme Court in *Trinko* did not address the Agencies' suggested version of such a standard.

Whether the disproportionality standard would, in practice, result in markedly different outcomes than application of the basic rule of reason depends in part on how one defines "disproportionate." The original proponent of the test, Professor Hovenkamp, appears to view it more as a tie-breaker in favor of section 2 defendants in "close cases." As he explains in the most recent edition of his treatise,

> A burden-shifting analysis should enable courts to avoid "close" balancing in most situations. The rule of reason applied in cases involving unilateral conduct need not differ significantly from that applied to multilateral conduct. The principal difference between § 1 and § 2 is that the existence of an agreement among competitors shifts the scale against the defendants. As a result, in close cases it is proper to condemn the arrangement by resolving uncertainties against the defendant. By contrast, when the challenged conduct is unilateral, the court must be somewhat more cautious. We would be inclined to resolve close cases in favor

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86 *See* Salop, *supra* note 9, at 351–52 ("[T]hat same judicial competence argument would apply just as strongly to the implementation of the profit sacrifice test, which requires a court to evaluate profitability in an unrealistic, hypothetical world."); Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense For Exclusive Dealing*, 73 ANTITRUST L.J. 779, 801 (2006) ("[The] application of traditional rule of reason analysis is a good deal *less* complicated [than the no economic sense test].").

87 *See* Salop, *supra* note 9, at 351 ("[C]riticism[s] involv[ing] judicial competence . . . seem extreme and unreliable. The rule of reason has been used in Section 1 and Section 7 cases, so it is not clear why Section 2 would be so much harder."); July 18 Hr'g Tr. at 91 (Salop) ("[B]alancing tests all over the law. All over the place. And a generalized criticism that courts aren't good at balancing, well, that's pretty much what courts do."); *id.* at 24 (Pitofsky) ("[W]ho are the judges deciding joint venture cases? Merger cases? Rule of reason cases? . . . [T]hey all involve generalist judges. Up until now, I thought U.S. antitrust was doing a pretty good job . . . .").

> of the defendant. But we reemphasize, as *Microsoft* suggests, that cases involving (a) a truly exclusionary practice, (b) offset by a compelling efficiency explanation, and (c) with no less restrictive alternative will be uncommon.[88]

On the other hand, if one defines "disproportionality" to require the plaintiff to show that the challenged practice has anticompetitive effects that are substantially disproportionate to any efficiencies, the difference between the two standards—the basic rule of reason and disproportionality—may be more significant.

As a practical matter, disproportionality may play a greater role in shaping the law as an implicit constraint than as an express, "thumb-on-the-scales" factor. Neither anticompetitive harm nor procompetitive benefit is often precisely quantifiable. Courts consequently are likely to continue assessing evidence in ways that avoid predicating liability on a purported scintilla of excess harm over benefit. Similarly, enforcement agencies may well refrain from bringing resource-intensive enforcement actions when they suspect that competitive benefits are closely commensurate to any harms. Applying the rule of reason in a manner sensitive to its practical limits may resolve most concerns regarding administrability and chilling of procompetitive conduct without need to forfeit even-handed application within the zone of reliable measurement.

B. The "Sacrifice" Tests: Profit-Sacrifice and No-Economic-Sense

The profit-sacrifice and no-economic-sense tests, which some have proposed as an alternative to the rule-of-reason/consumer welfare approach, are similar, and are often discussed interchangeably. Essentially the profit-sacrifice test asks whether the monopolist, through the challenged conduct, has sacrificed short-run profits in the expectation of recouping those profits in the future after its rivals have exited the market. The rationale is that "conduct that seems rational (profit maximizing or loss minimizing) without regard to the creation or preservation of monopoly ha[s] a fully legitimate explanation," and "cannot be condemned without running a severe risk of chilling competitive behavior."[89] Although there are different formulations of the test,[90] all focus on the conduct's impact on the short-run profits of the monopolist.

