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ARTICLES

MONOPOLIZING BY CONDITIONING

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Across the economy, monopolists of all kinds are engaged in "conditional dealing." This is the practice of unilaterally offering benefits and penalties, or bribes and threats, to induce trading partners to refrain from competing against the monopolist or from dealing with its rivals. Pharma giants offer discounts conditioned on "loyalty," agricultural monopolists impose "exit penalties" for switching to rivals, and social networks offer interoperability for apps only so long as they don't compete.

Economic scholarship shows that conditional dealing can inflict serious harms, but the law has not caught up. In particular, harmful conditioning goes undeterred because it falls into the gaps between the categories of our fragmented monopolization law. Courts have repeatedly tried to squeeze conditioning into ill-fitting categories, rejected claims on the basis of economically irrelevant criteria, and sometimes thrown up their hands altogether. The result: shambolic doctrine, tolerance of harmful behavior, and the collapse of enforcement efforts.

Conditional dealing should be recognized as a new category of monopolizing conduct. To that end, this Article provides a new analytical framework: a definition of conditioning, as well as standards for gauging its exclusionary impact, contribution to power, and procompetitive justifications. It explains why a host of criteria often applied by courts—from price-cost and "coercion" tests to quantitative foreclosure screens—should be jettisoned. And it sketches two further ideas with broader implications for antitrust: a framework of "quick look monopolization" for nakedly harmful conditioning and a reinterpretation of the "attempted monopoly maintenance" offense to tackle knowing misconduct in complex markets.

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INTRODUCTION

What could be more flagrantly anticompetitive than bribing or threatening a business to deter it from becoming, or from dealing with, a competitor? Surely, one might think, any self-respecting antitrust system would come down very hard on a monopolist that tried anything of the kind.

But the practice is rife. Enforcers have sued digital platforms for offering an array of valuable benefits—from search preferencing to interoperability—to encourage their trading partners to steer clear of rivals and rivalry.[1] Agritech giants pay distributors to reject cheaper crop protection chemicals that would reduce farmers' costs.[2] And pharmaceutical monopolists wield enormous rebates to induce customers to refuse cheaper generic alternatives that patients would value.[3]

And when enforcers do challenge such practices—typically under the prohibition on "monopolization" in Section 2 of the Sherman Act[4]—courts often seem barely interested. For example, the D.C. Circuit has effectively shrugged at an allegation that a dominant social network leveraged valuable interoperability to deter other apps from developing competing functions,[5] while the Ninth Circuit showed little interest in allegations that a processor-chip monopolist used a patent license as a

1. See infra section I.A.1. "Search preferencing" means more favorable treatment in search results (e.g., higher ranking, or display in a featured box or sidebar); "interoperability" means interconnection between compatible products and services. These have featured in allegations against Amazon and Meta (Facebook) respectively. See infra notes 28–33, 58–61 and accompanying text.

2. See infra section I.A.2 (discussing an FTC suit alleging anticompetitive "loyalty discounting" by two agritech companies).

3. See infra section I.A.3 (describing how pharmaceutical companies use rebates to keep certain drugs off approved formularies).

4. See Sherman Act of 1890, 15 U.S.C. § 2 (2018) ("Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .").

5. See New York v. Meta Platforms, Inc., 66 F.4th 288, 305–06 (D.C. Cir. 2023) (applying refusal to deal law and rejecting plaintiff's theory of harm).

vehicle to surcharge customers' dealings with rivals.[6] So what's going on? What's the point, one might ask, of having a monopolization statute if it doesn't catch this kind of thing?

It turns out that antitrust does a staggeringly bad job at handling practices of this kind. These are all examples of *conditional dealing*: a monopolist treating other market participants more favorably when they refrain from (or limit) competition against the monopolist, or refrain from (or limit) dealing with its rivals. In a paradigmatic conditional dealing case, there is no actual agreement or commitment that the counterparty won't compete or won't deal with rivals. Instead, there is just an explicit or implied policy, unilaterally applied by the monopolist, that punishes competition and rewards "loyalty." The inducement may be naked (e.g., cash payments or penalties) or it may involve differentiated terms of trade with the monopolist (e.g., granting or withholding access to a product or service, or offering better or worse prices, to encourage "loyalty").

Conditional dealing falls into a troubling gap in antitrust doctrine. On the one hand, antitrust has fairly clear rules for *agreements* involving monopolists, including deals with rivals to avoid competition ("market allocation" agreements),[7] and deals requiring trading partners to cut off rivals ("exclusivity" agreements).[8] These rules provide for fairly close scrutiny. Agreements of the first kind are usually per se illegal;[9] agreements of the second kind are analyzed to determine whether rivals are being harmfully and unjustifiably foreclosed.[10]

On the other hand, antitrust also has fairly clear rules for unilateral choices about pricing and supply. These rules, by contrast, are highly permissive, amounting to virtual immunity. Thus, above-cost pricing is usually per se legal, even if customers complain that a monopolist's prices are too high or competitors complain they are too low.[11] And businesses can generally refuse to deal with their rivals at will.[12] In theory, it's possible

6. See Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 997–1003 (9th Cir. 2020) (holding that the FTC's "'anticompetitive surcharge' theory fails to state a cogent theory of anticompetitive harm").

7. See Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49–50 (1990) (describing a market allocation agreement as "unlawful on its face").

8. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (holding that a substantial foreclosure standard applied to the analysis of an exclusive agreement).

9. See, e.g., *Palmer*, 498 U.S. at 49–50.

10. See, e.g., *Tampa Elec.*, 365 U.S. at 327.

11. See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 449–53 (2009) (rejecting a "price-squeeze" theory of antitrust liability); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993) (holding that liability for predatory pricing claims requires a showing of below-cost pricing).

12. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) ("[A]s a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise

for a refusal to deal to violate the antitrust laws,[13] but the eye of that needle is so slender that no plaintiff has squeezed through it in decades.[14]

Conditional dealing falls right between these two categories. It seems to present all the dangers of classically harmful agreements, regardless of whether an actual agreement exists, and regardless of how the threats and bribes are labeled, paid, or extracted. But it also seems to implicate all the liberty concerns that attend unilateral pricing and supply choices. After all, if there is no general antitrust duty to deal with the world, it seems to follow that a monopolist can choose to sell only to noncompetitors, or to sell to them on more favorable terms. That position even has some everyday intuitive appeal: Why should a business have to sell to its own rivals, or to businesses that choose to partner with its rivals?

Conditioning ruthlessly exposes a deep problem with the monopolization offense: its discomfort with practices that do not fall into its clean, shoebox-like categories (like exclusivity or tying) and that force courts to rely on monopolization's elusive and uncertain first principles.[15] It's all very well to say, as courts often do, that monopolization law asks whether conduct is "anticompetitive" or "predatory" rather than "competition on the merits," but that kind of sloganeering is virtually no help in the real world.[16]

So courts—and some commentators—tend to try to jam conditioning into an existing shoebox, often one that is subject to heavily pro-defendant rules. For example, when a coalition of states alleged that the Facebook personal social network dangled valuable interoperability to deter app developers from developing competing functions, the D.C. Circuit analyzed that practice as a simple refusal to deal: a practice that, as noted above, is virtually per se legal.[17] And when the FTC alleged that Qualcomm, a leading chip supplier, used patent licenses as a vehicle to tax

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his own independent discretion as to parties with whom he will deal.'" (second alteration in original) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919))).

13. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601–11 (1985) (imposing liability for the termination of a cooperative venture with a smaller rival).

14. See Erik Hovenkamp, The Antitrust Duty to Deal in the Age of Big Tech, 131 Yale L.J. 1483, 1490 n.26 (2022) [hereinafter Hovenkamp, Big Tech] (noting that no plaintiff has won a refusal case since 2004).

15. See, e.g., Thomas A. Lambert, Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach, 92 N.C. L. Rev. 1175, 1177 (2014) (noting that the "problem with Section 2" is that "nobody knows what it means"); see also Daniel Francis, Making Sense of Monopolization, 84 Antitrust L.J. 779, 784 (2022) [hereinafter Francis, Making Sense of Monopolization] ("[T]he core idea of 'monopolization' remains maddeningly elusive.").

16. See Daniel Francis, Antitrust Without Competition, 74 Duke L.J. 353, 358 (2024), [hereinafter Francis, Competition] (criticizing the use of an "unliquidated competition criterion"); Herbert Hovenkamp, The Slogans and Goals of Antitrust Law, 25 N.Y.U. Legis. & Pub. Pol'y 705, 745–51 (2023) ("[A]n antitrust concern articulated as a 'protection of the competitive process' does not give us much help unless we have some background substance to tell us what intelligent competition policy is.").

17. See New York v. Meta Platforms, Inc., 66 F.4th 288, 305–06 (D.C. Cir. 2023).

customers' dealings with its rivals, the Ninth Circuit analyzed the claim as a complaint primarily about excessive royalty rates, and automatic legality followed.[18] In still other cases, courts have been persuaded to apply an array of tests—"coercion," below-cost pricing, the "predominance" of price, duration and terminability, and so on[19]—that have little or nothing to do with the underlying dangers, notwithstanding the rich economic literature protesting that these considerations are beside the point.

This economic literature leaves no doubt that conditioning can enable a monopolist to do just what the Sherman Act abhors: inflict welfare harms by excluding rivals in ways that contribute to monopoly power and are not justified by offsetting benefits.[20] But antitrust's ability to respond to harmful conditioning is being hobbled by the structure of monopolization doctrine: specifically, its heavy reliance on analytical categories that were designed to respond to other, rather different, practices.[21] In other words, this is a problem that the law has created for itself. Economists seem perfectly clear-eyed about the effects and dangers of conditional dealing.[22]

Monopolization's failure to reckon with conditioning is holding back efforts to deal with some of the most pressing concerns on the antitrust agenda. This includes, for example, concerns about platform monopolists proffering a benefit (like interoperability or better search rankings) to induce their trading partners to disfavor rivals;[23] agricultural monopolists using conditional discounts and "exit penalties" to prevent rivals from getting a foothold;[24] and pharmaceutical monopolists using rebates to keep lower-cost competitors down or out in markets for life-saving treatment.[25] In these and other areas, monopoly conditioning may threaten worse harms than just higher prices.

* * *

This Article argues that we should meet conditional dealing on its own terms by recognizing a new category of monopolizing conduct. *Anticompetitive conditioning* or *conditional dealing* is the application by a monopolist of conditions that punish others for competing with it (horizontal conditioning) or for trading with its rivals (vertical conditioning).

18. See Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1000–03 (9th Cir. 2020).
19. See infra section II.A.
20. See infra section I.B.
21. See infra section II.A.
22. See infra section I.B.
23. See infra section I.A.1.
24. See infra section I.A.2.
25. See infra section I.A.3.

This Article unfolds in three parts. Part I presents the problem: conditional dealing by monopolists. It surveys the uses and dangers of this practice in a selection of critical tech, agriculture, and healthcare markets, then synthesizes the rich body of economic scholarship on conditioning and its effects.

Part II sets out the Article's primary contribution: a new analytical framework for courts and others analyzing conditioning under Section 2 of the Sherman Act. This includes a test for identifying conditional dealing (the "hold-constant" test) and a doctrinal framework for assessing its legality. This involves assessments of whether a condition has an exclusionary incidence on rivals (i.e., whether a horizontal condition significantly impairs the incentives of one or more rivals to meet demand, or whether a vertical condition significantly impairs the ability of one or more rivals to do so by substantially foreclosing their access to inputs, distribution, customers, or complements); whether the exclusion is reasonably capable of contributing significantly to monopoly power; and whether the practice is justified by offsetting welfare benefits.

This Part also explains why many factors often emphasized by courts and others—from price-cost measures and coercion tests to doctrines of de facto exclusivity—should have no place in this analysis. And, using conditional dealing as a vehicle to explore some broader questions of principle, this Part proposes some more general course corrections for antitrust: a modest regrounding of the concept of substantial foreclosure; a clarification that free riding in an antitrust case is, without more, a neutral fact, not a trump card for a defendant; and the long-overdue recognition that an unconditional refusal to deal is per se lawful, notwithstanding the agonizing refusal of courts to say this out loud. Part II also points out some landmarks in antitrust's precedential canon that are best understood as conditioning cases.

Part III sketches two further ideas to reinforce monopolization's frontier. The first idea is what might be called *quick look monopolization*. It draws on a doctrine developed under Section 1 of the Sherman Act that, in clear cases, a plaintiff may establish a prima facie case by reference to the basic nature and context of the agreement without having to piece together evidence of actual effects or impacts.[26] This approach has never been applied in monopolization law, but it *should* be, because its logic applies equally in that setting. It provides a principled way to sharpen monopolization doctrine in a small subset of clear cases, including conditioning cases lacking plausible justifications.

The second idea is a reinterpretation of the offense of *attempted monopoly maintenance*. Conventional accounts present the attempt offense as a sort of mini-monopolization: that is, a ban on conduct by a near-

26. See Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999) (noting that certain agreements may be found anticompetitive without elaborate analysis of the market so long as the "great likelihood of anticompetitive effects can easily be ascertained").

monopolist that has provably resulted in actual exclusion and actual contribution to power. But the offense also bears a second, neglected reading: a prohibition of conduct by an actual monopolist that is intended to cause welfare harms by suppressing rival ability and incentive to compete and which is dangerously likely to have led to that outcome—regardless of whether it really did have that effect. It provides a principled way to deter intentional misconduct, even in our most complex and dynamic markets.

Ultimately, this Article's central claim is a simple and intuitive one. A monopolist's use of an explicit or implicit condition to punish trading partners for competing, or for dealing with competitors, is a distinct form of antitrust wrongdoing, not an edge-case example of a more familiar practice like tying or predatory pricing. Just like other familiar kinds of violations, conditioning presents clear, well-understood risks of consumer harm, and it can be scrutinized by courts without unreasonable intrusion on the freedom of businesses to run their affairs. When a monopolist uses such a practice to exclude rivals and augment its monopoly, courts should demand evidence of justification—and should impose liability if it is not forthcoming. Such claims should not be shrugged off for failure to fit neatly into a handful of doctrinal boxes that were crafted with very different practices in mind.

It is time to close antitrust's conditioning loophole.

I. THE MONOPOLIST'S BARGAIN

This Part aims to show that anticompetitive conditioning—the unilateral imposition by a monopolist of threats or bribes to deter trading partners from competing (horizontal conditioning) or from dealing with competitors (vertical conditioning)—is a serious problem. That is: It is happening in important sectors, and it may cause real harm.

A. *Conditioning in Practice*

Some of the most prominent concerns on today's competition policy agenda turn out to be worries about conditional dealing. This Article will put the spotlight on three critical sectors: tech, agriculture, and pharmaceuticals.[27]

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27. These have been repeatedly identified as priority areas for antitrust enforcement. See, e.g., D. Bruce Hoffman, Dir., FTC Bureau of Competition, Antitrust in the Digital Economy: A Snapshot of FTC Issues, Remarks at Global Competition Review Live (May 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf [https://perma.cc/H5TF-5ZHT] (tech); Michael Kades, Deputy Assistant Att'y Gen., DOJ, Keynote Address at the ABA Antitrust Fall Forum (Nov. 22, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-keynote-address-aba-antitrust [https://perma.cc/8MNS-EJD8] (agriculture); Rebecca Kelly Slaughter, Comm'r, FTC, Keynote Remarks at the FTC/DOJ Pharmaceutical Task Force Workshop (June 14, 2022),

1. *Tech*

a. *Amazon: E-Commerce Merchant Policy.* — The FTC's blockbuster 2023 monopolization case against Amazon is complex, but has three theories at its core.[28] The first of these alleges that Amazon treats merchants worse on its platform when those merchants sell their products through other channels at lower prices.[29] The second alleges that Amazon harms competition by tying its Prime distribution to fulfillment services.[30] The third alleges that Amazon set and changed its prices in various ways to punish rivals for lowering them and to encourage rivals to raise them.[31]

The first of these theories is a conditioning story. The policy allegedly discourages merchants from dealing with other platforms on terms that allow better prices.[32] When such lower prices are detected, Amazon allegedly denies offending products access to the promotional high-visibility "Buy Box" and then applies a range of other unfavorable treatments—including "demoting them in search results," "hiding their prices on the Search Results Page," and "excluding them from Sponsored Products advertisements"—causing their sales to "tank."[33] Or, to put it another way, Amazon makes favorable treatment of merchants conditional on those merchants preventing rival platforms from setting lower retail prices.

The policy resembles what is sometimes called a most-favored-nation (MFN) agreement. In general, an MFN agreement requires one party to treat the other at least as favorably as it treats any of its other trading partners.[34] This can be procompetitive, including because it ensures that low prices and high-quality outputs are shared with the MFN beneficiary and because it can give the beneficiary confidence that investments will not expose it to opportunism and holdup.[35] And it can also be anticompetitive, including because it deters the bound party from

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https://www.ftc.gov/system/files/ftc_gov/pdf/Keynote-Remarks-Pharma-Workshop.pdf [https://perma.cc/24R3-E84K] (pharma).

28. See Amended Complaint ¶¶ 259–434, Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash. filed Mar. 14, 2024) [hereinafter FTC Amazon Amended Complaint].

29. See id. ¶¶ 16, 271–287.

30. See id. ¶¶ 27–32.

31. See id. ¶¶ 327–339 (describing Amazon's "first-party anti-discounting" strategy); id. ¶¶ 418–434 (describing a "Project Nessie" program to encourage rivals to raise price).

32. Id. ¶¶ 16, 271–875.

33. Id. ¶¶ 277–87.

34. The antitrust analysis of MFN agreements is complex, and few cases have been litigated to verdict. See generally Jonathan B. Baker & Judith A. Chevalier, The Competitive Consequences of Most-Favored-Nation Provisions, Antitrust, Spring 2013, at 20 (discussing MFN analysis); Steven C. Salop & Fiona Scott Morton, Developing an Administrable MFN Enforcement Policy, Antitrust, Spring 2013, at 15 (same).