The no-economic-sense test, though similar to the profit-sacrifice test,[91] was developed in

[88] 3 AREEDA & HOVENKAMP, *supra* note 12, ¶ 651e3, at 122 (citation omitted).

[89] Herbert Hovenkamp, *Antitrust and the Dominant Firm: Where Do We Stand?* 11, http://www.ftc.gov/os/comments/section2hearings/hovenkamppaper.pdf.

[90] *See, e.g.*, Melamed, *supra* note 6, at 389–91 (discussing different formulations of the profit-sacrifice test); ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 92 (same); Jan. 31 Hr'g Tr. at 29 (Edlin) (same).

[91] *See, e.g.*, Popofsky, *supra* note 7, at 443 (profit-sacrifice test is sometimes articulated as the no-economic-sense test); Sherman Act Section 2 Joint Hearing: Predatory Pricing

part to address some of the perceived shortcomings of the sacrifice test.[92] Under the no-economic-sense standard, conduct would not be condemned "unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."[93] As long as the conduct (apart from its exclusionary effect) contributes to the firm's profits, it would satisfy the no-economic-sense test.[94]

The Department of Justice has advocated using the no-economic-sense test in a number of its recent section 2 cases,[95] and both Agencies urged in *Trinko* that it be adopted for cases involving alleged refusals to assist a rival. To date, however, it has not won acceptance in the courts.[96]

The sacrifice tests are based largely on the Supreme Court's predatory pricing jurisprudence, the cornerstone of which is a landmark law review article in which Professors Areeda and Turner explained that "predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of future gains."[97] That concept has played a significant role in a number of judicial decisions construing section 2, including *Aspen Skiing*[98] and *Brooke Group*.[99] And the *Trinko* Court, while not adopting the test, did emphasize

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Hr'g Tr. 122, June 22, 2006 [hereinafter June 22 Hr'g Tr.] (Brennan) (noting that the profit-sacrifice and no business sense tests "are equivalent, if one assumes that 'business sense' means 'maximize profits'").

92 *See* Werden, *supra* note 6, at 424.

93 *See Trinko* Brief, *supra* note 48, at 15.

94 *See* Werden, *supra* note 6, at 416, 420.

95 *Id.* at 413–14.

96 ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 91 ("Although DOJ has advanced this [no-economic-sense] test in several cases . . . no court has ever adopted it").

97 Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).

98 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 475 U.S. 585, 608 (noting that defendant "elected to forgo . . . short-term benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor").

99 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993). However, the sacrifice test is not identical to the *Brooke Group* test. *See* Salop, *supra* note 9, at 326 ("*Brooke Group* does not use a true profit-sacrifice standard but rather a negative-profit standard.").

the importance of the *Aspen Skiing* defendant's "willingness to forsake short-term profits to achieve an anticompetitive end" as a key element of the liability finding in that case.[100]

Although the sacrifice tests have been broadly recognized as helpful to the analysis of certain types of single-firm conduct, such as predatory pricing and refusals to deal with rivals, contentions that the tests should supplant a rule-of-reason analysis for assessing a wide range of single-firm conduct are more controversial.[101] In part, this reflects concern with the breadth of protection that these tests offer a monopolist, compared to an approach that considers both competitive harms and benefits. As one commentator has observed,

> Together, the sacrifice and no economic sense tests for unlawful exclusionary behavior offer the narrowest ground for condemning conduct as monopolistic. Taken literally, they avoid balancing because any reasonable prospect of net gain to the monopolist that does not come from injury to competition exonerates the defendant.[102]

In part, the controversy also stems from concern that profit-sacrifice may by its nature be a poor lens for examining some forms of potential exclusionary conduct, as discussed below.[103]

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

[101] *See, e.g.*, Jan. 31 Hr'g Tr. at 30 (Edlin) (arguing that while profit sacrifice is an appropriate factor to consider as part of the analysis, it should not be used as a necessary test); Salop, *supra* note 9, at 320 (observing that "[a]s a literal matter, the profit-sacrifice standard is a test of anticompetitive purpose and intent," which is how the Court used it in *Aspen and Trinko*); *id*. at 374 ("profit sacrifice may be a useful piece of evidence in conjunction with other evidence, but when it is the sole liability standard, or a required prong of the liability standard, the profit-sacrifice test is likely to cause significant judicial errors without adding any benefits").