35. See Baker & Chevalier, supra note 34, at 20–22.

discounting to the beneficiary's rivals.[36] But the FTC's case alleges no actual agreement to accord MFN treatment nor a commitment by most merchants to do so. Instead, unilateral conditions do the work by punishing favorable dealings with Amazon's rivals.[37] The result may be just the same: that rival platforms, which could provide price and quality competition for Amazon, are excluded, and consumers harmed as a result.

b. *Google: Search Distribution Foreclosure.* — The 2020 antitrust lawsuit filed by the Justice Department and a coalition of states against Google challenged the alleged foreclosure of distribution for internet search—that is, cutting off rivals' paths to market—through a series of practices, including exclusivity and default agreements.[38] A district court recently imposed liability as a result;[39] Google has stated that it will appeal.[40]

Some of the practices at issue involve conditional dealing. For example, Google's agreement with Verizon allowed Verizon to choose to preload other general search engines, in addition to Google, onto its devices, but "it had to accept [a] much-lower . . . revenue share on those models" to do so.[41] Verizon concluded that doing so "would result in a $1.4 billion loss in revenue."[42] Google's agreement with AT&T was "very similar" to the Verizon deal.[43] And T-Mobile's agreement provided for a "bounty per device" to induce exclusivity: "If T-Mobile [did] not configure a device on an exclusive basis, it [was] entitled to no bounty at all."[44] Google's agreement with Motorola required preinstallation of Google as a default general search engine and provided for "additional monthly payments" if Google was the exclusive default on all search access points on a device.[45] In each of these cases there was no obligation to deal exclusively, but doing so meant a greater reward. In other words: vertical conditioning.

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36. See, e.g., United States v. Apple, Inc., 791 F.3d 290, 305 (2d Cir. 2015) (holding that Amazon's MFN clauses contributed to competitive harm by deterring bound parties from offering favorable terms to the beneficiary's rivals).

37. In fact, the FTC alleges that a "price parity" commitment was formerly required but is no longer, after it attracted attention from enforcers. FTC Amazon Amended Complaint, supra note 28, ¶¶ 274–276.

38. See United States v. Google LLC, Nos. 20-cv-3010 (APM) & 20-cv-3715 (APM), 2024 WL 3647498, at *50–65 (D.D.C. Aug. 5, 2024).

39. Id. at *125 ("Plaintiffs have established that Google is liable under Section 2 of the Sherman Act . . . .").

40. David Shepardson & Mike Scarcella, Google Has an Illegal Monopoly on Search, US Judge Finds, Reuters (Aug. 6, 2024), https://www.reuters.com/legal/us-judge-rules-google-broke-antitrust-law-search-case-2024-08-05/ [https://perma.cc/CMN9-LFGT] ("Alphabet said it plans to appeal [the] ruling.").

41. *Google*, 2024 WL 3647498, at *61.

42. Id.

43. Id. at *62.

44. Id.

45. Id. at *63.

A second theme of the Google search case points to horizontal conditioning. Google has reportedly paid Apple billions of dollars each year for the status of exclusive default search provider on iOS devices.[46] This amounts, of course, to traditional vertical exclusivity of a kind well known to antitrust. But there is some basis to think that Apple is also a potential competitor to Google: that is, they are in a horizontal relationship too. Apple, some commentators have suggested, is distinctively well situated to create and commercialize a rival search engine.[47] As a result, Google has been willing to pay over the odds for search distribution to incentivize Apple to stay out of the search market.[48]

This implies a horizontal conditioning story. Google, that story goes, may have been paying Apple extra compensation for search distribution services on the implicit condition that Apple stays out of the upstream search market. And the result may be that consumers have been deprived of the benefits, including quality and innovation benefits, that Apple's entry into search could bring. The district court highlighted evidence that Apple understood that entering search would jeopardize a very significant amount of revenue from Google.[49]

c. *Google: Play Store "Project Hug".* — In Epic Games's recent jury-trial victory over Google,[50] Epic alleged, among other things, horizontal conditioning aimed at the market for Android app stores.[51] The alleged purpose of such conditioning was to protect Google's own app store, the Play Store, from competition.[52]

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46. Id. at *51 ("In 2022, Google's revenue share payment to Apple was an estimated $20 billion . . . .").

47. See Steven C. Salop, Potential Competition and Antitrust Analysis, Roundtable on the Concept of Potential Competition 25, DAF/COMP/WD(2021)37 (June 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)37/en/pdf [https://perma.cc/NM32-PSJY] ("Apple was a potential entrant into search or a potential entrant sponsor.").

48. See, e.g., Nico Grant, Inside Google's Plan to Stop Apple From Getting Serious About Search, N.Y. Times (Oct. 26, 2023), https://www.nytimes.com/2023/10/26/technology/google-apple-search-spotlight.html (on file with the *Columbia Law Review*); David Pierce, Google Reportedly Pays $18 Billion a Year to Be Apple's Default Search Engine, The Verge (Oct. 26, 2023), https://www.theverge.com/2023/10/26/23933206/google-apple-search-deal-safari-18-billion [https://perma.cc/8JDS-JHQG] ("[Google's] money not only gives Google prime placement on Apple devices but it also has historically kept Apple from building its own search engine.").

49. *Google*, 2024 WL 3647498, at *52 (noting that Apple expected that it would forgo many billions of dollars in Google revenue if it launched its own search engine).

50. See Jaspreet Singh & Harshita Mary Varghese, Google's Court Loss to Epic Games May Cost Billions but Final Outcome Years Away, Reuters (Dec. 13, 2023), https://www.reuters.com/legal/googles-court-loss-epic-games-may-cost-billions-final-outcome-years-away-2023-12-12/ [https://perma.cc/JRM8-KP6W].

51. Second Amended Complaint ¶¶ 128, 198–205, Epic Games, Inc. v. Google LLC, No. 3:20-CV-05671-JD (N.D. Cal. filed Nov. 17, 2022).

52. Id. ¶ 128.

The allegations related to a policy initially known as Project Hug and subsequently renamed the Games Velocity Program. This was an alleged policy of providing special benefits to developers that might be able and willing to enter the market for app stores so long as they stayed out.[53] For example, when Activision Blizzard indicated some intention to develop its own Android app store, Google allegedly agreed to pay Activision roughly $360 million over three years, contingent on various MFN-like restrictions that would have made it more difficult for Activision to launch a commercially viable app store.[54] Epic alleged that, while there was no agreement not to enter, Google thus "understood that its agreement . . . effectively ensured that [Activision] would abandon its plans."[55]

Similarly, Epic alleged that, when Riot Games indicated the same intention, Google entered into a similar deal—with a payment of around $30 million—and similar obligations that were "understood and intended [to ensure] that Riot, like [Activision], would not launch a competing Android app store."[56]

These claims could be read to imply an underlying policy of offering benefits to possible app store entrants on implicit condition that they stay out of that market. In other words: horizontal conditioning.

d. *Facebook: Platform Policies.* — The FTC's 2020 lawsuit against Facebook (now Meta) challenged three practices: Facebook's acquisition of Instagram, Facebook's acquisition of WhatsApp, and Facebook's use of certain "platform policies."[57] A large group of states, led by New York, filed a parallel complaint.[58]

The platform-policies theory was an anticompetitive conditioning claim. The allegation was, in essence, that Facebook agreed to provide valuable interoperability to app developers so long as their apps did not develop competing social network functionalities and did not interoperate in various ways with rival social networks.[59] The FTC explicitly alleged that "the public announcement and enforcement of the policies changed the incentives of software developers, deterring them from developing features and functionalities that would present a competitive threat to Facebook, or from working with other platforms that compete with

53. Id.

54. Id. ¶ 199.

55. Id. ¶ 200.

56. Id. ¶ 201.

57. Complaint ¶¶ 68–168, Fed. Trade Comm'n v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (No. 1:20-cv-03590-CRC) [hereinafter 2022 Facebook Complaint]; First Amended Complaint ¶¶ 77–228, *Facebook*, 581 F. Supp. 3d 34 (No. 1:20-cv-03590-CRC).

58. Complaint at 5 n.1, New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20-cv-03589-JEB), 2020 WL 7348667.

59. See Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 9–11 (D.D.C. 2021); New York v. Facebook, Inc., 549 F. Supp. 3d at 18–20.

Facebook."[60] The first dimension of this policy (denying, in various ways, interoperability for apps that replicated Facebook's functionalities) was an alleged horizontal condition; the second (denying, in various ways, interoperability for apps that connected to or promoted rivals) was an alleged vertical condition.

As we shall see below, the court flatly rejected this claim. And in an appeal of the states' case, the D.C. Circuit held that, while the alleged vertical conditioning should be analyzed under exclusive dealing law, the alleged horizontal conditioning was a simple refusal to deal and lawful as a result.[61]

e. *Qualcomm: No License, No Chips.* — The FTC's 2017 monopolization case against Qualcomm had many facets, including challenges to refusals-to-deal and to traditional exclusivity.[62] But the central pillar of the case—the challenge to Qualcomm's "no license, no chips" policy[63]—was, at heart, a challenge to anticompetitive conditioning. The following is one way of understanding the complex case that was alleged by the FTC.

The FTC alleged that Qualcomm was a monopolist supplier of processor chips to device original equipment manufacturers (OEMs) like Apple and Samsung, as well as a holder of a portfolio of patents practiced by its own chips and those of rivals.[64] It operated a policy of declining to supply its chips to OEMs that had not obtained a license to Qualcomm's patents: thus, "no license, no chips."[65] The license required OEMs to pay Qualcomm a sizable royalty on all devices, including devices using rivals' chips instead of Qualcomm's.[66]

The FTC alleged that the commitment to make the payments was extracted by withholding, or threatening to withhold, chip supplies—not access to IP—and that the royalty payments included, in addition to value for Qualcomm's IP, a harmful surcharge or tax on purchases from chip competitors.[67]

This sounds a lot like a complaint about excessive pricing—a complaint that U.S. antitrust does not recognize.[68] So, to see the vertical conditioning dynamics that may have been in play, imagine a series of three hypotheticals. First, imagine that a chip monopolist had required its chip customers to pay—as a condition of being allowed to buy chips—a

60. 2022 Facebook Complaint, supra note 57, ¶ 137.

61. See New York v. Meta Platforms, Inc., 66 F.4th 288, 304–06 (D.C. Cir. 2023); see also infra section II.A.1.

62. Federal Trade Commission's Complaint for Equitable Relief ¶¶ 107–130, Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 5:17-cv-00220), 2017 WL 242848.

63. Id. ¶¶ 61–106.

64. Id. ¶ 2.

65. Id. ¶ 61.

66. Id. ¶¶ 61–63.

67. Id. ¶ 87.

68. See infra section II.A.2.

naked penalty every time the customer bought a chip from a rival. Plainly, such an obligation would not be a strict exclusivity agreement, but it would punish and deter dealings with rivals, like a tax. This is obviously a vertical condition.

Second, now imagine that the same chip monopolist required its chip customers to pay the very same penalty when buying *any* chip: its own or a rival's. This makes the penalty "nondiscriminatory" in form. But this does not change a thing. The chip monopolist will rationally lower its own nominal price by the amount of the penalty to avoid raising its effective price unprofitably.[69] So the "nondiscriminatory" surcharge is economically identical to a discriminatory one.

Finally, imagine that instead of simply charging a naked penalty, the chip monopolist also conferred some patent rights and called the total payment a "royalty." For example, instead of a naked $X surcharge, suppose that the chip monopolist threw in a patent license of value $Y and charged $X+Y for a patent license, labeling the whole sum a "patent royalty."[70]

The third hypothetical is economically identical to the first: both involve vertical conditioning. The FTC's case can be understood as an allegation that the third hypothetical captures what was going on, and that as a result rival chip suppliers were being excluded to the detriment of customers and consumers. As we shall see, the FTC won at trial but lost on appeal: The Ninth Circuit analyzed this part of the case primarily as a complaint about excessive royalties rather than vertical conditioning.[71]

2. *Agriculture*

a. *Crop Protection: Loyalty Discounts.* — Crop protection chemicals—like insecticides and fungicides—are a critical input in agricultural supply chains.[72] Like drugs, such chemicals come in branded varieties, typically protected by patents at launch, and generic versions that enter after the patent expires.[73]

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69. The effective economic price of the monopolist's chip is equal to the nominal price plus the surcharge. And the profit-maximizing effective price of that chip is unchanged from the first hypothetical, so the chip monopolist wants to keep its effective price unchanged. Thus, it reduces its nominal chip price.

70. See Petition of the FTC for Rehearing En Banc at 14–15, Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (presenting a version of this account).

71. See infra section II.A.2.

72. See SNS Insider, Crop Protection Chemicals Market to Hit USD 75.72 Billion by 2030 Due to Rising Global Population and Food Demand Coupled With Advancements in Agricultural Technology, Yahoo Fin. (Nov. 27, 2023), https://finance.yahoo.com/news/crop-protection-chemicals-market-hit-140000061.html [https://perma.cc/WCT5-REET]; see also Julius J. Menn, Current Trends and New Directions in Crop Protection, 18 Am. J. Indus. Med. 499, 499–500 (1990) ("[C]rop protection chemicals are and will continue to be . . . the major element in protecting food and fiber crops . . . .").

73. See Jett McFalls, Young-Jae Yi, Ming-Han Li, Scott Senseman & Beverly Storey, Tex. A&M Transp. Inst., Evaluation of Generic and Branded Herbicides: Technical Report 1

In a complaint filed in September 2022, the FTC has alleged that two agritech giants, Syngenta and Corteva,[74] are using anticompetitive vertical conditions to extend pesticide monopolies long after patent expiration.[75] Specifically, the FTC alleges that the suppliers achieve this through loyalty discounting: offering lower prices to distributors that buy 85% or more of their needs from the monopolists, and higher prices to disloyal businesses that do not.[76] These programs allegedly apply to "substantially all leading distributors,"[77] and collectively foreclose "a substantial share" of each relevant market to generic competitors.[78] They are not alleged to reduce prices below cost.[79] This practice involves no commitment not to deal with rivals, but punishes and deters doing so. In other words, it is vertical conditioning.

The FTC alleges that the rebates are complex, uncertain, and delayed, to "make it less likely that a distributor will lower its prices in anticipation of [a rebate]."[80] So they increase distributor profits, rather than lowering customer prices. As a result, the FTC alleges, distributors have "declined to buy more than minimal amounts" of generic products.[81] "Multiple generic manufacturers" have declined to enter; others have exited.[82] The result: higher prices.[83]

The crop protection companies moved to dismiss the complaint, protesting the "remarkable proposition that reducing prices—without more—is anticompetitive."[84] Among other things, they argued that prices, and alleged schemes in which price is the predominant mechanism, are not unlawful unless they are below cost.[85] The district court declined to dismiss the case but indicated that if pricing—rather than other "coercive"

(2015) (discussing herbicide formulation's patent process, lifespan, and profitability compared to generics).

74. See Press Release, FTC, FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers (Sept. 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate [https://perma.cc/4U8D-CJCM] (referring to Syngenta and Corteva as "two of the largest pesticide manufacturers operating in the United States").

75. See First Amended Complaint ¶¶ 59–202, Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Dec. 23, 2022).

76. Id. ¶¶ 64–72 (Syngenta); id. ¶¶ 73–76 (Corteva).

77. Id. ¶ 84.

78. Id. ¶ 171.

79. Id. ¶ 176.

80. Id. ¶¶ 85, 175.

81. Id. ¶¶ 177–178.

82. Id. ¶¶ 182–183.

83. Id. ¶¶ 190–202.

84. Memorandum of Law in Support of Syngenta's Motion to Dismiss the Amended Complaint at 1, *Syngenta*, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Jan. 13, 2023).

85. Id. at 3, 15; Memorandum in Support of Defendant Corteva, Inc.'s Motion to Dismiss at 18–19, Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP (M.D.N.C. filed Jan. 13, 2023).

practices—turned out to be the "predominant" method of exclusion, the court would apply the principle that above-cost prices are per se legal.[86]

b. *Koch Foods: Chicken Grower Exit Penalties.* — The Justice Department has recently alleged that, from 2014 onward, Koch Foods (a leading poultry processor) has imposed an "exit penalty" in its agreements with chicken growers.[87] This was a requirement that growers make a cash payment to Koch—large enough to equal or exceed a grower's annual take-home pay after expenses—in order to switch to a rival within a period of ten or fifteen years after contracting with Koch.[88] The complaint alleges that Koch "actively enforces" these requirements, with the result that "[s]ome farmers returned to Koch rather than face litigation, while others declined to pursue a switch because the exit penalty would be too onerous."[89] The complaint further alleges that "Koch's highly visible efforts to collect its exit penalties have deterred farmers who might otherwise avail themselves of competition between Koch and other processors to obtain better compensation for themselves and their families."[90] In other words, the agreements do not forbid switching to a rival but they deter and punish it. Koch elected to settle, agreeing not to enforce existing provisions and to stop imposing new ones.[91]

3. *Pharmaceuticals.* — Many pharmaceutical manufacturers offer rebates against the list price of their drugs, contingent upon favoring their drugs over those of rivals.[92] Sometimes these are offered to payors such as private insurers or Medicare,[93] but increasingly they are negotiated with pharmacy benefit managers (PBMs).[94]

86. Fed. Trade Comm'n v. Syngenta Crop Prot. AG, No. 1:22-cv-00828-TDS-JEP, 2024 WL 149552, at *14–19 (M.D.N.C. Jan. 12, 2024).

87. Complaint ¶ 5, United States v. Koch Foods Inc., No. 1:23-cv-15813 (N.D. Ill. filed Nov. 9, 2023).

88. Id.

89. Id. ¶ 44.

90. Id. ¶ 49.

91. Press Release, DOJ, Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods From Imposing Unfair and Anticompetitive Termination Penalties in Contracts With Chicken Growers (Nov. 9, 2023), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing [https://perma.cc/C5EC-V9UP].

92. Press Release, FTC, FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middleman that Block Cheaper Drugs (June 16, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes [https://perma.cc/X7LD-LAJF] ("[Pharmaceutical] rebates are often conditioned on the drug staying in a preferred position on the formulary.").

93. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 400 (3d Cir. 2016) (involving rebates paid by manufacturers to hospitals' group purchasing organizations).