[102] Hovenkamp, *supra* note 89, at 11; *see also* July 18 Hr'g Tr. at 25–26 (Pitofsky) ("[L]awyers can always come up with a plausible economic reason. That's not the issue. The issue is whether that reason is good enough to outweigh the anticompetitive effects."); Sherman Act Section 2 Joint Hearing: Exclusive Dealing Hr'g Tr. 104, Nov. 15, 2006 [hereinafter Nov. 15 Hr'g Tr.] (Marvel) ("I do not like the test . . . . [T]here is always economic sense in these practices, and . . . there will always be some plausible argument that could be made."); May 1 Hr'g Tr. at 77 (Baker) (arguing that the profit-sacrifice and no-economic-sense tests "put a thumb on the scales in favor of defendants").

[103] *Compare, e.g.*, Melamed, *supra* note 80, at 1267 (arguing that "[t]he sacrifice test can provide a sound unifying antitrust principle for analyzing all exclusionary conduct that has efficiency benefits") with Elhauge, *supra* note 6, at 280 (countering that "there are

Supporters of the no-economic-sense and profit-sacrifice tests urge that they are in keeping with the Supreme Court's repeated concern about false positives and chilling procompetitive conduct. For example, while acknowledging that the tests have been criticized by commentators "who are concerned that [they] will result in false negatives,"[104] one proponent nevertheless contends that the policy tradeoffs are worth it:

> The sacrifice test does not purport to condemn all conduct that might create market power or reduce economic welfare. Rather, the test rests on the judgment that market-wide balancing tests, which in theory could condemn all welfare-reducing conduct, will in practice prove to be an inferior legal standard because of their greater difficulty in administration and their perverse incentive effects. Whether the costs of false negatives from the sacrifice test exceed the costs of false positives, increased administration costs and increased uncertainty from market-wide balancing tests [is] ultimately an empirical question. The choice between balancing tests and the sacrifice test is one of legal policy.[105]

Supporters also recommend these tests on grounds of administrability: they contend that firms can use them to assess the legality of proposed actions before acting and that courts should be able to apply them relatively easily.[106] Even supporters, however, acknowledge challenges in

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many undesirable forms of *unilateral* exclusionary conduct that do not involve short-term sacrifices of profit") *and* Salop, *supra* note 9, at 313 (noting that while the profit-sacrifice test "can be useful" in cases involving unilateral refusals to deal, it "is not generally a reliable indicator").

104 Melamed, *supra* note 80, at 1257.

105 *Id.* at 1258; *see also* Werden, *supra* note 6, at 433 (stating that "[t]he no economic sense test is predicated on the proposition that some potentially harmful conduct must be tolerated to avoid even greater harms from chilling risk taking and aggressively competitive conduct").

106 *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 91 ("Proponents contend the [no-economic-sense] test . . . 'can be administered effectively by courts and businesses alike' because the test essentially focuses on the economic rationality or profitability of the defendant's conduct from the defendant's perspective at the time the defendant decides whether to undertake a particular course of conduct."); Melamed, *supra* note 6, at 393 ("Perhaps most important, the sacrifice test provides simple, effective and meaningful guidance to firms so that they will know how to avoid antitrust liability without steering clear of procompetitive conduct."); *see also* July 18 Tr. at 31–32 (Pate) (arguing that balancing tests are "inherently lacking in any objective content that businesses can apply" and urging that "some variation of a price-cost comparison . . . is going to be necessary if objectivity is going to be brought to the inquiry"); Jan. 31 Hr'g Tr. at 135 (Rubinfeld) (describing the profit-sacrifice test as "easier to operationalize").

applying these test in some circumstances, observing that they "can be difficult in cases involving simultaneous benefits for the defendant and cost increases for rivals"[107] or in settings lacking a "single, well-defined 'but for' scenario" for making the comparison needed to assess the challenged conduct's economic sense.[108]

Other commentators offer a variety of criticisms. Some criticize these tests for failing to focus on effects on consumers and competition. In the words of one panelist, "The fundamental problem . . . with all of these sacrifice tests is that these tests don't flow from any kind of first principles [based on] . . . consumer welfare."[109] Others make similar points.[110]

Critics also warn that a profit-sacrifice test can be overinclusive in that it might condemn procompetitive investments and product innovation. Almost all substantial investments—from building a new factory to new product development—involve a short-term sacrifice of current profit in expectation of future profits that result, at least in part, from taking business from competitors. The profit-sacrifice test is criticized on the ground that it may condemn such clearly

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107 Melamed, *supra* note 80, at 1261; *see also* Werden, *supra* note 6, at 421 ("The utility of the no economic sense test ultimately is apt to vary, depending mainly on the feasibility of determining whether the challenged conduct would make no economic sense but for its tendency to eliminate competition. That determination should be feasible in the vast majority of cases, but it might not be if the conduct generates legitimate profits as well as profits from eliminating competition.").

108 *See* Werden, *supra* note 6, at 420.

109 Jan. 31 Hr'g Tr. at 35 (Edlin).

110 *See* May 1 Hr'g Tr. at 77 (Baker) (arguing that the profit-sacrifice and no-economic-sense tests cause you to "take your eye off the ball" by focusing on "the defendant's virtue" rather than "harm to competition"); *id.* at 67 (Kolasky) ("[profit-sacrifice test] focuses . . . too much attention on whether the conduct makes sense from the standpoint of the alleged monopolist as opposed to what is its effect on the consumer") July 18 Hr'g Tr. at 25 (Pitofsky) (stating that he is "uncomfortable" with the profit sacrifice test because it focuses on the monopolist rather than the consumer); *see also* Gavil, *supra* note 21, at 71 ("As an economic matter, 'sacrifice' is not relevant either to the defendant's market power or the fact that its conduct resulted in actual exclusion or consumer harm."); Salop, *supra* note 9, at 345 (describing the "hypothetical profits" of the profit-sacrifice test as "a highly imperfect (and generally biased) predictor of the impact of the conduct on competition and consumer welfare"); Jacobson & Sher, *supra* note 86, at 786 ("[M]ost importantly, the no economic sense and profit sacrifice tests still do not ask the correct question—that is, whether the practice is likely to aid consumers or to hurt them.").

procompetitive conduct.[111]

In addition, although these tests are based in part on purported ease of administration, critics have asserted that they are difficult to implement.[112] In particular, some critics stress, assessing what portion of an act's anticipated profits are exclusionary as opposed to non-exclusionary is apt to be difficult.[113] Others argue that predation screens such as profit sacrifice are not appropriate for exclusion cases, and warn about extending the predatory pricing paradigm to other forms of exclusionary conduct.[114] For instance, some critics maintain that the profit-

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111 *See, e.g.*, Jan. 31 Hr'g Tr. at 113–14 (Gilbert) ("[A] profit sacrifice test . . . doesn't . . . make any sense to innovation . . . [since] innovation almost always involves a profit sacrifice . . . [which is called] investing in research and development . . . . [Moreover], if [innovation] really works [it] probably excludes competitors. [P]roducing a really good mousetrap [means that] other mousetraps can't compete."); Elhauge, *supra* note 6, at 274 (arguing that the profit-sacrifice test fails because sacrificing short-term profits to make investments that enable one to destroy rivals is ordinarily not a sign of evil but the mark of capitalist virtue); *see also* Dennis W. Carlton, *Does Antitrust Need to Be Modernized?*, J. ECON. PERSP., Summer 2007, at 155, 170 ("[P]ublic policy should encourage firms that want to invest in activities that consumers value in order to gain future sales from other rivals. However, because such actions by definition reduce present profits, a blind application of a "profit sacrifice" test could condemn almost any competitive behavior. When a test could potentially challenge a wide array of core competitive behaviors, it becomes dangerous.").