94. See Nitzan Arad, Elizabeth Staton, Marianne Hamilton Lopez, Samson Goriola, Aparna Higgins, Mark McClellan & Barak Richman, Duke Univ. Margolis Ctr. for Health Pol'y, Realizing the Benefits of Biosimilars: Overcoming Rebate Walls 5 (2022), https://healthpolicy.duke.edu/sites/default/files/2022-03/Biosimilars%20-

PBMs are intermediaries between payors and drug companies.[95] They maintain formularies of drugs with tiers of preference that affect how providers prescribe the drugs.[96] For example, a formulary might provide that, for a particular indication (i.e., use case), Drug A is covered if prescribed first, with Drugs B and C covered only if Drug A has first been tried unsuccessfully. Or it might provide that Drug A is covered without prior authorization, and that Drugs B and C are covered only with such authorization. So a rebate granted to a PBM might be conditioned, for example, on meeting a purchase-share threshold,[97] or on keeping rivals off the formulary or consigned to lower tiers.[98]

Of course, rebating can be a form of desirable price discounting.[99] And a PBM or other buyer may be able to force manufacturers to lower drug prices by announcing that it will deal exclusively with one supplier.[100] But many commentators have raised concerns about harms from excluding rivals.[101] The core worry is that a buyer that would otherwise deal with both an incumbent and a rival will be deterred from doing so by the prospect of losing rebates, with the result that market or monopoly power is maintained and consumers pay more for drugs.[102]

%20Overcoming%20Rebate%20Walls.pdf [https://perma.cc/59UG-L7E9] (noting that rebates are paid to both PBMs and health plans).

95. See Minority Staff of the U.S. Sen. Comm. on Fin., 115th Cong., A Tangled Web: An Examination of the Drug Supply and Payment Chains 26–35 (2018), https://www.finance.senate.gov/imo/media/doc/A%20Tangled%20Web.pdf [https://perma.cc/Q47U-43QJ] [hereinafter Senate Minority Report] (describing the role of PBMs in the healthcare supply and payment chains).

96. See In re EpiPen, 44 F.4th 959, 966–67 (10th Cir. 2022) (describing formularies and their relationship to PBMs).

97. See Joanna Shepherd, Pharmacy Benefit Managers, Rebates, and Drug Prices: Conflicts of Interest in the Market for Prescription Drugs, 38 Yale L. & Pol'y Rev. 360, 366–67 (2019) (noting share incentives).

98. See FTC, Report on Rebate Walls 2 (2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-report-rebate-walls/federal_trade_commission_report_on_rebate_walls_.pdf [https://perma.cc/TX9T-YMQN].

99. See Senate Minority Report, supra note 95, at 27; Fiona Scott Morton & Lysle T. Boller, Enabling Competition in Pharmaceutical Markets 21 (Hutchins Ctr. Working Paper No. 30, 2017), https://www.brookings.edu/wp-content/uploads/2017/05/wp30_scottmorton_competitioninpharma1.pdf [https://perma.cc/9VBG-VVWQ].

100. See, e.g., *In re EpiPen*, 44 F.4th at 967 (describing how announced exclusivity can lead to a bidding war and lower prices); Scott Morton & Boller, supra note 99, at 19 (same).

101. See FTC, Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products 1 (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf [https://perma.cc/WU47-75FS] [hereinafter FTC, Policy Statement].

102. As this Article was going to print, the FTC filed a complaint challenging a variety of PBM practices, including certain exclusionary rebates, as unfair methods of competition and unfair acts or practices. See Complaint ¶¶ 99–118, Caremark Rx, LLC, FTC File No. 221 0114, No. 9437 (F.T.C. Sept. 20, 2024), https://www.ftc.gov/system/files/ftc_gov/

There are several reasons why a buyer might want to deal with a rival drug supplier as well as an incumbent but be unable to switch entirely away from the incumbent. The incumbent's drug may be suitable for more indications than the rival's.[103] Manufacturers may offer rebates covering multiple drugs such that access to a discount on *any* drug is premised on meeting conditions for *all* drugs, leaving unintegrated rivals unable to match the terms.[104] Or downstream actors, like providers, may have some preference for the original drug.[105] And if the buyer cannot entirely switch to the rival, the prospect of losing the rebate may ensure it does not deal with the rival at all.

Many rebate dollars seem to be passed on in the form of lower prices.[106] But others are not. Rebates are often calculated and paid at the end of an accounting period, and so PBMs may be more likely to treat them as a lump sum and retain them as profits, rather than as a cost savings to be passed on as lower prices.[107] They are also typically confidential, so downstream payors often cannot tell how much the PBM is being paid.[108] Particularly in such cases, PBMs may choose drugs with a higher rebate over rivals' that are cheaper for payors.[109] And some allege that "PBMs designate payments from manufacturers and pharmacies as fees rather than rebates to prevent these funds from being passed on to plan sponsors."[110] Accordingly, there may be reasons to fear rebating's rise.[111]

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pdf/d9437_caremark_rx_zinc_health_services_et_al_part_3_complaint_corrected_public.pdf [https://perma.cc/4RPR-8PSD].

103. See Arad et al., supra note 94, at 8–9.

104. See The Role of Pharmacy Benefit Managers in Prescription Drug Markets Part II: Not What the Doctor Ordered: Hearing Before the H. Comm. on Oversight and Accountability, 118th Cong. 23 (2023) (statement of Rena M. Conti, Associate Professor, Questrom School of Business) [hereinafter Conti Testimony] (describing the PBM rebate strategy).

105. See, e.g., Arad et al., supra note 94, at 11.

106. See, e.g., Hearing Before the S. Comm. on Health, Educ., Lab., and Pensions, 118th Cong. 13 (2023) (statement of Adam Kautzner, President, Express Scripts) ("In total, Express Scripts passes 95% of rebates it receives to health plan clients and their customers.").

107. See FTC, Policy Statement, supra note 101, at 1.

108. See Senate Minority Report, supra note 95, at 26; Darius Lakdawalla & Meng Li, JAMA Network Open, Association of Drug Rebates and Competition With Out-of-Pocket Coinsurance in Medicare Part D, 2014 to 2018, at 2 (2021).

109. See Conti Testimony, supra note 104, at 18; Senate Minority Report, supra note 95, at 27.

110. Senate Minority Report, supra note 95, at 29.

111. See Lakdawalla & Li, supra note 108, at 7 (noting sharp increases in prices and rebates).

4. *Summary.* — The foregoing examples can be presented systematically:

Example	Type of Alleged Conditioning	Deterred Activity	Benefit / Penalty
Amazon E-Commerce	Vertical	Allowing lower prices through other channels	More prominent / less prominent distribution
Google Search (Network and Device Partners)	Vertical	Preinstalling other search engines	More revenue share / less (or no) revenue share
Google Search (Apple)	Horizontal	Entering search market	Larger payment / smaller (or no) payment
Google Project Hug	Horizontal	Entering app store market	Cash payment / no cash payment
Facebook Platform Policies (No Replication)	Horizontal	Replicating core functionalities	Interoperability / no interoperability
Facebook Platform Policies (No Promotion)	Vertical	Promoting rival personal social networks	Interoperability / no interoperability
Qualcomm No License, No Chips	Vertical	Buying rivals' chips	No surcharge payment / surcharge payment
Crop Protection Loyalty Discounts	Vertical	Buying rivals' chemicals	Lower prices / higher prices
Chicken Grower Exit Penalties	Vertical	Switching to a rival	No exit fee / exit fee
Pharmaceutical Rebate Walls	Vertical	Favorable treatment of rivals (share / tier)	High rebate / low or no rebate

B. *Conditioning in Theory*

Conditional dealing has been subject to extensive economic analysis, including much important recent work. The full picture is intricate, but the bottom line is simple: Conditional dealing, like many forms of

monopolization, may result in either harm or benefit. And it is hard to be sure which effect predominates in the wild.[112]

1. *Theories of Harm*

a. *Horizontal Conditioning.* — Horizontal conditioning—inducing actual or potential rivals to refrain from or limit rivalry—threatens all the harms of traditional market allocation. When a monopolist pays off a business that would otherwise have become a rival, the result is the continuation of the monopoly instead of the competition that would have resulted, with all the usual harms: higher prices, lower output, and so on.[113]

A deal of this kind is often rational for the participants because the producer profits of monopoly generally exceed the combined producer profits of duopoly (or oligopoly, or competition), such that both the incumbent and the potential entrants can do better splitting monopoly profits than by competing.[114] The lower the profits that a potential entrant expects from entry—perhaps because competition will drive prices down very close to costs, or because the entrant doubts its ability to enter successfully—the more likely that entrant may be to take the deal instead. Consumers bear the harms.

Of course, this share-the-spoils theory will not always be plausible. If fully effective competitive entry is inevitable, a monopolist may have little to gain by paying off individual rivals. There is no point in paying a ransom to protect a monopoly that will surely be lost anyway.[115] And if the entrant believes that it can outcompete the monopolist on the merits—perhaps because it has lower costs or a better product—then it may prefer to take a shot at getting its own monopoly profits, rather than accepting a share of the incumbent's.[116]

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112. See Bogdan Genchev & Julie Holland Mortimer, Empirical Evidence on Conditional Pricing Practices: A Review, 81 Antitrust L.J. 343, 354 (2017) (noting the challenges of empirical work on this issue).

113. See, e.g., Daniel Francis & Christopher Jon Sprigman, Antitrust: Principles, Cases, and Materials 46–49 (2d ed. 2024) (outlining the harms of monopoly).

114. See, e.g., Steven C. Salop, The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test, 81 Antitrust L.J. 371, 379 (2017) [hereinafter Salop, Paradigm] (noting the monopolist's "bidding advantage[]").

115. As a result, share-the-spoils stories commonly center on entrants that are distinctively well situated to enter, and therefore distinctively threatening to incumbents. The most celebrated example is probably the case of "first filer" generic pharmaceutical manufacturers, whose unique advantage is conferred by the Hatch–Waxman regulatory framework, leading to the notorious "pay-for-delay" practice in which first-filers are co-opted by branded-drug incumbents through large "reverse settlements." See C. Scott Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, 81 N.Y.U. L. Rev. 1553, 1562–78 (2006) (describing the "pay-for-delay dilemma").

116. As Einer Elhauge notes, "[L]ong-term prospects of at least remaining in the market, *if not besting the incumbent*, are normally what motivates entry and persuades capital markets to fund it." Einer Elhauge, Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—And the Implications for Defining Costs and Market Power, 112 Yale L.J. 681, 773 (2003) (emphasis added). Of course, entrants are not always the best judge of their

But in many plausible cases a monopolist may believe that it can protect its own position—at least for some time—by paying off an important rival or subset of rivals. And those rivals may also believe that they can do better by taking the payoff and focusing elsewhere than by squaring up for the fight. In such cases a horizontal conditioning practice may emerge and may result in all the familiar harms of antitrust wrongdoing: higher prices, lower quality, reduced output, and less innovation.

b. *Vertical Conditioning.* — Vertical conditioning—inducing trading partners to refrain from or limit dealing with rivals—presents a slightly more complicated story. As Professor Steve Salop and others have demonstrated, a conditioning practice that incentivizes trading partners to refrain from dealing with rivals (either completely or to some extent) can raise the rivals' costs of inputs, distribution, customers, or complements and thereby reduce the extent to which they can exert pressure on the monopolist, resulting in welfare harms.[117] This is by now a classic antitrust concern.[118]

But vertical conditioning is not quite the same as paradigm exclusivity. The latter usually involves a binding commitment from trading partners not to deal with rivals.[119] By contrast, conditioning involves the application of a policy that merely incentivizes loyalty but does not involve a

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own prospects. See Avishalom Tor, The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy, 101 Mich. L. Rev. 482, 508 (2002) ("[E]ntrants may not only overestimate the profitability of successful entry, but also underestimate the investments and the time necessary for the venture to become viable.").

117. See, e.g., Salop, Paradigm, supra note 114, at 372; Willard K. Tom, David A. Balto & Neil W. Averitt, Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing, 67 Antitrust L.J. 615, 627 (2000).

118. See, e.g., Fiona M. Scott Morton, Contracts that Reference Rivals, Antitrust, Summer 2013, at 72, 72–73 (identifying various ways in which vertical agreements referencing rivals may inflict harm); see also Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209, 223–49 (1986) (describing in detail the possible effects of a vertical exclusionary agreement).

119. See Richard M. Steuer, Exclusive Dealing in Distribution, 69 Cornell L. Rev. 101, 102 (1983) ("'Exclusive dealing,' as defined in the legal literature, is a restriction that a supplier imposes on a customer, forbidding the customer from purchasing some category of products from any other supplier."). When there is an option of breaching the commitment and paying a penalty of some kind—such as damages—the economics of paradigm exclusivity may look more like those of vertical conditioning. See Patrick DeGraba, Patrick Greenlee & Daniel P. O'Brien, Conditional Pricing Practices—A Short Primer 10 (2017), https://www.ftc.gov/system/files/documents/reports/conditional-pricing-practices-short-primer/conditional_pricing_practices_-_a_short_primer_-_sept_2017.pdf [https://perma.cc/S3TZ-3PQL] ("Under a liquidated damages provision, a buyer essentially faces a 'disloyalty tax' if it switches too many of its purchases to an entrant.").

commitment to it. The trading partner constantly faces a choice about whether to become disloyal and incur the penalty.[120]

Traditional exclusivity theories must engage with a well-known Chicago School challenge: A monopolist's trading partner is unlikely to accept an exclusivity obligation that makes its own situation worse unless it is compensated with either lower prices reflecting resulting efficiencies or equivalent benefits.[121] This challenge is not always apposite in conditioning cases, many of which do not involve anyone "accepting" or agreeing to anything, by contrast with a paradigm exclusivity case in which a partner affirmatively commits to loyalty. But the challenge reminds us that any plausible theory of harm must explain why the relevant actors would behave as the theory suggests.

Happily, the economic literature has paid extensive attention to explaining why and how anticompetitive conditions (or similar practices) can plausibly generate harm of a kind that antitrust might care about. Several explanatory theories have emerged.

Out-of-Market Leverage Theories

In an important category of cases, the monopolist uses some out-of-market leverage—that is, a trading partner's desire to achieve or avoid some out-of-market outcome that the monopolist can cause or prevent—to encourage trading partners to abjure or restrict dealings with rivals. This might be very simple: a cash bribe, say, or a threat to burn down a factory. Or it might involve a second market in ways that resemble tying or bundling: for example, by offering access to a separate desired product (tying-like), or a better price for it (bundling-like). In what we are calling a conditioning case, unlike true tying or bundling, what is induced is (at least some) abstention from dealing with rivals, not additional dealing with the monopolist.[122]

Leverage of this kind can contribute to monopoly or market power in a market of concern by making rival output less attractive, even if the rival

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120. See Benjamin Klein & Andres V. Lerner, Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts, 80 Antitrust L.J. 631, 669 (2016) [hereinafter Klein & Lerner, Price-Cost Tests] (describing price-incentive mechanisms); see also Enrique Ide, Juan-Pablo Montero & Nicolás Figueroa, Discounts as a Barrier to Entry, 106 Am. Econ. Rev. 1849, 1852–53 (2016) (arguing that this ex post exclusion story requires some kind of ex ante lock-in, particularly in the form of a commitment to make an unconditional transfer in exchange for generous treatment in a subsequent period).

121. Robert Bork, for one, articulated this objection:

> 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. . . . [T]here is every reason to believe that exclusive . . . contracts have no purpose or effect other than the creation of efficiency.

Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 308–09 (1978).

122. This distinction is sometimes elided by courts (and others!), leading to misclassification. See infra section II.C.

output is higher quality or lower cost.[123] In extreme cases there may be no above-cost price that a rival could offer that would win the business of a rational trading partner subject to the monopolist's condition.[124]

In-Market Leverage Theories

A second category involves "in-market" leverage across segments of demand for a single product or service. In the classic version, at least some trading partners have some amount of demand that is noncontestable (or less contestable)—meaning that there are no substitutes (or a strong preference) for the monopolist's output—and also some additional demand that is (more) contestable, meaning that the monopolist's output is preferred less or not at all in that segment of demand. The preference may arise from a variety of factors, including product differentiation, regulatory requirements, goodwill or trading-partner risk aversion, preferences of end customers, switching and transaction costs, and so on.[125] For example, a trading partner with an overall demand of 100 units per week might strongly prefer the monopolist's output for 20 of those units but have little or no such preference for the remainder of its demand.

The rest of the story resembles out-of-market leverage. The monopolist might refuse to supply in the first segment unless the trading partner refrains from dealing with rivals in the second segment;[126] or it may offer better terms in the first segment for doing so.[127] And, just as with out-of-market leverage, there may be no above-cost price that a rival could offer for the contestable share such that the trading partner would

123. See Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harv. L. Rev. 397, 403–20 (2009) [hereinafter Elhauge, Death of Single Monopoly Profit] ("Tying by a firm with tying market power typically does increase monopoly profits even when the tie has no efficiencies."); Barry Nalebuff, Exclusionary Bundling, 50 Antitrust Bull. 321, 321 (2005) (noting that bundling-like strategies can prevent even efficient rivals from competing).

124. See Daniel A. Crane, Mixed Bundling, Profit Sacrifice, and Consumer Welfare, 55 Emory L.J. 423, 443–44 (2006) [hereinafter Crane, Mixed Bundling] (demonstrating this effect).

125. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 401 (3d Cir. 2016) (noting that a "unique cardiology indication" provided "incontestable demand"); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997) (acknowledging the role of "proven product and strong reputation"); Roger D. Blair & Thomas Knight, Bundled Discounts, Loyalty Discounts and Antitrust Policy, 16 Rutgers Bus. L. Rev. 123, 145 (2020) (noting product differentiation and downstream customer demand as constraints on the effect of loyalty schemes); Michael A. Salinger, All-Units Discounts by a Dominant Producer Threatened by Partial Entry, 81 Antitrust L.J. 507, 531 n.71 (2017) (alluding to FDA approvals as a determinant of contestability).

126. See Salinger, supra note 125, at 533.

127. See Blair & Knight, supra note 125, at 145 (discussing discounts that operate in this way).

rationally deal with the rival at all.[128] Many variations on this simple story are possible: A prominent one involves granting retroactive loyalty rebates on sales already made, which are by definition noncontestable.[129]

Simple accounts may treat demand contestability as exogenously determined, with competitive concern limited to the competitive segment. This is certainly a convenient modeling assumption. But contestability is more often endogenous: relative preference for the monopolist may wane as entrants build goodwill, network effects, know-how, and so on. Thus, a contestable segment may serve as an entry ramp into a noncontestable segment.[130]

Incumbent-Entrant Coordination Theories

Another set of theories, explored in the writings of Professors Einer Elhauge and Michael Salinger, shows that vertical conditioning may help to facilitate coordination between an incumbent and an entrant. Elhauge, for example, focuses on cases in which the reward for loyalty is a guaranteed margin of preference over terms offered to disloyal trading partners.[131] This approximates what is sometimes called "MFN-plus" treatment.[132] He points out that, just like other MFN practices, this makes it more costly for the bound party to discount to disloyal trading partners, as loyal beneficiaries must get even better terms.[133] This in turn reduces rivals' incentives to compete on price.[134]

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128. See Klein & Lerner, Price-Cost Tests, supra note 120, at 639 (noting that rivals may face an implicit below-cost price); Janusz A. Ordover & Greg Shaffer, Exclusionary Discounts, 31 Int'l J. Indus. Org. 569, 570 (2013) (making an equivalent point).

129. See Blair & Knight, supra note 125, at 143–44 (providing a worked example of a retroactive discount that excludes equally efficient rivals); see also Am. President Lines, LLC v. Matson, Inc., 633 F. Supp. 3d 209, 219 (D.D.C. 2022) (describing an allegation of exclusionary "first dollar" discounting); Church & Dwight Co., Inc. v. Mayer Lab'ys, Inc., 868 F. Supp. 2d 876, 905 (N.D. Cal. 2012) (noting the argument that a discontinuous rebate schedule can create "golden handcuffs" for buyers).

130. See Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 Colum. L. Rev. 515, 530–31 (1985) (emphasizing the importance, in leverage analysis, of long-run dynamic effects, including impact on reputation and strategic positioning).

131. See Einer Elhauge, How Loyalty Discounts Can Perversely Discourage Discounting, 5 J. Competition L. & Econ. 189, 193 (2009) [hereinafter Elhauge, Loyalty Discounts]. As Professor Daniel Crane notes, these may be uncommon. Daniel A. Crane, Bargaining Over Loyalty, 92 Tex. L. Rev. 253, 285–86 (2013) [hereinafter Crane, Loyalty].

132. See Thomas A. Lambert, Have Elhauge and Wickelgren Undermined the Rule of Per Se Legality for Above-Cost Loyalty Discounts?, Truth on the Market (Sept. 12, 2012), https://truthonthemarket.com/2012/09/12/have-elhauge-and-wickelgren-undermined-the-rule-of-per-se-legality-for-above-cost-loyalty-discounts/ [https://perma.cc/8MUX-8KF3] ("The loyalty discounts that [Elhauge] model[s] really just look like souped-up 'Most Favored Nations' clauses . . . .").

133. See Elhauge, Loyalty Discounts, supra note 131, at 193; see also Einer Elhauge & Abraham L. Wickelgren, Robust Exclusion and Market Division Through Loyalty Discounts, Int'l J. Indus. Org., Nov. 2015, at 111, 112.

134. See Elhauge, Loyalty Discounts, supra note 131, at 213.

And Salinger has pointed out that when an incumbent engages in share-based discounting to its customers, a rival's incentives may be affected in interesting ways. The rival can try to contest share outside the zone marked out for it by the threshold but may prefer to sit instead within the threshold and enjoy higher prices if further entry will be limited.[135] For example, if an incumbent monopolist's discount is contingent on its customers allocating 60% of their purchases to the monopolist, a rival might *either* compete aggressively for all purchases *or* simply take the highest possible price for the remaining 40%.

Collective Action Theories

Another category of theories posits that harm may result from a collective action problem. In the traditional telling, an incumbent's trading partners commit to exclusivity because: (1) the incumbent indicates that it will give better treatment to those that commit to exclusivity than to those that do not, (2) no trading partner believes that it alone can provide enough scale to sustain an entrant, and (3) no trading partner believes that any other trading partner will do so either, for the same reason.[136] This story depends on, among other things, scale barriers to entry,[137] and it may be thwarted by a strong trading partner that can solve the collective action problem.[138] But an incumbent that can discriminate may be able to buy off such strong partners.[139]

Although vertical conditioning need not necessarily involve an affirmative commitment of the kind that this account traditionally contemplates, it can. For example, when a monopolist invites trading partners to agree to pay a fee (or similar) for dealing with rivals in the future, their willingness to agree may be explicable by reference to a collective-action account of this kind.

And collective-action analysis may even help to explain the success of conditioning practices involving no traditional commitments. For example, if a monopolist will charge a higher price to disloyal customers for some period of time in the event that they deal with a rival, trading partners may be unwilling to deal with the rival because they fear that the rival will not sustain competitive scale. This would leave those trading

135. See Salinger, supra note 125, at 511.

136. See Eric B. Rasmusen, J. Mark Ramseyer & John S. Wiley Jr., Naked Exclusion, 81 Am. Econ. Rev. 1137, 1137–38 (1991) (modeling this effect).

137. See id. at 1143.

138. See Louis Kaplow & Carl Shapiro, Antitrust, *in* Handbook of Law and Economics 1047, 1206 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (noting that "one or a few large buyers may find it profitable to support entry").

139. See Ilya R. Segal & Michael D. Whinston, Naked Exclusion: Comment, 90 Am. Econ. Rev. 296, 307 (2000) (noting that the possibility of discrimination makes exclusion possible even if trading partners can coordinate); see also Robert Innes & Richard J. Sexton, Strategic Buyers and Exclusionary Contracts, 84 Am. Econ. Rev. 566, 576 (1994) ("[T]he next buyer only needs to be given a payoff that is as high as could be obtained if all buyers *except* [the first] reject their [initial exclusivity] contracts.").

partners stuck with "disloyal" terms from the monopolist for the relevant period, while their competitors enjoy better treatment. In effect, the monopolist creates a commitment mechanism through its conduct.

Rent-Sharing and Pass-Through Theories

When a monopolist's trading partners are not end-consumers, they may become stakeholders in the monopolist's power. In particular, when competition among trading partners is intense, their margins may be competed away, leaving them with little or nothing to gain from increased competition against the monopolist.[140] Any cost savings from competition will simply be passed on to their own customers, not retained as profit.[141] But those same trading partners may have something to gain from continued monopoly if the monopolist will share some of the rents with them.[142] End-consumers end up bearing the costs.[143]

The thinner trading partners' own margins, the lower the compensation they may accept to forgo the benefits of competition and help protect the monopoly.[144] "In effect, the service that [they can be paid to] provide is the exclusion of a potential entrant."[145] This generally requires, among other things, that the trading partners are critical to entry, that entry would result in increased competition rather than a mere change of monopolist, and that the trading partners would not enjoy equivalent rents after entry.[146]

There are many ways for a monopolist to share rents with trading partners. These include side payments,[147] rebates,[148] "bonuses" or "fees,"[149] and the use of price-maintenance or exclusive territories to insulate trading partners from competition with one another.[150] Or a price-discriminating monopolist might price high to disloyal customers while pricing low to those customers' competitors, to "compete away most of the

140. Ide et al., supra note 120, at 1864 (modeling this claim).

141. Id.

142. See DeGraba et al., supra note 119, at 11 ("The supplier distributes a portion of the rents back to the retailers in the form of a lump sum payment in exchange for retailers' exclusivity to the supplier.").

143. See id.

144. See Joseph Farrell, Deconstructing Chicago on Exclusive Dealing, 50 Antitrust Bull. 465, 477 (2005) (arguing that increased pass-through to intermediate buyers facilitates anticompetitive exclusion).

145. John Asker & Heski Bar-Isaac, Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals, 104 Am. Econ. Rev. 672, 681 (2014).

146. See id. at 682.

147. See John Simpson & Abraham L. Wickelgren, Naked Exclusion, Efficient Breach, and Downstream Competition, 97 Am. Econ. Rev. 1305, 1306, 1318 (2007).

148. See Ordover & Shaffer, supra note 128, at 569.

149. See Steuer, supra note 119, at 129.

150. See Asker & Bar-Isaac, supra note 145, at 680.

benefits of using the rival's input" and thus punish trading partners for dealing with the monopolist's rival.[151]

And, just as a set of trading partners can become stakeholders in the monopolist's incumbency, the monopolist in turn can become a stakeholder in protecting those trading partners from competition. Each new player in that market makes exclusion harder for the monopolist, so the monopolist may have an incentive to help the trading partners resist entry and expansion at their own level of the supply chain.[152] The result can be a cozy implicit bargain between a monopolist and a set of important trading partners.

Predation Theories

A final set of theories posits that the harm will arise through a two-step process that corresponds to standard predatory pricing.[153] In the first step, the monopolist offers prices that rivals cannot profitably match to trading partners that decline to deal with rivals.[154] Rivals run out of money and exit, and given entry barriers, the monopolist is left with more power than it started with.[155]

This is a variation on a common price predation story, with the tweak that the prices are conditional. The core mechanism of harm here often owes more to the price than the condition, though the condition may result in rivals making even fewer sales than they would with unconditional pricing.[156]

2. *Theories of Benefit.* — Conditional dealing may also result in welfare benefits. These may flow either from the behavior induced by the condition, or from the inducement itself.

Of course, the existence of some benefits does not imply that a practice is beneficial *overall*, nor that the harmful effects are necessary to achieve the benefits. In fact, every form of monopolization, however flagrant, generates some benefits. For example, if a monopolist manufacturer blows up all its rivals with dynamite, that conduct will at least save downstream retailers the transaction costs of dealing with the rivals, give the retailers strong incentives to promote the distribution of the

151. Patrick DeGraba, Naked Exclusion by a Dominant Input Supplier: Exclusive Contracting and Loyalty Discounts, 31 Int'l J. Indus. Org. 516, 517 (2013).

152. See Asker & Bar-Isaac, supra note 145, at 682–83; Elizabeth Granitz & Benjamin Klein, Monopolization by "Raising Rivals' Costs": The Standard Oil Case, 39 J.L. & Econ. 1, 9–10 (1996) (discussing Rockefeller's use of these tactics in 1871–1872).

153. On the economics of predation, see Janusz A. Ordover & Robert D. Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 Yale L.J. 8, 9–10 (1981).

154. Id.

155. Id.

156. See Salop, Paradigm, supra note 114, at 372 (noting that a challenge to conditional pricing under a predation theory "would attack the 'level' of the prices" rather than the condition).

monopolist's product, and allow the manufacturer to invest in the retailers without fear of free riding. There is, thus, always a bright side.[157]

a. *Benefits of Induced Behavior.* — Sometimes benefits may result from the fact that one or more trading partners are induced not to compete or deal with competitors.

Two cautionary notes at the outset. First, many prominent benefit theories have been developed in the context of paradigm exclusivity, in which the trading partner makes an affirmative promise to deal only with the monopolist.[158] But in conditioning cases there is usually no such commitment, just an incentive effect.[159] This may preclude or undermine traditional benefit claims that are premised on high confidence that the trading partner will in fact remain loyal.[160]

Second, some courts and commentators have confused the benefits of exclusivity with the benefits of commitments made to a bound party in return for exclusivity, including commitments relating to supply, pricing, and so on.[161] But nothing about a promise not to deal with a monopolist's rivals requires any particular package of corresponding duties for the monopolist.

Facilitating investments that would not otherwise take place because of free-riding effects. A monopolist may be deterred from making certain investments if some of the resulting benefits will accrue to rivals.[162] Some of this effect flows from externalization: The monopolist will invest less than it would if it internalized all the payoff. Another part of the effect flows from the fact that an investment may improve the ability or incentive

157. See Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," and Consumer Harm, 70 Antitrust L.J. 311, 353 (2002) [hereinafter Jacobson, Consumer Harm] (discussing the potential efficiencies of exclusive dealing contracts); Tom et al., supra note 117, at 617 (same).

158. See Tom et al., supra note 117, at 616–19 (summarizing orthodox analysis of exclusivity agreements).

159. Id. at 621–22 (noting the "emerging issue in antitrust litigation and counseling" of practices short of traditional exclusivity that resemble it in some respects, including partial commitments and arrangements that incentivize exclusivity without requiring it).

160. See Fiona M. Scott Morton & Zachary Abrahamson, A Unifying Analytical Framework for Loyalty Rebates, 81 Antitrust L.J. 777, 801 (2017) (observing that in some cases loyalty discounts have not spurred complementary investment). But see Steuer, supra note 119, at 127 (noting that the possibility of breach can soften the effect of a commitment).

161. For example, the Supreme Court has stated that, for a buyer, an exclusive deal "may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306 (1949) (footnote omitted). None of these effects flows from exclusivity as such: Instead, they may flow from particular promises that a supplier may or may not offer in exchange for an exclusivity commitment.

162. See Scott Morton & Abrahamson, supra note 160, at 801 ("[A] manufacturer might train workers at an intermediary to repair a product only if the intermediary sells a high enough share from that manufacturer to limit free-riding."); Steuer, supra note 119, at 127.

of one or more rivals to compete against the monopolist, cannibalizing its profits. Reducing free riding may increase the monopolist's socially valuable investment.[163]

Facilitating investments that would otherwise be deterred by fear of opportunism. When a monopolist makes relationship-specific investments, it may become vulnerable to holdup or opportunistic threats by its trading partner.[164] This risk may deter the monopolist from making the investments in the first place.[165] Practices that deter the partner from credibly threatening to go elsewhere may reduce the threat, and thus encourage the monopolist to invest.[166]

Allocating risk of fluctuations in demand. Some investments may not be rational unless the monopolist has confidence in the level of future demand for its output.[167] Inducing exclusivity may contribute to such confidence, and thus make the investments rational.[168] Exclusivity may also offer a way to allocate the risk of fluctuating demand to the most efficient bearer of that risk.[169]

Aligning incentives and encouraging investment. A trading partner that deals with the monopolist and its rivals may have little incentive to promote any particular brand.[170] An exclusive relationship may give the

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163. See Jacobson, Consumer Harm, supra note 157, at 360 (arguing that leaks of confidential information disincentivize future investments); Steuer, supra note 119, at 130–31 (discussing the free riding which ensues when sellers are forced to share confidential information with their buyers, putting trade secrets at risk of exposure).

164. See Ittai Paldor, Antitrust Law's Harm to Competition: A New Understanding of Exclusivity, 69 Buff. L. Rev. 1095, 1120 (2021) ("If the party required to make these relationship-specific investments is not guaranteed a certain amount of sales for a predetermined price, the investments may be abandoned.").

165. Id.

166. See DeGraba et al., supra note 119, at 4–5 ("Exclusive contracts . . . can promote efficiency by improving incentives for parties to make beneficial investment when holdup or free-riding might otherwise occur."); Paldor, supra note 164, at 1122. Note that in both free-riding stories, the benefit arises from the social value of the additional increment of investment that is contingent on protection against free riding. What we are calling here "opportunistic threats" may overlap heavily with what we might otherwise call "desirable price competition against the monopolist."

167. Paldor, supra note 164, at 1120 & n.88 (noting that some relationship-specific investment is contingent on a guaranteed minimum sales volume).

168. See Crane, Loyalty, supra note 131, at 261 (arguing that exclusivity can help guarantee a minimum sales volume despite uncertain demand); Paldor, supra note 164, at 1120 & n.88 (same).

169. See Crane, Loyalty, supra note 131, at 260–61; Herbert Hovenkamp, The Federal Trade Commission and the Sherman Act, 62 Fla. L. Rev. 871, 889 (2010) (describing risk-management benefits of loyalty discounts).

170. See Jacobson, Consumer Harm, supra note 157, at 357–58 (noting that a distributor authorized to deal with several brands is "subject to conflicting interests and less likely to promote" any one as effectively).

trading partner an incentive to support the monopolist's product, resulting in extra distribution efforts.[171]

b. *Benefits of Inducements.* — Conditioning cases often involve benefit claims that relate not to the induced behavior of the counterparty (e.g., the fact that the counterparty will not compete or deal with rivals) but to the inducements offered to obtain that behavior, when evidence indicates that those inducements could or would not reasonably be offered absent the challenged practice.[172]

Discounts are good. All else equal, true price reductions toward the competitive price tend to increase output and welfare.[173] (All else may not be equal, though: The mere fact that two different prices are involved does *not* mean that either or both are less than they would be absent the condition.[174]) In particular, a trading partner may decide to deal exclusively in order to extract lower prices from the monopolist and its competitors.[175]

Price discrimination and price competition for contestable demand. In some cases, exchanging better terms for loyalty may allow the monopolist to offer to make additional sales above the monopoly output level.[176] This in turn may allow the monopolist to be a price competitor for contestable demand at a price below the market-wide monopoly price.[177] In such cases, the monopolist is effectively price-discriminating among segments of the same customer's demand, charging a lower price on more elastic demand. This may make a larger contribution to welfare when rivals are few or weak.[178]

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171. See Genchev & Mortimer, supra note 112, at 352; Jacobson, Consumer Harm, supra note 157, at 357; David E. Mills, Inducing Downstream Selling Effort With Market Share Discounts, 17 Int'l J. Econ. Bus. 129, 133–36, 140 (2010) (showing that loyalty discounts reduce the cost of induced selling efforts).

172. See supra section I.A.1.c (discussing Google's Project Hug benefits to potential competitors, perhaps rational only in light of the benefits' anticompetitive effects).

173. See Blair & Knight, supra note 125, at 123 (noting that discounts are generally procompetitive and welfare-enhancing); Ordover & Shaffer, supra note 128, at 569 (same).

174. See Elhauge, Loyalty Discounts, supra note 131, at 216 ("There is no sound economic reason to conflate real discounts from but-for levels with price differences conditioned on compliance with exclusionary terms."); see also Elhauge, Death of Single Monopoly Profit, supra note 123, at 450 ("The most important thing to get straight about bundled discounts is that they need not reflect true discounts at all.").