112 *See* May 1 Hr'g Tr. at 69 (Jacobson) ("it is a very, very difficult test to administer"); *id.* at 77 (Baker) (noting "tremendous problems with administrability"); *id.* at 75 (Elhauge) (contending that the no-economic-sense test is more difficult to administer than the rule of reason).

113 *See, e.g.*, Elhauge, *supra* note 6, at 293 ("The general problem is that the efforts to modify the profit-sacrifice test to avoid its substantive defects necessarily require distinguishing between profits earned desirably (even if it excludes rivals) and profits earned undesirably. . . . Not only does it beg the question of what the criteria of desirability are, it also eliminates any administrability benefit by converting the test from one based on actual profits to one based on the desirability of how those profits were acquired."); Salop, *supra* note 9, at 321, 323 n.50 (noting that there is debate over the proper way to implement the standard, including what the benchmark should be and how to determine what profits are due to reducing competition as opposed to other causes).

114 *See, e.g.*, June 22 Hr'g Tr. at 122 (Brennan); May 1 Hr'g Tr. at 16 (Krattenmaker) ("Predatory pricing is not the only paradigm."); Susan A. Creighton *et. al.*, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 980 (2005) ("Although thorough scholarly investigation of exclusion came early in the context of predatory pricing, that does not mean that predatory pricing should be the paradigm for all exclusion cases. In fact, care

sacrifice/no-economic-sense tests are inappropriate for exclusive dealing because the only way exclusive-dealing arrangements make economic sense is "precisely because they lessen competition by rivals for the affected business."[115] Others have observed that these tests cannot usefully be applied to various forms of misleading and deceptive conduct, including sham litigation.[116]

Finally, some have questioned the basic premise that sacrifice tests are needed to address costs associated with false positives. As one panelist observed, "[T]here have been mistakes that have been made, but the idea that there's just constant false positives in Section 2 enforcement, I don't know where that's coming from."[117] Another panelist observed that, in his view, "modern example[s]" of false positives are "scarce," and, in any event, "[e]recting arbitrary hurdles because the right test is difficult to administer is . . . wrong-headed."[118] According to another commentator, the case for tests such as the no-economic-sense test "presume[s] a substantial threat of false positives and hence over-deterrence from the current state of the law, even though there is little or no evidence to support that fear in recent judicial treatments of dominant firm conduct."[119] And another panelist has recently argued that "the risk of false positives is now

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is warranted in applying more generally tests for predation derived from predatory pricing.").

115 Nov. 15 Hr'g Tr. at 59 (Jacobson) (stating that "as applied to exclusive dealing, the no economic sense test really does make no economic sense"); *see also* Jacobson & Sher, *supra* note 86, at 781 (analyzing exclusive dealing only under a no-economic- sense or profit-sacrifice test is "unintelligible" because "there is no way to separate the economic benefit to the defendant from the exclusionary impact on rivals. The relevant question for exclusive dealing is not whether it 'makes economic sense' (because it so frequently does), but whether, on balance, the specific arrangements at issue are likely to raise prices, reduce output, or otherwise harm consumers. The no economic sense test declines that inquiry.").

116 *See* Creighton *et. al.*, *supra* note 114, at 985–86 n.39 ("[P]rofitability, economic rationality, or cost may not be very useful metrics for cheap exclusion, either because costs are low, zero, or indeterminate, or because the 'profits' involved may not result from efficient conduct."); Popofsky, *supra* note 7, at 463 ("The profit sacrifice test, if applied universally, would dismantle the protective sham litigation doctrine to the possible detriment of consumers.").