175. See Salinger, supra note 125, at 535 n.82.

176. U.S., Roundtable on Fidelity Rebates 5, DAF/COMP/WD(2016)20 (June 7, 2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1606fidelity_rebates-us.pdf [https://perma.cc/W79K-9RX5].

177. See Salinger, supra note 125, at 523 ("[P]urchasers in the competitive segment get much lower prices while consumers in the monopolized segment get the same price.").

178. For this reason, most illustrations of the salience of this effect focus on two-firm cases. See, e.g., id. at 520, 523 (modeling this with a monopolist and a single entrant); see also Sean Durkin, The Competitive Effects of Loyalty Discounts in a Model of Competition Implied by the Discount Attribution Test, 81 Antitrust L.J. 475, 490–91 (2017).

Volume-like discounts for trading partners of various sizes. Volume discounts are a common and often beneficial means of competing on price,[179] and they may proxy the increased efficiencies of trading at scale.[180] But because different trading partners may have different abilities to accommodate scale, suppliers may turn to share discounts instead as a purportedly fairer alternative.[181] And to the extent that such discounts constitute true price reductions or help to achieve real scale efficiencies, they too may result in genuine benefits.[182]

* * *

Conditional dealing, then, appears to be taking place in some of the most important sectors of our economy, from our largest digital platforms to markets for necessaries like food and medicine. And an array of economic scholarship has articulated a variety of ways in which such practices might enable monopolists to exclude rivals and harm consumers—just the kinds of things with which antitrust is traditionally concerned. Unfortunately, as Part II will explore, the law of monopolization is lagging far behind.

II. CONDITIONING AS MONOPOLIZATION

This Part argues that it is time to admit a new category to monopolization's library of forms, alongside tying, bundling, predatory pricing, and so on. Conditional dealing is the offering, by a monopolist, of conditional terms to trading partners that provide for disfavored treatment if they compete—either at all or to a particular extent—with the monopolist (horizontal conditioning) or if they trade—again, at all or to a particular extent—with the monopolist's rivals (vertical conditioning). Or, to put it the other way around, terms that provide that trading partners will receive favored treatment if they abandon or limit competition against the monopolist or dealings with its rivals.

The following discussion will focus only on Section 2 of the Sherman Act,[183] leaving other avenues of challenge to conditional dealing—including Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the FTC Act—for another day.[184]

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179. See Dennis W. Carlton & Michael Waldman, Safe Harbors for Quantity Discounts and Bundling, 15 Geo. Mason L. Rev. 1231, 1233 (2008) (discussing volume discounts' ubiquity and relationship with efficiencies).

180. Id.

181. See Tom et al., supra note 117, at 629 (noting the argument that share discounts "allow[] smaller customers to buy on more equal terms").

182. Id. (mentioning the potential benefits of market-share discounts).

183. See 15 U.S.C. § 2 (2018).

184. For example, some courts are willing to infer an agreement, sufficient to trigger the application of Section 1, 15 U.S.C. § 1, from so-called threat-and-accession interactions.

A. *A Failure of Shoeboxes*

Section 2 of the Sherman Act, 15 U.S.C. § 2, establishes the monopolization offense. This governs businesses that hold or attain monopoly power: a high bar, connoting significant freedom from competition.[185] It prohibits creating or extending such power through conduct variously labeled "exclusionary," "anticompetitive," "predatory," or "not competition on the merits."[186]

As this overload of eyebrow-wiggling labels might suggest, there is considerable uncertainty about what general principles, if any, govern the monopolization offense.[187] The core difficulty is that vigorous competition—the behavior that antitrust is supposed to value and require—involves prospering at the expense of rivals, capturing their market share, and perhaps forcing them out of the market.[188] And success leads to monopoly. So courts have struggled to give an account of monopolization that does not punish desirable conduct.[189]

In practice, courts usually dodge this first-principles question—sometimes genuflecting to it in a paragraph or two of empty cant[190]—and rely instead on a taxonomy of neat, shoebox-like categories of behavior, each with a corresponding micro-rule of legality. Thus, we have fairly specific rules for predatory pricing, tying, bundling, and so on.[191] Predatory pricing, for example, constitutes monopolization if it involves a

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See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526 (5th Cir. 2022) (endorsing such an inference in principle).

185. For illustration, a market share of around 60–70% is suggestive of monopoly power, although share alone is not dispositive. See, e.g., Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 n.5 (9th Cir. 2022); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945); see also Francis & Sprigman, supra note 113, at 338 (discussing the relationship between share and monopoly power).

186. See Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("[T]he possession of monopoly power [is not] unlawful unless it is accompanied by an element of anticompetitive *conduct*."); United States v. Grinnell Corp., 384 U.S. 563, 570–71, 576 (1966) (condemning monopoly achieved through "exclusionary practices").

187. See supra note 15 and accompanying text.

188. See Frank H. Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 972 (1986) ("Competitive and exclusionary conduct look alike.").

189. See Francis, Making Sense of Monopolization, supra note 15, at 784–91 (surveying considerable judicial and scholarly disagreement).

190. Courts often purport to rely on a thick, normative, and undefined concept of "competition" for this purpose, usually with unhelpful results. See Francis, Competition, supra note 16, at 433–34.

191. See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 994 F.3d 1166, 1173 (10th Cir. 2021) (explaining that there are "specific rules for common forms of alleged misconduct" (citing Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013))).

monopolist (1) charging below-cost prices that (2) create a dangerous probability of recouping its losses through enhanced monopoly power.[192]

The result is that monopolization law effectively thinks in these shoeboxes: Plaintiffs either fit into a recognized category or they lose. Courts are often reluctant to impose monopolization liability[193] and hardly ever do so without plenty of reassurance that they are coloring well inside the lines.[194] "General principles" Section 2 claims are seldom tried, and less often successful.[195]

This spells trouble for conditioning claims, because most such practices simply do not fit into any of the shoeboxes recognized in existing monopolization law. In many cases, courts often try to jam them in anyway, with unappetizing results.[196] But in other cases, courts explicitly recognize that conditioning theories do *not* fit into these categories and throw up their hands in ways that very clearly expose the costs of a shoebox-based system of micro-rules: particularly a system that does not include conditioning.

In one recent case, for example, a district court considered an allegation that an incumbent competitor offered shipping slots to a rival on favorable terms so long as the rival withdrew from the upstream market for ships—that is, a horizontal condition.[197] The court confessed that it "struggle[d] to cabin" this allegation, and "[w]ithout additional briefing on how the proposal should be treated under the antitrust laws . . . the Court hesitate[d] to opine further on how the allegation fit[] with [the plaintiff's] claims."[198]

Likewise, in another recent case, confronted with a vertical condition exerting what was labeled "in-market leverage" in Part I, an appellate court confessed similar confusion:

> [The plaintiff] describes a phenomenon where an entrenched firm might be able to offer hard-to-match discounts to the non-entrenched share by offering loyalty discounts conditioned on sales exceeding the entrenched demand. But [the plaintiff] does not provide us any legal standard by which to evaluate [the defendant]'s alleged leveraging of entrenched share, making it

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192. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

193. See, e.g., Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170 (10th Cir. 2023) ("We exercise caution when evaluating what qualifies as exclusionary conduct under [Section 2 of] the Sherman Act.").

194. See Francis, Competition, supra note 16, at 428 (arguing that a fear of false-positive liability has led to underenforcement of antitrust laws, particularly in cases that fall outside familiar categories).

195. See id.

196. See infra note 201 and accompanying text.

197. See Am. President Lines, LLC v. Matson, Inc., 633 F. Supp. 3d 209, 219 (D.D.C. 2022).

198. Id. at 230–31.

> impossible for us to determine whether there is a material issue of fact.[199]

So the court "refrain[ed] from deciding this issue independently."[200]

The point is a simple one. By falling in the wrong box or none at all, conditioning cases routinely fail for reasons that have little or nothing to do with the economic concerns surveyed above, leaving the law of conditional dealing—to the extent that we have such a thing—an unedifying mess.[201] And, as the following will show, no existing member of monopolization's family of shoeboxes is well placed to accommodate conditional dealing.

1. *Refusal to Deal.* — Some conditional practices involve granting or cutting off access to a product or service to induce trading partners not to compete or not to work with rivals. In such cases courts have sometimes applied the law of refusal to deal. This framework usually governs claims that a monopolist is denying a rival access to some kind of supply, hindering the rival's competitive effectiveness.[202]

Courts treat such claims with extreme skepticism. Indeed, antitrust generally starts from the proposition that every business has an affirmative right to pick its own customers.[203] The Supreme Court articulated this point soon after the Sherman Act was passed.[204] The Court's 1919 *Colgate* decision is still routinely cited for "the long recognized right of [a] trader

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199. In re EpiPen, 44 F.4th 959, 1001–02 (10th Cir. 2022) (footnote omitted).

200. Id. at 1004.

201. See Su Sun, Editor's Note: Assessing Conditional Pricing, 81 Antitrust L.J. 337, 337 (2017) (noting that there is "no consensus" on the analytical framework applicable to conditional pricing). Even when plaintiffs win in cases involving a conditioning theory, the reasoning is seldom convincing. In *Chase Manufacturing*, for example, the Tenth Circuit correctly upheld a theory of harm in a case in which a monopolist threatened trading partners with termination if they dealt with a rival (i.e., vertical conditioning). Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170–77 (10th Cir. 2023). But the reasoning was lamentable. The court held that there was evidence of illegality because: (1) the defendant held "significant market power"; (2) "distributors did not flock to [the rival product], despite its 20-to-25% lower price and superior quality"; (3) there was evidence of "coercive behavior"; and (4) the defendant had "not explained how its conduct fostered competition." Id. at 1171–72. But evidence of market power goes to whether we are dealing with a monopolist, not whether the conduct was unlawful; the fact that distributors did not switch to a rival does not itself imply that the monopolist's conduct was improper; coercion is an empty test for the reasons explained above, see infra section II.B.2.b; and before we can require a defendant to show justifications, we need a prima facie case. So *Chase Manufacturing*'s outcome was correct, but the reasoning was not.

202. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) ("Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 [of the Sherman Act]."); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–11 (1985) (finding a Section 2 violation for a refusal to deal).

203. See Hovenkamp, Big Tech, supra note 14, at 1487 ("[T]he default rule is that a firm can lawfully refuse to deal with rivals . . . .").

204. See United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 320 (1897) (outlining a private business's right to charge what they wish and deal with whom they wish).

or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And . . . [to] announce in advance the circumstances under which he will refuse to sell."[205]

In principle, this right is a qualified one. Monopolization liability is available at least in theory for a narrow category of refusals, given the Court's 1985 holding in *Aspen Skiing* that it was unlawful for a monopolist ski resort to pull out of cooperation with a smaller rival without adequate "justification."[206] But the seminal modern Section 2 case, 2004's *Trinko*, went out of its way to marginalize *Aspen Skiing* ("at or near the outer boundary" of the law[207]) and held that even a monopolist with a statutory duty to deal could not be liable in antitrust for refusing to do so.[208] The Court emphasized the hazards of dragging courts into the supervision of forced selling, fearful of the resulting need to regulate prices, terms, and performance.[209] No one seems to have won a refusal to deal case since.[210] A separate essential facilities doctrine is recognized in theory by lower courts but seems to be similarly imaginary in modern practice.[211]

Most modern readings of *Aspen Skiing*—channeling *Trinko*'s spirit—confine it to cases in which a monopolist terminates a previous, profitable course of dealing for purely anticompetitive reasons.[212] But it is not obvious why it should be worse to cut off a rival than not to deal with it in the first place (particularly given that this rule seems likely to dissuade monopolists from selling to rivals in the first place, for fear that they may

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205. United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (quoting *Trans-Mo. Freight*, 166 U.S. at 320). The fuller quotation is more qualified, reading: "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right . . . ." Id. (emphasis added). But the thrust of the opinion, and the status of the principle, is unmistakable.

206. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–11 (1985); see also Otter Tail Power Co. v. United States, 410 U.S. 366, 377–82 (1973) (imposing liability for a refusal to deal).

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

208. Id.

209. Id. at 414–15.

210. See Hovenkamp, Big Tech, supra note 14, at 1490 n.26.

211. See Brett Frischmann & Spencer Weber Waller, Revitalizing Essential Facilities, 75 Antitrust L.J. 1, 8–9 (2008) (noting that "[t]he [essential facilities] doctrine has been subject to increasing scholarly criticism" and that "[t]he *Trinko* decision in 2004 represents [its] near extinction . . . in the Supreme Court").

212. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013); Covad Commc'n Co. v. Bell Atl. Corp., 398 F.3d 666, 673–76 (D.C. Cir. 2005). But see Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 461 n.13 (7th Cir. 2020) (alluding to the possibility of "a broader approach, in which harm 'wholly disproportionate' to [a] valid business justification can . . . support a refusal-to-deal-claim" (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 772c2 (4th ed. 2015))); Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 19, New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023) (No. 21-7078), 2022 WL 266802 ("There is . . . no rigid test for analyzing refusals to deal under Section 2.").

become locked in by antitrust), nor is it clear what should count as a good reason.[213] At least one appellate court has held that a desire to exclude rivals from one's own property is a good enough reason to justify a refusal.[214] It's not obvious why that's wrong in a legal system that does not generally force persons to share their property; and if it's right, it's not clear what refusal would ever fail that test.

Multiple courts have analyzed conditioning through the rather dim and narrow lens of refusal to deal law.[215] For example, when the FTC and a coalition of states alleged that Facebook (now Meta) violated Section 2 by offering valuable interoperability services to apps only on condition that the apps neither developed competing functionalities (i.e., horizontal conditioning) nor promoted in certain ways those that did (i.e., vertical conditioning), the district court and the D.C. Circuit analyzed the horizontal conditioning as a refusal to deal.

In the district court, Judge James Boasberg held that it was "clear off the bat" that:

> Facebook's adoption of a policy of not offering API access to competitors did not, standing alone, violate Section 2. . . . [A] monopolist has no duty to deal with its competitors, and a refusal to do so is generally lawful even if it is motivated . . . by a desire 'to limit entry' by new firms or impede the growth of existing ones.[216]

From this it followed that "a firm's merely announcing its choice not to deal with competitors . . . cannot violate Section 2."[217] This may have deterred some from competing, but "Facebook had no antitrust duty to avoid creating that deterrent."[218] Such a policy was "plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing."[219]

Crucially, Judge Boasberg held that illegality could only flow from actual refusals, not from a conditional policy. "[T]he mere act of announcing or maintaining a general no-dealing-with-competitors *policy*

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213. See Michael Jacobs, Introduction: Hail or Farewell? The *Aspen* Case 20 Years Later, 73 Antitrust L.J. 59, 65–67 (2005) (questioning *Aspen*'s reasoning).

214. Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218 (9th Cir. 1997) ("[A] monopolist's 'desire to exclude others from its [protected] work is a presumptively valid business justification . . . .'" (second alteration in original) (quoting Data Gen. v. Grumman Sys. Support, 36 F.3d 1147, 1187 (1st Cir. 1994))).

215. See, e.g., Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440 (1910); *Viamedia*, 951 F.3d at 462–63; Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 227 F. 46, 48–49 (2d Cir. 1915); Whitwell v. Cont'l Tobacco Co., 125 F. 454, 461–63 (8th Cir. 1903).

216. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 27 (D.D.C. 2021) (quoting Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)).

217. Id.

218. Id.

219. Id. at 28.

cannot, in and of itself, violate Section 2; rather, the analysis must focus on particular *acts*" of refusal.[220]

On appeal in the states' case, the D.C. Circuit specifically upheld the choice of the refusal to deal lens for analysis of the horizontal conditioning allegation.[221] Stating that interoperability with Facebook's platform was "a privilege, and one highly sought,"[222] the court reiterated core refusal to deal principles: "To consider Facebook's policy as a violation of § 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors. That theory . . . runs into problems under [*Trinko*]," and if sharing were required, "courts would have to manage corporations' business affairs, a role for which the judiciary is ill suited."[223]

But on closer examination this lens is a very poor fit for conditioning. A refusal claim involves alleged harm from not getting access to some output, while a conditioning claim involves alleged harm from the affirmative creation of a condition that affects incentives, even if no trading partner is ever cut off.[224] In fact, if the condition works as feared, the threat will induce compliance, and no one will have to be "punished."

Moreover, the remedial problem that dominates refusal law and was emphasized in *Trinko*[225]—namely, the challenge of setting prices and terms and then policing compliance with them—is entirely absent in the conditional-dealing context. To remedy a refusal, a court must require dealing, set detailed terms, and monitor behavior;[226] to remedy a condition, the court need only forbid the condition, leaving the parties and the court otherwise free to get on with their lives. Thus, the D.C. Circuit's suggestion that barring a condition amounts to "manag[ing] corporations' business affairs"[227] is hard to understand—and hard to

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220. Id. at 28–29; see also Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 27 (D.D.C. 2021) (making the same point in connection with Section 13(b) of the FTC Act).

221. The appellate court indicated that exclusive dealing law should apply to the vertical conditioning. New York v. Meta Platforms, Inc., 66 F.4th 288, 304–05 (D.C. Cir. 2023).

222. Id. at 302.

223. Id. at 305.

224. A recent DOJ Antitrust Division brief expressed this point clearly:

> Unlike unilateral refusals to deal, which can harm competition by withholding valuable access from rivals (leaving them weakened and less competitive), plaintiffs allege *conditions that harm competition by inducing app developers to change their behavior* by limiting or discouraging them from dealing with [the defendant]'s rivals or by deterring them from becoming rivals to [the defendant] themselves.

Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, supra note 212, at 15 (emphasis added).

225. See Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 414–15 (2004).

226. Id.

227. New York v. Meta Platforms, Inc., 66 F.4th at 305.

reconcile with the fact that antitrust courts tell businesses not to engage in particular practices all the time.[228]

Indeed, conditioning no more constitutes an antitrust refusal to deal than does, say, tying or exclusivity. In a tying case, a defendant refuses to sell A unless the customer also buys B. This may involve a literal refusal to deal in A, but courts have not for that reason thought it appropriate to invoke the "long recognized"[229] right to choose one's own customers to defeat tying allegations. Quite the contrary, the antitrust laws have long been haunted by the idea that tying is or may be per se illegal.[230] Likewise, the whole antitrust law of exclusivity would be impossible to explain or justify if the "greater" freedom to refuse to deal included the blanket "lesser" freedom to sell only to exclusive partners.

In sum, conditional dealing and refusal to deal are different behaviors, involving different theories of harm, and inviting different remedies.

2. *Pricing*. — Some conditioning practices involve pricing. In the classic version, lower prices are charged to trading partners if they do not compete against the monopolist (or if they limit the extent to which they do), or if they do not trade with the monopolist's rivals (or, again, if they limit the extent to which they do).[231]

Courts have sometimes analyzed such practices under the law of predatory pricing. This is the antitrust rule against charging unsustainably low prices to drive rivals out of a market protected by entry barriers, creating a dangerous probability of recoupment through enhanced monopoly power.[232] The Supreme Court has insisted that there can be no liability in such cases unless the price was below the monopolist's own costs,[233] and courts are skeptical of recoupment theories.[234] Ultimate liability is very rare.[235]

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228. See Edward Cavanagh, Antitrust Remedies Revisited, 84 Or. L. Rev. 147, 188–89 (2005) ("Conduct remedies are the most frequently invoked by the courts in monopolization cases.").

229. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

230. See, e.g., Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 498–99 (1969) (indicating that a tie with market power in the tying product is per se illegal); see also Francis & Sprigman, supra note 113, at 316–18 (reviewing the status of the per se rule).

231. See Tom et al., supra note 117, at 615 (noting the rise of "market-share discounts" rewarding partial exclusivity).

232. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (laying out this test).

233. See id.

234. See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 121 n.17 (1986) ("[T]he obstacles to the successful execution of a strategy of [price] predation are manifold . . . ."); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[P]redatory pricing schemes are rarely tried, and even more rarely successful.").

235. See Derek W. Moore & Joshua D. Wright, Conditional Discounts and the Law of Exclusive Dealing, 22 Geo. Mason L. Rev. 1205, 1244 (2015) (noting plaintiffs' poor track record under the *Brooke Group* test).

Courts treat predation claims with a deep skepticism similar to that seen in refusal to deal cases. Like those cases, the antitrust law of pricing seems to implicate an affirmative liberty with deep roots. In passing the Sherman Act, for example, Congressman David Culberson of Texas—a prominent supporter of the legislation—proclaimed: "I am inclined to think that the Standard Oil Company can sell its product at just such prices as it pleases . . . ."[236] The courts have repeatedly agreed.[237]

Some courts have applied predation law, including the immunity that it extends to above-cost prices, in conditioning cases. The Third Circuit has held that "when pricing predominates over other means of exclusivity, the price-cost test applies," meaning per se legality unless prices are below cost.[238] Other courts have expressed similar views.[239]

In other cases, courts have interpreted conditioning claims as complaints about excessive prices, which do not constitute a basis for antitrust liability.[240] For example, in rejecting the FTC's challenge to Qualcomm's "no license, no chips" policy—a policy that, the FTC alleged, surcharged dealings with rivals through an inflated "royalty" payment[241]—the Ninth Circuit held that, if a surcharge is designated a patent royalty, a challenge to the surcharge "sounds in patent law, not antitrust law."[242]

But the law of predation is a poor fit for conditional dealing. In a predation case, the objection is to the defendant's use of a deeper pocket to drive rivals out, with the plaintiff asking the court to examine a price (which every business cannot help but set) to see whether it is too low (though antitrust usually values low prices[243]). By contrast, most of the

236. 21 Cong. Rec. 4090 (1890) (statement of Rep. Culberson).

237. See, e.g., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447–48 (2009) (emphasizing the freedom of businesses to refuse to deal); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004) (same); Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 916 (7th Cir. 2020) (same); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (same).

238. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 409 (3d Cir. 2016); see also ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 274 n.11 (3d Cir. 2012) (holding that "the price-cost test applies to market-share or volume rebates").

239. See, e.g., Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1061 (8th Cir. 2000) (discussing the strong presumption of legality applicable to discounts that remain above a firm's average variable cost); Valassis Commc'ns, Inc. v. News Corp., No. 17-cv-7378, 2019 WL 802093, at *10 (S.D.N.Y. Feb. 21, 2019) (holding that when a pricing practice is lawful under the price-cost test, it may not be aggregated with other practices in a "monopoly broth"); see also Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 257 F.3d 256, 266–69 (2d Cir. 2001) (applying plaintiff's own theory, which involved pricing below cost).

240. See, e.g., *Trinko*, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

241. See supra section I.A.1.e (discussing the suit in depth).

242. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 999 (9th Cir. 2020).

243. See Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) (describing "competition's basic goals" as "lower prices, better products, and more efficient production methods").

conditional dealing theories reviewed in Part I have nothing to do with deep pockets or unmatchable prices. Nor do those theories concern behavior that a defendant cannot reasonably avoid.

As Salop has underscored, the concern in a conditional pricing case is with the condition, not the price.[244] It makes no difference whether an inducement to reject rivals is a better price, a side payment, or a threatening stick of dynamite.[245] Accordingly, a host of writers have emphasized that price-cost tests are of little to no help in screening for competitive harms from conditioning.[246] For example, in a rent-sharing case, a monopolist shares the rents from exclusion with intermediate buyers in exchange for their help keeping rivals out.[247] This can be done through side payments that leave the buyers just a bit better off under monopoly than they would be under competition.[248] No price need come close to the monopolist's costs, or anyone else's, for harm to result.

Neither does scrutiny of conditional pricing implicate liberties of any very high order. Even the Clayton Act legislators did not seem to see any contradiction between respecting the right to set a price, on the one hand, and prohibiting commodity deals involving a condition of exclusivity, on the other.[249]

Finally, there is a broader point of both principle and practice at issue here. Immunizing any practice involving above-cost pricing would turn every price term into a sheltered channel through which a monopolist can launder all kinds of side payments or penalties, with immunity for the broader scheme. This would swallow a big chunk of antitrust. For example, instead of using an exclusive agreement, a monopolist might charge preclusively high prices to counterparties if they deal with rivals. Instead of tying, the monopolist might charge a preclusively high price for the tying product alone. And so on.

Ultimately, it does not seem rational to treat compensation for market allocation, or for abjuring competitors, differently just because it is paid through manipulation of a price term rather than in a manila envelope. Monopolists of all kinds with colorable services to offer, or colorable IP

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244. See Salop, Paradigm, supra note 114, at 372.

245. See infra section II.B.2.c (considering the economics of exclusion).

246. See, e.g., Giacomo Calzolari & Vincenzo Denicolò, Loyalty Discounts and Price-Cost Tests, Int'l J. Indus. Org., Dec. 2020, 102589, at 1, 13 ("[T]he application of price-cost tests to loyalty discount cases is problematic."); Elhauge, Loyalty Discounts, supra note 131, at 216 (stating that arguments for a price-cost test "miss the point"); Moore & Wright, supra note 235, at 1217 (arguing that a below-cost price "is neither necessary nor sufficient to establish competitive harm"); Salop, Paradigm, supra note 114, at 372 (arguing that the "proper focus" of analysis in conditional-pricing cases is foreclosure, not costs).

247. See supra notes 140–152 and accompanying text.

248. See supra notes 140–152 and accompanying text.

249. See Clayton Act of 1914, 15 U.S.C. § 14 (2018) (prohibiting sale on condition of exclusivity); 51 Cong. Rec. 9256 (1914) (statement of Rep. Graham) ("It is a natural right of a man to fix prices for the commodities which he has to sell.").

rights to license, would have free rein to violate core antitrust rules. Antitrust's relentless focus on economic substance over form commands a different result.[250]

3. *Tying*. — Some conditioning practices involve granting or withholding access to a product or service to deter trading partners from competing or dealing with competitors. For example, a monopolist might refuse to sell in market A to any business that competes against it in market B. The resemblance to traditional tying—in which the monopolist refuses to supply a "tying" product unless customers also buy a "tied" one—has led some courts and commentators to favor the use of tying law in such cases.[251]

Whether brought under Sections 1 or 2, a tying claim generally requires, among other things, market power in the tying market; the existence of "separate" products; strict conditioning ("forcing"); foreclosure of a substantial volume of commerce; and a "harm to competition" in the market of competitive concern, which under Section 2 means harm through contribution to monopoly.[252]

Courts sometimes apply these criteria to vertical conditions—sometimes under the label of "negative tying."[253] For example, in *Data General* the First Circuit considered an allegation that an incumbent computer manufacturer had unlawfully excluded an independent aftermarket service provider (ISP) by refusing to license its diagnostic software to ISPs or their clients.[254] The court indicated that, if the incumbent had indeed entered into an "arrangement[] conditioning the sale of one product on an agreement *not* to purchase a second product from [ISPs]"—forcing customers to buy service from the incumbent or to maintain their own computers—this could constitute an illegal "negative

250. See, e.g., Am. Needle, Inc. v. NFL, 560 U.S. 183, 191 (2010) ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."); Fed. Trade Comm'n v. AbbVie Inc., 976 F.3d 327, 356 (3d Cir. 2020) (discussing the predominance of economic realities over forms in antitrust); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 470 (7th Cir. 2020) (same); In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 550 (1st Cir. 2016) (same).

251. See infra notes 253–258 and accompanying text.

252. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481–83 (1992) (laying out the elements of a tying claim); United States v. Microsoft Corp. 253 F.3d 34, 65–66, 85 (D.C. Cir. 2001) (same, and discussing the anticompetitive effects of a tie); In re Google Digital Advert. Antitrust Litig., 627 F. Supp. 3d 346, 402 (S.D.N.Y. 2022) (same). This Article does not address the prospect of per se Section 1 liability.

253. See, e.g., Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016) ("A negative tie 'occur[s] when the customer promises not to take the tied product from the defendant's competitor . . . .'" (first alteration in original) (quoting Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 912 n.23 (9th Cir. 2008))); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994) (discussing negative ties in the Section 1 context), abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010).

254. See *Data Gen.*, 36 F.3d at 1154.

tie."[255] But the court rejected that tying claim. There was scant evidence that such a condition actually existed,[256] and—"[m]ore importantly"—"virtually no evidence that any [customer] ha[d] *unwillingly* chosen to maintain its own computers" rather than deal with the ISPs, so the "allegation of a negative tie . . . fail[ed] in the absence of proof that [the incumbent] coerced consumers to accept such an arrangement."[257] A number of other cases and commenters have likewise assimilated conditional dealing practices to tying.[258]

But conditioning cases do not easily fit under the tying microscope. First, only a small subset of conditions can be plausibly captured by tying law. Tying law generally requires an absolute refusal to supply a tying product unless a separate tied product is purchased too.[259] This seems to rule out all horizontal conditioning cases (those in which the trigger for adverse treatment is becoming a rival rather than dealing with rivals); all vertical conditioning cases in which the inducement is better terms, rather than product access; and all single-product practices, even those involving in-market leverage.[260]

Second, tying analysis is not aimed at the right issue. Paradigm tying uses product access to "force a customer to buy another product it likely wouldn't have bought,"[261] whereas vertical conditioning uses it to punish dealing with rivals. The first kind of condition is satisfied when a customer buys something from the monopolist; the second is satisfied when the customer refrains from buying something from someone else. There is some directional similarity between these effects—if X buys from Y, X has less demand for the output of Y's rivals—but they are distinct.

Moreover, the set of tying practices and the set of vertical conditioning practices have dissimilar characteristics: In short, the first set is generally less troubling than the second. Paradigm tying includes the many—overwhelmingly benign—cases in which a defendant unconditionally combines products for technological or cost reasons, like adding a

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255. Id. at 1178. The court did not separately consider a Section 2 tying theory.

256. Id. at 1181.

257. Id.

258. See, e.g., Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272 (6th Cir. 2015) (discussing differential pricing as a tying claim under Section 1); Scott Morton & Abrahamson, supra note 160, at 832 (arguing that tying law provides the best frame for evaluating loyalty discounts).

259. See Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–18 (1984) ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product . . . ."), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

260. See supra section I.B.1.b.

261. Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1179–80 (10th Cir. 2023) (citing Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1039 (10th Cir. 2017)); see also *Jefferson Par.*, 466 U.S. at 10–12.

function to software or selling a car with tires on.[262] Vertical conditioning does not include these ubiquitous product-integration cases. And the effect of an incentive to refrain from or limit dealings with rivals—the hallmark of a vertical condition—is obviously more likely to be harmful than an obligation to buy some additional output from the monopolist. After all, it's one thing if a defendant prefers not to go to the trouble of selling cars and tires separately, but quite another to induce customers not to buy tires from rivals when the first set wears out or if they want an upgrade. The second practice seems much less likely to have anything to do with efficiency and much more likely to result in harm.[263]

Finally, tying doctrine imposes irrelevant obligations of pleading and proof on plaintiffs. Because tying law aims to prevent power in one (tying) market from being used to generate power in a second (tied) market, courts impose a variety of criteria—market power in the tying product market, a "separate products" test, and a requirement of "forcing"—that have nothing to do with theories of harm from conditioning.[264] In a vertical conditioning case, access to the tying-like product is just a side payment in tacit exchange for some exclusivity in the market of competitive concern. It could just as well be cash, or a low or negative price for a competitive product, or a lifetime supply of pizza. Thus, vertical conditioning can inflict harm (1) even if the defendant has no market power in the first market (access need only be valuable: some differentiation short of antitrust market power will do that); (2) even if the two products fail the separate products test; and (3) even if there is no coercion because the trading partners are willing.[265] Tying law misses all this, and it promises a slew of false negatives as a result.

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262. See Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 1717 (5th ed. Supp. 2024) [hereinafter Areeda & Hovenkamp, Antitrust Law] (describing how ties can bring about cost savings and product improvements).

263. The central point is that, in the first category of practices, the defendant's own operations are directly at issue. There may be significant cost savings from integration or bundled supply, and significant costs to disaggregation. Imagine, for example, telling a consumer-electronics retailer that it must also allow customers to buy individual components like circuit boards and diodes as well as finished equipment; telling a supermarket that it must allow customers to buy eggs or slices of bread individually, or just a splash of milk rather than a whole pint; telling a bookseller that it must allow customers to buy individual chapters rather than whole books; or telling a software manufacturer that it must allow consumers to buy some, but not all, of the features of an application. As these examples illustrate, there will often—perhaps almost always—be good, cost-related reasons why a supplier might choose not to disaggregate products and services beyond a certain point and why we might be reluctant to try to make them do so. Conversely, a defendant is much less likely, across the run of all cases, to have good reasons to try to prevent a customer from dealing at all with a rival. The potential harms from doing so are obvious, and the potential justifications are much more likely to reflect special circumstances.

264. See supra note 252 and accompanying text.

265. See supra section I.B.1.b (outlining theories of harm in vertical conditioning cases).

4. *Bundling*. — Some conditions involve offering a lower price for one product or service as an inducement to stay loyal in another market.[266] The resemblance to bundling—in which a monopolist in one market may acquire power in a second market by offering a discount that unintegrated competitors can't match[267]—has led some analysts to apply bundling law to such practices.[268]

The law of bundling is the subject of a circuit split. The majority rule, from the Ninth Circuit's *PeaceHealth* decision, condemns bundles only when the discount is large enough that, if allocated to the competitive product, it would reduce price below the defendant's own costs,[269] for reasons familiar from the predation discussion.[270] The minority rule, from the Third Circuit's decision in *LePage's*, is not quite so demanding, nor so clear.[271] It rejects the price-cost test, but it is not quite clear what rule it prescribes.[272] Some commentators have recommended a price-cost-based approach to evaluate conditioning cases of various kinds.[273]

But there are some evident problems with the use of bundling law here. First, of course, bundling doctrine in the traditional sense could apply only to a small sliver of vertical cases: those involving a price reduction on one product for loyalty in another market. The Third Circuit has explicitly refused, for example, to apply bundling law to a case of in-market leverage.[274]

Second, just as with tying law, bundling law is really aimed at a different practice with a different, and usually lower, risk profile. True bundling involves the very common practice of offering a discount for the purchase of a bundle of goods; this need not penalize or preclude dealings with rivals in the market of concern.[275] Conditioning, by contrast, makes a discount contingent on refraining from dealing with rivals. Across the set of all cases, this seems much more likely to be harmful and much less likely

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266. See, e.g., Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 892 (9th Cir. 2008) (describing a condition wherein a healthcare provider offered discounts on tertiary services to insurers so long as they were made the sole preferred provider for primary, secondary, and tertiary services).

267. See Nalebuff, supra note 123, at 322–24 (describing bundling).

268. See, e.g., Benjamin Klein & Andres V. Lerner, The Law and Economics of Bundled Pricing: *Lepage's*, *PeaceHealth*, and the Evolving Antitrust Standard, 53 Antitrust Bull. 555, 579–85 (2008) (evaluating the law applicable to bundled discount contracts).

269. *PeaceHealth*, 515 F.3d at 906.

270. See supra section II.A.2.

271. LePage's Inc. v. 3M, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc).

272. See Salinger, supra note 125, at 508 ("A common criticism of *LePage's* was that it did not provide clear guidance to companies . . . .").

273. See, e.g., Klein & Lerner, Price-Cost Tests, supra note 120, at 639 (proposing a price-cost based test, involving allocation of discounts to contestable sales, for single-product loyalty-discount cases).

274. See Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) ("[W]e are aware of no court that has credited this novel theory [of single-product bundling].").

275. See supra note 262 and accompanying text.

to be efficient.[276] Among other things, scope economies often arise when products are supplied together, making a bundled discount efficient, but a discount conditioned on loyalty is less likely to proxy for selling efficiencies than one conditioned on the nature and quantity of product supplied.