117 July 18 Hr'g Tr. at 23 (Pitofsky).

118 Jan. 31 Hr'g Tr. at 36 (Edlin); *see also* May 1 Hr'g Tr. at 86 (Jacobson) (stating that the concept that false positives are a problem is "larger in the eyes of the enforcement community" than in "the real world"); *id.* at 89 (Krattenmaker) and *id.* (Jacobson) (agreeing that false positive risk is more "ephemeral" than is commonly put forward).

119 Gavil, *supra* note 21, at 23.

much less serious than it was, thanks in large part to the Supreme Court's rulings over the last fifteen years," and that "if anything, we are now in greater danger of false negatives . . . ."[120]

In short, while the profit-sacrifice/no-economic-sense tests may be helpful for counseling purposes and for informing the analysis on certain types of conduct such as unilateral refusals to deal, they have drawn relatively little support and considerable opposition as unitary section 2 conduct standards.

C. The Equally-Efficient-Competitor Test

Under the "equally-efficient-competitor" test, proposed by Judge Richard Posner, a practice is deemed exclusionary only if it is reasonably calculated to exclude a rival that is at least as efficient as the defendant.[121] It is based on the rationale that a firm should not be condemned for having lower costs than its rivals and pricing accordingly.[122] As Judge Posner explains, "It would be absurd to require the firm to hold a price umbrella over less efficient entrants . . . [P]ractices that will exclude only less efficient firms, such as the monopolist's dropping his price nearer to (but not below) his cost are not actionable, because we want to encourage efficiency."[123]

The courts have referred to the concept of an equally efficient competitor in a number of recent cases involving discounting practices.[124] Proponents of this standard point out that it

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120 Kolasky, *supra* note 72, at 86–87; *see also* Popofsky, *supra* note 7, at 469 ("Detractors of the profit sacrifice test . . . contend that it risks costly false negatives," and "assert that the costs of wrongly entrenching monopoly power are just as, if not more, pernicious than the costs of deterring procompetitive conduct").

121 *See* RICHARD A. POSNER, ANTITRUST LAW 194–95 (2d ed. 2001) (adding that if the plaintiff makes such a showing "[t]he defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient").

122 Hovenkamp, *supra* note 89, at 14.

123 POSNER, *supra* note 121, at 196.

124 *See* Cascade Health Services v. Peace Health, 515 F.3d 884, 896 (9th Cir. 2008) (noting that "it is possible, at least in theory, for a firm to use a bundled discount to exclude an equally or more efficient competitor and thereby reduce consumer welfare in the long run"); LePage's Inc. v. 3M, 324 F.3d 141, 155 (3d Cir. 2003) (en banc) (observing that "even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce"); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (noting that, if a firm prices below "avoidable" or "incremental" cost, equally efficient competitors cannot permanently match this low price and stay in business); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F.

allows firms to take full advantage of their efficiency and protects competition offered by efficient rivals. Moreover, it is useful because it allows firms to assess their conduct at the outset based on their own costs.[125]

Critics nonetheless find this test undesirable for a number of reasons. First, some say, its basic premise—that section 2 should focus on the potential exclusion of competitors as efficient as the incumbent monopolist—is wrong because "the entry of even a less efficient rival can stimulate competition and lower prices if an incumbent dominant firm is charging monopoly prices."[126] These critics claim that this is especially true in the case of nascent competition where a "'less efficient rival' standard could lead to false negatives . . . and pose a significant threat of under-deterrence."[127]

The proposed test also has been criticized as unadministrable. What constitutes an equally efficient competitor is not self-defining, and the concept may be difficult to apply outside the predatory-pricing context.[128] For example, would a firm that produces a single product as

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Supp. 455, 466 (S.D.N.Y. 1996) (noting that "a firm that enjoys a monopoly on one or more of a group of complementary products, but which faces competition on others, can price all of its products above average variable cost and yet still drive an equally efficient competitor out of the market").

125 *See* Sept. 12 Hr'g Tr. at 15 (Lowe) (acknowledging that while there may be more than one test applicable to any particular case, the equally-efficient-competitor analysis is useful because it allows dominant firms to assess their conduct based on their own costs).

126 Gavil, *supra* note 21, at 51; *see also* June 22 Hr'g Tr. at 124 (Brennan) (criticizing test, noting that "[i]nefficient competitors hold down price" and "[c]omplement market monopolization leading to their exclusion can raise price and harm consumers"); Salop, *supra* note 9, at 328 ("The fundamental problem with applying the equally efficient entrant standard to [raising rivals' costs] conduct is that the unencumbered (potential) entry of less-efficient competitors often raises consumer welfare.").

127 Gavil, *supra* note 21, at 61; *see also* June 22 Hr'g Tr. at 73 (Bolton) (expressing concern over exclusion of entrants that offer nascent competition); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 154 (2005) ("The equally efficient rival definition of exclusionary conduct has much to be said for it, but it can underdeter in situations where the rival that is most likely to emerge is less efficient than the dominant firm.").

128 *See* Nov. 29 Hr'g Tr. at 140–41 (Ordover) (observing that "what it means to be an equally efficient competitor is itself subject to debate"); Melamed, *supra* note 6, at 388 ("it is not clear what it means to exclude only a less efficient rival, especially when firms and products are heterogenous" and concluding that the test "is not . . . likely to be useful as an antitrust rule in itself").

efficiently as a defendant in a tying case qualify as an efficient competitor if it does not produce the other products involved in the tie? In the multiproduct setting, a firm may be equally efficient with respect to one product but not with respect to all the products. A diversified firm may enjoy superior efficiencies in joint production and marketing as compared to a firm that is arguably as efficient with respect to the one target product. Thus, it may be difficult to conclude that a firm would be equally efficient based on analysis of only that targeted product. Moreover, it is difficult to measure and compare efficiencies in multiproduct cases where there are joint costs. Similarly, the concept of an equally efficient competitor may be difficult to apply in the context of exclusive dealing, where a firm's efficiency may depend on how it distributes its products.

Thus, although the equally-efficient-competitor test has the virtue of focusing on the most clearly pernicious behavior, it may miss some practices that reduce competition and harm consumer welfare, particularly in settings where concerns with nascent competition are greatest. The test, like the proposed sacrifice tests, is a useful principle to consider when assessing certain types of conduct, such as rebates and discounts, but it cannot serve as a single standard for the broad range of conduct subject to challenge under section 2.

D. The Impairing-Rivals'-Efficiencies Test

This test, proposed by Professor Elhauge, reflects theories based on raising rivals' costs,[129] and asks "whether the alleged exclusionary conduct succeeds in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency."[130] Thus, if the challenged conduct furthers monopoly power *only* by contributing to the monopolist's own efficiency, it would be deemed legal. However, if furtherance of monopoly power is due in any part to the impairment of the rival's efficiency the conduct would be deemed unlawful.

Although many cases reflect theories based on raising rivals' costs,[131] no court is known to have applied the proposed efficiency-impairment test, and it has received less attention than the other proposals. Its primary proponent argues that it is superior to an open-ended balancing test with all its perceived uncertainties, builds on *Aspen Skiing's* focus on efficiencies, and avoids

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129 *See* Hovenkamp, *supra* note 89, at 15–17 & n.53. *See generally* Steven C. Salop & David T. Scheffman, *Raising Rivals Costs*, 73 AM. ECON. REV. 267 (May 1983); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1987), for discussion of these theories.

130 *See* Elhauge, *supra* note 6, at 315.

131 *See* Hovenkamp, *supra* note 89, at 16 & n.54 (collecting cases and noting that "[m]any cases brought under both §§ 1 and 2 of the Sherman Act have acknowledged the theory").

what he views as serious deficiencies in the other proposed tests.[132]

As one commentator has noted, however, the test, if applied literally, would be highly "interventionist":[133] any conduct that impaired a rival's efficiency would be condemned even if that conduct also resulted in substantial efficiencies for the monopolist. For example, the test "would condemn a firm for using practices that lowered its own costs, if, in the process, [those practices also] denied scale economies to a rival."[134] It would also "condemn a firm that used a practice that increased its sales beyond the point that its scale economies topped out, if in so doing it denied scale economies to a rival."[135] Thus, the test would introduce antitrust review over many efforts to achieve efficiencies, could condemn many practices that on balance are beneficial to consumers, and, in many settings, could prove very difficult to administer.