Third, neither of the leading legal standards seems an appealing metric for conditioning cases. No one, alas, has a clue what the *LePage's* standard is.[277] And the *PeaceHealth* price-cost test, even with discount attribution, is not a convincing proxy for any of the theories of competitive concern described above. Commentators have overwhelmingly recognized that significant harm can result from conditioning without below-cost pricing, allocated or not.[278]

Finally, bundling law is not aimed at the concerns that conditioning raises. Like tying, it is primarily a response to the concern that monopoly power in one market will be used to exclude unintegrated rivals in the market of concern.[279] But the economic concern with conditioning turns on neither the existence of monopoly power in the first market nor the proposition that the rivals are strictly unintegrated. In a conditioning case, the discount is just a side payment for exclusivity. The competitive concern is that demand will be affected, in a way we are willing to label a distortion, by a cross-market subsidy.[280] It makes no economic difference at all whether the discount, subsidy, or side payment is funded by a monopoly price margin in another market, an annuity from Aunt Ethel, or general revenue. And rivals that are weakly integrated in the first market are just as vulnerable to exclusion as those that are not. The bundling analogy does not land.

5. *Exclusivity.* — Vertical conditioning centrally involves inducing trading partners not to deal with rivals. As such, it invites the application of the law of exclusivity (or exclusive dealing), which under Section 2 typically involves a monopolist extracting a commitment from trading partners not to deal with rivals.[281]

Exclusivity doctrine centrally asks whether an exclusive relationship generates harmful substantial foreclosure of rivals and, if so, whether its

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276. An equivalent observation was made and developed above in connection with tying. See supra note 263 and accompanying text.

277. See, e.g., Daniel L. Rubinfeld, 3M's Bundled Rebates: An Economic Perspective, 72 U. Chi. L. Rev. 243, 264 (2005) ("The [*LePage's*] decision . . . lacks a clear, coherent economic rationale and leaves unclear when package pricing . . . will or should be condemned under the antitrust laws.").

278. See supra note 246.

279. See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1186–87 (9th Cir. 2016) (declining to apply the *PeaceHealth* test because the affected rival was integrated).

280. See infra section II.B.2.c.

281. See supra section I.A (collecting examples).

harms are offset by benefits.[282] The foreclosure standard is notoriously vague—Professor Daniel Crane has called it "banal and nonpredictive"[283]—but it is often identified with the denial of access to a high quantitative share of whatever is being purportedly foreclosed: inputs, distribution, customers, or complements.[284] Courts often require a plaintiff to show foreclosure of a share around 40–50% in Section 1 cases and a modest but undefined amount less under Section 2.[285]

Some courts have analyzed vertical conditional dealing through this lens, sometimes using the term "de facto exclusivity" to reflect the extension of the paradigm beyond strictly exclusive agreements.[286] For example, in a brief discussion, the D.C. Circuit indicated that the vertical conditioning dimensions of Facebook's platform policies should be analyzed under exclusive dealing law.[287] That claim failed, the court held, for two reasons. First, because the alleged obligation not to develop competing functions was limited to individual apps that connected with Facebook and did not restrict the ability to create other apps for other social networks (i.e., the policy required only partial, not complete, forbearance from competition). And second, because the states had failed to allege how Facebook's rivals had been foreclosed, including "the importance of cross-network apps to [rivals], what fraction of developers were discouraged, or whether network-bridging apps were the 'most efficient channels' for Facebook's competitors to acquire users."[288] Other

282. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 331–34 (1961) (holding that the rival's opportunities in the market must have been "significantly limited").

283. Crane, Loyalty, supra note 131, at 274.

284. See, e.g., *Tampa Elec.*, 365 U.S. at 328 (customers); McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 837–38 (11th Cir. 2015) (distribution).

285. See, e.g., OJ Com., LLC v. KidKraft, Inc., 34 F.4th 1232, 1247 (11th Cir. 2022) (describing the plaintiff's burden to prove foreclosure of a substantial share); *McWane*, 783 F.3d at 835 (noting that "foreclosure is usually no longer sufficient by itself"); United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

286. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282 (3d Cir. 2012) (discussing "de facto partial exclusive dealing" (emphasis omitted)); LePage's Inc. v. 3M, 324 F.3d 141, 157–59 (3d Cir. 2003) (applying exclusivity analysis to a vertical condition); Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1250 (D. Utah 1999) (holding that the "practical effect" of exclusivity is sufficient to trigger the application of exclusive dealing law).

287. See New York v. Meta Platforms, Inc., 66 F.4th 288, 304 (D.C. Cir. 2023); see also supra section I.A.1.d (discussing this litigation in more detail).

288. New York v. Meta Platforms, Inc., 66 F.4th at 304 (quoting United States v. Microsoft Corp., 253 F.3d at 70).

courts have also applied the law of exclusivity to conditioning,[289] and some writers have favored doing so.[290]

To be sure, exclusivity presents the closest fit with vertical conditioning among all monopolization's categories, and the framework offered here will draw on it.[291] But simply slotting conditioning cases into existing exclusivity law will not suffice—even aside from the fact that it obviously cannot cover horizontal conditioning. (Horizontal conditioning, of course, involves inducement not to compete with the monopolist, not inducement not to trade with its rivals, and so lacks any resemblance to paradigm exclusivity.)

First, many courts have held that exclusivity law simply does not cover conditioning, and that it is limited instead to cases involving an affirmative exclusive commitment,[292] perhaps of literally all the bound party's business.[293] The Ninth Circuit has explicitly held that share-based conditional discounts "are not exclusive dealing arrangements, de facto or actual, unless they 'prevent[] the buyer from purchasing a given good from any other vendor.'"[294] Even the Justice Department, obtaining relief in a 2011 monopolization matter involving large discounts in exchange for exclusivity, went out of its way to suggest an important role for price-cost tests—hallmarks of pricing analysis, not exclusivity analysis—in that

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289. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 529 (5th Cir. 2022) ("[C]onditional refusals to deal are functionally equivalent to exclusive-dealing arrangements."); *OJ Com.*, 34 F.4th at 1247 (finding that precedent treats conditional refusals to deal and exclusive dealings "as synonymous"); Fed. Trade Comm'n v. Surescripts, LLC, 424 F. Supp. 3d 92, 100–04 (D.D.C. 2020) (evaluating exclusive contracts under the substantial foreclosure standard).

290. See, e.g., Tom et al., supra note 117, at 615 (arguing that "market-share discounts structured to produce total or partial exclusivity should be judged according to the same economic principles that govern exclusive dealing"); see also Blair & Knight, supra note 125, at 131 (applying *Brooke Group*'s test to conditioning); Moore & Wright, supra note 235, at 1217 (advocating for a foreclosure test).

291. See infra section II.B (describing proposed framework).

292. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 265 (3d Cir. 2012) (holding that certain agreements "were not true requirements contracts because they did not expressly require the [trading partners] to purchase a specified percentage of their needs from [the monopolist]"); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062–63 (8th Cir. 2000) ("Brunswick's discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount . . . ."); Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 69 F. Supp. 2d 571, 575 (S.D.N.Y. 1999) ("The incentive agreements are not exclusive dealing agreements by their terms, and do not require anyone to buy or sell any British Airways tickets, but merely provide larger commissions or discounts if the targets are met.").

293. See Tom et al., supra note 117, at 633 ("Some cases suggest that agreements must require a very high level of exclusivity, perhaps even 100 percent, before they can be considered 'exclusive dealing contracts.'").

294. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1003–04 (9th Cir. 2020) (alteration in original) (quoting Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996–97 (9th Cir. 2010)).

case.[295] But nothing in the theories of harm described in Part I is limited to cases involving strict commitments to exclusivity.

Second, exclusivity cases, doctrine, and scholarship are saturated with criteria that are unrelated to conditioning harms. These include, for example: the duration and terminability of the agreements, whether "coercion" is present, the level of market concentration, whether exclusivity is "common" or "normal," and so on.[296] Thus, for example, the Tenth Circuit recently dismissed a conditioning case based on loyalty rebates because "exclusive rebate agreements were a normal competitive tool in the . . . market, [the defendant's] exclusive rebate agreements were short and easily terminable, and [the defendant] did not coerce any [trading partners]."[297] Likewise, in denying the motion to dismiss in the FTC's "crop protection chemicals" case against Syngenta and Corteva,[298] the court indicated that it was applying exclusivity law only because the plaintiff had plausibly alleged "coercive" conduct beyond pricing, like threats to cut off supply.[299]

But none of these criteria are important measures of, or useful proxies for, competitive harm in a conditioning case, given the economics of harm surveyed in Part I. In fact, they are virtually irrelevant—and certainly not necessary for harm. The creation of an incentive for loyalty does not depend on the duration or terminability, or even the existence, of any underlying agreement. What matters is whether dealing with rivals will be punished by the monopolist. A concentrated market is no more necessary here than in any other monopolization case. Whether a practice is in some sense "common" is obviously immaterial to whether its use by a monopolist in a particular case has resulted in harm. And coercion is beside the point: None of our theories of harm require an unhappy or locked-in trading partner, or that the punishment for disloyalty take any particular form (e.g., a supply cutoff).

It is not even particularly clear how the quantitative foreclosure screen emphasized by many courts in exclusivity cases should be applied to conditional dealing practices. (For example, if a monopolist grants, or just offers, a 0.5% discount to all trading partners in exchange for exclusivity, is that 100% foreclosure, 0.5%, or something else?) In practice, courts do not seem willing to treat even significant impairments as generating substantial foreclosure in the exclusivity sense. In one recent case, the Fifth Circuit considered allegations that a monopolist had used a $50 million

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295. Competitive Impact Statement at 14, United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. 2011), 2011 WL 13054949.

296. See, e.g., *ZF Meritor*, 696 F.3d at 284 (coercion and market concentration); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163–64 (9th Cir. 1997) (market concentration); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) (duration of contracts).

297. In re EpiPen, 44 F.4th 959, 990 (10th Cir. 2022).

298. See supra section I.A.2.a.

299. See supra note 86 and accompanying text.

conditional "donation" to get a key trading partner to cut off a "laundry list of efficiency-enhancing, cooperative . . . projects" with a rival.[300] Remarkably, the Court held that "those allegations have nothing to do with [the rival] getting shut out of any market at all. So they're irrelevant for foreclosure purposes."[301]

And the accumulated law of justification in exclusivity cases is a poor fit with conditioning. The use of an exclusive dealing framework implicates a good deal of received learning about traditional justifications, including protection against free riding, security of demand, and so forth.[302] But that received learning—and resulting judicial willingness to credit such claims—is seldom fully applicable to a conditioning case, in which there is no commitment, just an incentive effect.[303]

Finally, analytical recourse to the question of whether some particular practice is or is not a de facto exclusivity agreement trades on an underlying binary idea that some agreements are equivalent to full exclusivity while others are equivalent to none. There does not seem to be any reason to do this, nor any particularly obvious place to draw a line that would make sense across the great variety of real markets and cases.[304]

So, while there is a strong family resemblance between vertical conditioning and traditional exclusivity, exclusivity doctrine has developed in countless ways that leave it an unpromising tool for accurately gauging the harms of conditioning—horizontal and vertical alike.

B. *A Doctrinal Framework*

Part I demonstrated that a monopolist can use a condition to inflict welfare harms through the exclusion of rivals: just the kind of thing that monopolization law is supposed to prevent. And now we have also seen that the shoebox-bound structure of Section 2 doctrine is impeding antitrust's ability to protect against this threat. Conditioning cases are falling outside monopolization's boxes altogether or being squeezed into inapposite categories.

This Article's core claim is that conditioning deserves an analytical category of its own within monopolization doctrine, with a corresponding micro-rule of legality. That is, we can define "conditioning" with sufficient clarity and then extrapolate from existing law and theory to determine

300. BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 530 (5th Cir. 2022).

301. Id.

302. See, e.g., Paldor, supra note 164, at 1119–27 (summarizing the traditional benefits of exclusive dealing).

303. See supra section I.B.2.

304. See Moore & Wright, supra note 235, at 1237 ("In truth, it would be impossible for a court or policymakers to identify ex ante a market-share threshold above which a market-share discount is tantamount to exclusive dealing.").

what does, and what does not, need to be proved to establish liability in a conditioning case.

As a foundation for this exercise, this Article will assume—for reasons grounded in monopolization's basic structure and history, and set forth at length elsewhere[305]—that any monopolization case requires a plaintiff to plead and prove, in addition to monopoly power, an affirmative case implementing three basic requirements: (1) *exclusion*, meaning material impairment of the ability or incentive of one or more rivals to meet demand, sufficient to result in (2) *contribution to monopoly power*, meaning that it is reasonably capable of making a significant contribution to such power, through (3) *unprivileged means*, meaning that the conduct is not within a recognized safe harbor. A defendant may rebut this case by showing (4) *justification*, meaning that the challenged practice is on balance beneficial by reason of benefits that could not reasonably be obtained with less harm.[306]

The challenge, then, is how to apply these tests to horizontal and vertical conditioning, consistent with first principles and existing doctrine.

1. *Defining a Condition: The Hold-Constant Test.* — Step zero in this framework requires a definition of a condition. This test should: (1) capture practices raising the concerns surveyed in Part I; (2) avoid unnecessary overlap with existing categories; (3) not pick up routine sale or purchase interactions; and (4) be reasonably straightforward to apply.

To that end, this Article offers a definitional test—the "hold-constant" test—as a predicate for the application of the conditioning framework. It is as follows:

A condition is a policy or practice implemented by a monopolist that provides for less favorable treatment of a market participant by reason of becoming a rival or dealing with a rival either at all or to some extent (or, equivalently, *more* favorable treatment for *not* doing so), otherwise holding constant the market participant's dealings with the monopolist.

In other words, if the practice involves treating the market participant worse by reason of its competing with the monopolist or dealing with a competitor of the monopolist (either at all or to some extent), assuming that nothing else changes about its interactions with the monopolist, then we have a conditional-dealing practice and should apply the framework given here.

This test captures the practices implicating the harms surveyed in Part I, including the relatively straightforward collusion-like dynamics of horizontal conditioning as well as the various concerns presented by vertical conditioning.[307] It includes naked threats and bribes, as well as the

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305. See Francis, Making Sense of Monopolization, supra note 15, at 791–824 (presenting an account of the history, theory, and doctrine of monopolization).

306. Id. at 804–20 (doctrinal framework).

307. See supra section I.B.

array of out-of-market and in-market inducements surveyed in Part I.[308] It includes what Professor Fiona Scott Morton calls "contracts that reference rivals,"[309] as well as unilateral-policy equivalents (which we might call "policies that reference rivals"), and the horizontal cousins we might call "contracts and policies that reference *rivalry*."

It also has a clear core that minimizes overlap with existing categories. We can briefly illustrate the boundaries. If the complaint is that the monopolist won't sell (at all or on desired terms), that's a refusal to deal claim; if the complaint is that the monopolist is incentivizing others not to compete, or not to deal with its rivals, by offering to sell so long as they play along, it's a conditioning claim. If the complaint is that the monopolist won't give access to (or a discount on) product A except to those who buy product B as well, that's a tying (or bundling) claim; if it's that the monopolist won't give access to or a discount on product A except to those who do not compete with it or deal with its competitors, that's a conditioning claim. And if the monopolist has extracted a commitment to exclusivity from trading partners, that's an exclusivity claim; if the monopolist has just incentivized its trading partners to stay loyal through incentive effects, that's a conditioning claim.

There will be some fuzz on the borderlines, as there always is. But this is no more a problem here than it is anywhere else. A plaintiff may plead any or all implicated theories.[310] In such cases the existence of the conditioning frame will help to make sure that such claims are not improvidently dismissed for failure to exhibit some unnecessary fact (e.g., lack of coercion or an underlying long-term agreement leading to dismissal of an exclusivity theory[311]).

The hold-constant proviso at the end of the definition ("otherwise holding constant the market participant's dealings with the monopolist") excludes from the definition cases in which the monopolist is paying for something other than abstention from competition or from dealing with rivals. If a benefit is conditional on extra investment, confidentiality, commitment of resources, and so on, it is not a condition in the sense with which we are concerned. To count as a condition, the threat or benefit must be contingent on rivalry or dealings with rivals *all else equal*.[312]

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308. See supra section I.B.1.

309. See Scott Morton, supra note 118, at 72, 77 (discussing contracts for which the "terms . . . depend on information from a different buyer-seller relationship involving at least one of the same parties").

310. See, e.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020) ("[A] dominant firm's conduct may be susceptible to more than one court-defined category of anticompetitive conduct.").

311. See supra section II.A.5.

312. For the avoidance of doubt, this analysis has nothing to do with the magnitude or salience or impact of the threat or benefit. This is not a coercion test. At this stage of the analysis, we are just trying to make sure that a condition exists.

The proviso also excludes from our definition cases in which what the trading partner is supplying is particularly scarce: space on a billboard, the one unit that the trading partner makes per year, etc. Simply buying that output is not vertical conditioning on this definition because there is no punishment for selling to rivals (or inducement for not doing so), all else equal. Instead, the underlying practicalities mean that, at least to some extent, selling to the monopolist means not selling to rivals, and that is not a condition on our telling. But if the trading partner would be punished for expanding its output or otherwise engaging in additional dealing with rivals—say, for adding a second billboard and selling that space to a rival or increasing output to start selling to rivals—then we have conditioning.

The word "otherwise" in the proviso does important work and carries meaning that may not be immediately obvious. It brings into the definition of a condition policies that require a transaction with the monopolist whenever a transaction occurs with a rival.[313] For example, rather than fining a customer $5 every time it competes or deals with a rival, a monopolist could just require its customer to buy a copper penny from the monopolist for $5.01 each time the customer worked with a rival. This can be understood as an anti-evasion feature of the rule, as just about any condition could be reframed into this form. It may take some analytical work to figure out whether a payment is in economic substance a punishment for competing or dealing with a rival, and not a genuine price for a product or service. It is for the plaintiff to prove that an actual condition exists, as part of its general burden to establish a violation.[314]

313. This might not be obvious. Recall that the point of the proviso is to exclude from our definition a condition that is triggered by something other than refraining from competing or dealing with rivals. For example, if a monopolist agrees to pay a bonus to trading partners that provide a valuable service to the monopolist, that is not what we are calling a condition: It rewards the service, not the harmful behaviors we are worried about. But, as the text explains, the existence of this proviso opens up a line for abuse or evasion. Rather than extracting a penalty for competing or dealing with competitors, a monopolist could simply require that, whenever dealing with a competitor, a trading partner must first purchase a product or service from the monopolist at an artificially inflated price—a disguised penalty. (This is one way of understanding *Qualcomm*. See supra section I.A.1.e.) Likewise, rather than offering a bonus for not competing or for not dealing with competitors, the monopolist could simply offer a product or service on artificially favorable terms to trading partners that do not compete or deal with rivals—a disguised bonus. (This is one way of understanding the Google–Apple theory of harm described in Part I.) The word "otherwise" ensures that, to the extent that an aspect of the dealing between monopolist and trading partner is itself triggered by competing or dealing with a competitor, that change in dealing does not trigger the proviso and thus cannot serve as an escape hatch for a creative monopolist.