IV. Conclusion

The past several years have witnessed a number of efforts to develop a single, universal bright-line test for evaluating unilateral conduct under section 2. There now appears to be growing consensus, however, that that is not the optimal approach.[136]

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132 *See generally* Elhauge, *supra* note 6.

133 Hovenkamp, *supra* note 89, at 15 n.53.

134 *Id*.

135 *Id*. at 16 n.53.

136 *See, e.g.*, Gavil, *supra* note 21, at 74 ("The quest for a unitary test for defining all exclusionary conduct should be abandoned—not because the economics of exclusion differs by context, it does not—but rather because the teaching of economic and legal process theory strongly suggest that a unitary and inflexible standard will necessarily under- or over-deter."); May 1 Hr'g Tr. at 12 (McDavid) (recommending that the search for a single standard be abandoned); *id.* at 56 (Jacobson) ("I think the consensus today is that there cannot be a single test for all aspects of [section 2] conduct."); May 8 Hr'g Tr. at 21–22 (Rule) (expressing "worries" about unitary approaches to single-firm conduct, and stating, "The problem with the unitary standards is, I think, they presume a . . . capability of regulators and enforcers and courts to distinguish efficient from inefficient conduct that just doesn't exist"); *id.* at 25 (Barnett) (observing that he is "[n]ot hearing a lot of support for a single unified test"); Sept. 12 Hr'g Tr. at 102 (Addy) (concluding that "we should [not] expect the kind of detail or precision that some proponents might advocate. . . . there is no Holy Grail."); *id.* at 13 (Lowe) ("We do not enter much into . . . 'the search for the Holy Grail test . . . .'"); *see also* ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 93 ("Thus far, no consensus exists that any one test can suffice to assess all types of conduct that may be challenged under Section 2.")

A hypothetical, ideal test would successfully balance several, potentially conflicting goals. The recent Antitrust Modernization Commission, for example, recommends that "[s]tandards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare."[137] These are reasonable goals; the problem, however, is, that each test has relative advantages and disadvantages for serving different goals, and the goals themselves may conflict to a certain extent.

Moreover, the optimal balance among the various goals will differ for different forms of single-firm conduct. Thus, while some types of conduct, such as various types of discounting practices, offer clear consumer benefits, others, such as various forms of deceptive conduct, may offer none. Accordingly, while it may be appropriate to adopt a special test for the former taking into account the danger of inadvertently chilling procompetitive behavior, that consideration will not be at issue in the latter case. Indeed, even with respect to a single form of conduct, particular fact patterns may suggest the need for different weightings.

These tensions may best be resolved by continuing to work toward the development of conduct-specific tests, as the Supreme Court has done with respect to predatory pricing and buying—at least in areas, which, like pricing practices, are "the essence of competition" and where the potential chilling of procompetitive conduct may be of special concern. However, where appropriate conduct-specific tests cannot be developed, the *Microsoft* rule-of-reason approach provides the optimal framework. Although the rule of reason may afford somewhat less certainty to businesses under certain circumstances, neither current scholarship nor the FTC/DOJ hearings have established a reliable basis for weighing the benefits of greater certainty against its costs. Similarly, while rules such as the sacrifice tests may reduce the danger of false positives, there is as of yet no clear basis for assessing the significance of that danger or for comparing it to the potential harm from false negatives. In these circumstances, replacing a neutral rule of reason with "thumb on the scales" sacrifice tests, or importing, across the board, an express requirement of disproportionality as a necessary element of section 2 liability, would not appear justified.

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[137] ANTITRUST MODERNIZATION COMM'N, *supra* note 2, at 88.