314. See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1181 (1st Cir. 1994) (granting summary judgment for defendant in a tying claim because plaintiff had failed to show actual conditioning).

Anything the market participant might value or disvalue can serve as an inducement: making or demanding a payment,[315] giving more or less favorable terms of trade in any market,[316] providing access to a separate product,[317] handing out free refrigerators[318]—anything at all. There is no exemption for "reasonable" penalties. In particular, a conditional penalty that is calibrated to reflect the opportunity cost of competition against the monopolist (in the spirit of the so-called efficient component pricing rule) is a condition on this definition.[319]

"Policy or practice" should also be understood broadly. Any explicit or implicit conditional offer, trading practice, or statement of intention will do, whether publicly declared, privately communicated, or reasonably inferable from conduct.[320] As a rule of thumb, if the monopolist's conduct caused others to reasonably apprehend that they would be treated more favorably if they refrained from competition or working with rivals, a condition of the relevant kind exists. Happily, close cases are the ones least likely to matter. Threats are of limited salience if the targets can't be sure whether they're being threatened! So a court can err on the side of requiring clarity before concluding that a condition exists.

Share-based discounts, for example, or other benefits that reward a trading partner for maintaining a particular share of dealings with the monopolist (e.g., low prices on condition that more than 80% or 90% of all purchases are from the monopolist), are paradigm examples of a vertical condition. That's because the trading partner can incur disfavored treatment by conducting additional dealings with rivals, holding constant the volume of purchases from the monopolist. Because the trading partner

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315. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526 (5th Cir. 2022) (evaluating a $50 million "donation[]" premised on cutting off a rival); Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1004 n.24 (9th Cir. 2020) ("[T]he requirement that Apple forfeit or reimburse Qualcomm millions of dollars in incentive funds was a strong deterrent to termination [of dealings with rivals].").

316. See, e.g., Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 995 (9th Cir. 2010) (rewarding higher purchase shares with lower prices).

317. See, e.g., Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 435 (7th Cir. 2020) (making access to "interconnect" services contingent on refraining from dealing with "advertising representation" rivals).

318. See Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1257–58 (5th Cir. 1988) ("Champion . . . [offered] distributors promotional gifts, ranging from jackets to refrigerators, if they removed competing spark plugs from their shelves.").

319. See Nicholas Economides & Lawrence J. White, Access and Interconnection Pricing: How Efficient Is the "Efficient Component Pricing Rule"?, 40 Antitrust Bull. 557, 575 (1995) (warning that in "real-world settings policy makers should be wary of blind devotion to the [rule]").

320. See, e.g., *Viamedia*, 951 F.3d at 435 (concerning explicit threats); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 282–83 (3d Cir. 2012) ("[D]espite the fact that Eaton did not actually terminate the agreements on the rare occasion when an OEM failed to meet its target, the OEMs believed that it might."); CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 76 (2d Cir. 1999) (considering an "unwritten exclusive dealing policy").

is punished for dealing with rivals, even if nothing else changes about the trading relationship, it's a condition.

By contrast, volume discounts, which reward a higher volume of dealings with the monopolist through lower prices (e.g., low prices on condition that you buy at least 1000 units from the monopolist in a twelve-month period),[321] are not conditions under this test, because the inducement responds to changes in dealings with the monopolist, not dealings with rivals.

It follows from this that monopolists may be able to engage in a work-around, using carefully calibrated volume discounts (based on quantity, not share) to approximate the effects of a true anticompetitive condition.[322] But this is not a reason for despair. Excluding rivals accurately with a volume discount requires accurate and timely insight into the present and expected future needs of a critical mass of trading partners, which may be difficult or impossible to obtain.[323] Moreover, the set of all volume discounts is more benign than the set of all vertical conditioning practices and contains many discounts that are welfare maximizing. Volume discounts are often good proxies for seller economies, and they often directly incentivize additional output.[324] And they preserve room for a trading partner to overbuy to sponsor the monopolist's competitors without losing the discount. Finally, and for all these reasons, simple volume discounts have been repeatedly endorsed by courts.[325] So there is no failure of principle in leaving this road open.

2. *Exclusion.* — The first question in a Section 2 case is exclusion: whether the challenged practice has impaired (or will impair) the ability or incentive of at least one rival to meet demand.[326] Many practices that

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321. See supra notes 179–180 and accompanying text.

322. See Scott Morton & Abrahamson, supra note 160, at 782–83 (pointing out that volume rebates "impose no explicit restraint on trade" but can be structured to have almost the same effects as loyalty rebates).

323. For example, to incentivize a buyer to completely refrain from dealing with a rival through a simple volume discount, a monopolist seller must be able to predict the amount of the individual buyer's total demand over the contract period. Set it too low and the buyer will be able to obtain the discount and still trade profitably with a rival; set it too high and the discount will be of reduced effectiveness because a buyer will have to overbuy to obtain it. Getting this right may be challenging at the best of times, and given changing market conditions, uncertainty about the future, multiple (maybe very many) buyers, information asymmetries, and other real-world conditions, it will often be impractical.

324. See, e.g., Carlton & Waldman, supra note 179, at 1233 (noting volume discounts' ubiquity and relationship with efficiencies).

325. See, e.g., LePage's Inc. v. 3M, 324 F.3d 141, 154 (3d Cir. 2003) (finding that volume discounts "are concededly legal and often reflect cost savings").

326. See Francis, Making Sense of Monopolization, supra note 15, at 804–06 (discussing exclusion).

exclude rivals are valuable and lawful,[327] but conduct that does not exclude cannot violate Section 2.[328]

a. *Horizontal: Allocation Without Agreement.* — In a case of horizontal conditioning, exclusion is likely to be found in the impairment of an actual or potential rival's incentive to compete: The prospect of receiving disfavored treatment effectively deters the firm from competing. A plaintiff must plead and prove that the condition had a significant—that is, more than trivial—deterrent effect of this kind.[329]

This means that a horizontal conditioning case requires proof that one or more trading partners to which the monopolist applied the condition faced a genuine choice about whether to become or remain a competitor of the monopolist—either at all or in some respect—and that the offered threat or bribe was significant enough to materially deter them from, or limit them in, doing so.[330] So if the trading partner did not reasonably have such a choice—for example, because it was irreversibly committed one way or the other—then there can be no exclusion.[331] Nor is there exclusion if the condition's effect was too trivial to affect that choice.[332]

b. *Vertical: Understanding Substantial Foreclosure.* — In a vertical conditioning case, the condition changes the incentives of trading

327. See Jacobson, Consumer Harm, supra note 157, at 352 (arguing that exclusive dealing arrangements that raise rivals' costs may be "a beneficial consequence of competition").

328. See Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 466–67 (D.C. Cir. 2008) (holding that, because the plaintiff failed to establish that the challenged conduct had actually excluded a rival, defendant had not monopolized); see also NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998) (conceding harm to consumers from increased telephone service rates, but finding no violation when the harm "flowed not so much from a less competitive market . . . as from the exercise of market power that [was] *lawfully* in the hands of [the] monopolist").

329. In principle, a horizontal condition could harmfully impair rival ability, rather than incentive, to compete; likewise, a vertical condition could harmfully impair rival incentive, rather than ability. There is no problem of principle with such cases, although they are likely to be special cases. (For example, a case in which a defendant monopolist degraded the quality of inputs or distribution that would be used by the customer to compete against it seems to fall into this category.) But the central stories of harm are likely to be those presented in the text. Moreover, assuming profit maximization, the ultimate difference between an effect on ability and one on incentive is not particularly clear.

330. This may overlap with invited or actual collusion. See Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 445 (7th Cir. 2020) ("Comcast . . . returned to Viamedia with a series of offers that would have required Viamedia to 'assign' 100% of its customers' [business] to Comcast in exchange for a one-time 'finder's fee.' That was essentially an offer to pay Viamedia to exit the marketplace.").

331. See, e.g., Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1176–89 (9th Cir. 2016) (noting allegations that, among other things, defendant afforded worse service to rivals than non-rivals, with no suggestion any entity could move between categories, and finding no liability).

332. This follows from the baseline obligation to show exclusionary impact. See supra note 328.

partners. By inducing trading partners to restrict the access of actual or potential rivals of the monopolist to inputs, distribution, customers, or complements, the monopolist impairs the ability of its rivals to compete.[333]

This is a familiar foreclosure concern. It depends, first, on a showing that the condition affected the behavior of trading partners. If it did not, there can be no exclusion: for example, because they would never have dealt with the rival in the first place or because they did so anyway.[334] When determining whether a condition has actually affected the behavior of trading partners, it may be instructive to see how those trading partners made choices that were not subject to the condition (e.g., purchases beyond a loyalty threshold).[335]

And it depends, second, on a showing that actual and potential rivals were significantly—that is, more than trivially—hindered in their ability to compete against the monopolist.[336] Thus there is no exclusion if, for example, close substitutes are readily available,[337] or if the relevant inputs, distribution, customers, or complements are competitively unimportant.[338] The existence of theoretical substitutes, however, is not enough.[339] Rival

333. See supra section I.B.1.b.

334. See Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1258 (5th Cir. 1988) (finding no evidence of an exclusive dealing contract's actual impact on trading partner behavior).

335. See, e.g., Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1045 (8th Cir. 2000) (emphasizing that "[s]everal boat builders chose to take a higher percentage of their engines from [the monopolist] than necessary to qualify for its largest market share discount"). This exercise should be conducted with some caution. For example, if a monopolist conditions a benefit (such as low prices) on purchasing 90% of requirements from the monopolist, a trading partner might rationally choose to go further and buy 100% of its needs from the monopolist because, given the requirement to hit the 90% threshold, the costs of dealing with another supplier for the remaining 10% of needs exceed the benefits of doing so. Under such circumstances, the trading partner's decision to buy above the threshold does not suggest that the condition has no effect.

336. See, e.g., McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 837 (11th Cir. 2015) (foreclosure requires that "opportunities for other traders to enter into or remain in [the] market [are] significantly limited" (alterations in original) (internal quotation marks omitted) (quoting United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001))).

337. See, e.g., CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 80–81 (2d Cir. 1999) (rejecting the argument that a monopolist's conduct amounts to exclusion when competitors had many alternatives to the lost distribution); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997) (same).

338. See Tom et al., supra note 117, at 632 (noting that when cost impacts are not significant, antitrust concerns are unlikely).

339. See ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 287 (3d Cir. 2012) (finding an agreement exclusionary despite a right of termination because the right was contingent on the existence of a lower-price substitute and no manufacturer could meet that threshold).

impairment, not rival exit, is the test,[340] despite occasional judicial suggestions to the contrary.[341]

Many courts have required evidence of coercion in conditioning cases.[342] But coercion is irrelevant: Its presence does not imply exclusion nor does its absence imply no exclusion. It is not even obvious what such a test could mean (every business wants better terms) or why it should imply overall harm (as noted above, some harmful exclusion actively benefits trading partners[343]). Both the economics of harm and monopolization doctrine turn on whether the monopolist is excluding rivals by changing trading partners' behavior, and neither turns on whether the trading partners felt good about it or were in some sense free to do otherwise.[344] It is hard to understand, for example, the Fifth Circuit's disregard of a $50 million inducement, paid by a monopolist to a key trading partner to cut off a rival, partly on the ground that the trading partner was not in enough of a budget crisis to create some necessary quantum of coercion.[345]

Nor do the dynamics of harm have anything to do with the duration or terminability of any underlying agreement—again, contrary to the views

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340. See, e.g., Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1175 (10th Cir. 2023) ("[W]hat matters is not whether [the monopolist] succeeded in totally excluding [its rival] from the . . . market but whether [the monopolist's] actions substantially foreclosed [the rival] from the market and impeded [the rival's] market growth."); *McWane*, 783 F.3d at 838 ("[T]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." (internal quotation marks omitted) (quoting United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005))); see also United States v. Microsoft Corp., 253 F.3d at 64 ("[A]lthough Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones."). In a deeper sense, this point is a cousin of the insight that antitrust does not protect individual competitors as such. See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). Welfare harms are the touchstone, and those may or may not involve actual competitor exit.

341. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1001–02 (9th Cir. 2020) (suggesting that, because other market participants still had access to the market, there could be no antitrust liability for contractual conditions); Virgin Atl. Airways Ltd. v. Brit. Airways PLC, 257 F.3d 256, 269 (2d Cir. 2001) (finding that business practices which have persisted for years without precluding rivals' market participation are presumptively legal).

342. See, e.g., In re EpiPen, 44 F.4th 959, 996 (10th Cir. 2022) (refusing to impose liability when the plaintiff failed to prove coercion); Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016) (same); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010) (same); see also Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000) (refusing to impose liability and emphasizing, among other things, that trading partners "were free to walk away from the discounts at any time, and they in fact switched to [rivals] at various points when [they] offered superior discounts").

343. See supra section I.B.1.b.

344. See Francis, Competition, supra note 16, at 408–10 (discussing the role of coercion in antitrust theory and doctrine).

345. BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 526–28 (5th Cir. 2022).

of some courts.[346] All the concerns surveyed in Part I can exist without an underlying agreement, much less one that is long in duration and hard to get out of. What matters is whether the monopolist is creating the relevant incentive effect, not whether it is doing so through a contract.[347]

This measure of exclusion corresponds to the best reading of what antitrust often calls "substantial foreclosure." But that term is used inconsistently, and often confusingly.[348] "Substantial foreclosure" in monopolization law means, or should mean: restriction of access to inputs, distribution, customers, or complements that generates a nontrivial competitive impairment of the affected rivals, consistent with the court's formulation of the concept as a test of whether "the opportunities for other traders to enter into or remain in [the relevant] market [are] significantly limited."[349]

To be sure, some loose judicial talk has created a puzzle here about the role of quantitative analysis. The Court in *Tampa Electric* seems to have identified the foreclosure test with a quantitative "substantial share" test of some kind.[350] Lower courts ran with that ball, inferring that this share-based measure was a separate, and quantitative, criterion for liability—and

346. See, e.g., *In re EpiPen*, 44 F.4th at 988 (arguing that "short, easily terminable exclusive agreements" are not concerning because competitors can wait such agreements out or induce their termination); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012) ("[M]odern antitrust law generally requires . . . contracts of sufficient duration to prevent meaningful competition by rivals [before finding unlawful exclusivity] . . . ."); *Allied Orthopedic*, 592 F.3d at 996–98 (stating that easily terminable contracts have little potential to foreclose competition); CDC Techs., Inc. v. IDEXX Lab'ys, Inc., 186 F.3d 74, 81 (2d Cir. 1999) (same); Omega Env't, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163–64 (9th Cir. 1997) (same).

347. This has been widely recognized. See, e.g., Elhauge, Loyalty Discounts, supra note 131, at 219 ("[E]ven when loyalty discount agreements require no buyer commitment at all, they can raise prices greatly above but-for levels."); Steuer, supra note 119, at 133 (arguing that even exclusive dealing contracts of short duration can have anticompetitive effects); Tom et al., supra note 117, at 624–25 (same).

348. See supra note 283 and accompanying text.

349. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961); see also McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 840 (11th Cir. 2015) (finding substantial foreclosure despite the fact that the victim "was not completely excluded from the . . . market" and "was able to enter and grow"). See generally Joshua D. Wright & Alexander Krzepicki, Rethinking Foreclosure Analysis in Antitrust Law: From *Standard Stations* to *Google*, Concurrentialiste (Dec. 17, 2020), https://www.networklawreview.org/wright-krzepicki-foreclosure/ [https://perma.cc/MNQ3-8CEK] (providing a thoughtful discussion of the foreclosure concept).

350. 365 U.S. at 327 ("[E]ven though a contract is found to be an exclusive-dealing arrangement, *it does not violate the section unless* the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." (emphasis added)); see also Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949) (holding that the harm-to-competition test under Section 3 of the Clayton Act "is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected").

raised its height over time.[351] As noted above, courts today often require, as necessary but not sufficient for liability, foreclosure of 40–50% of available inputs, etc., under Section 1 and something less under Section 2.[352]

This is an analytical mistake. Share-based proof and other methods of proof are *alternative* ways of proving exclusion, not cumulative requirements. To see why, it is helpful to recognize the foreclosure share requirement as one of antitrust's small family of structural presumptions. Others in this family include: the inference from concentration that a merger is harmful;[353] the inference from merged-firm share that a merger is harmful;[354] the inference of market power from share;[355] and the inference of monopoly power from share.[356]

These structural presumptions all work in the same way. They offer an evidentiary shortcut for a plaintiff, grounded in market share, as an alternative to direct proof of underlying economic harm or power. Each can be rebutted by evidence undermining the force of the inference.[357]

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351. Jacobson, Consumer Harm, supra note 157, at 325 (noting that "the threshold of illegality for foreclosure" has "moved higher and higher").

352. See supra note 285 and accompanying text.

353. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963) (articulating the presumption of merger illegality from structural evidence); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) (presenting the modern formulation of that presumption); DOJ & FTC, Merger Guidelines § 2.1 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/X3YL-XJ32] (describing the agencies' analytical approach to the structural presumption in merger law).

354. See *Phila. Nat'l Bank*, 374 U.S. at 363–64; United States v. Anthem, Inc., 236 F. Supp. 3d 171, 207 (D.D.C.), aff'd, 855 F.3d 345 (D.C. Cir. 2017) (laying out the contemporary formulation of this presumption); DOJ & FTC, supra note 353, § 2.1. The wisdom and economic logic of this presumption are uncertain. See Daniel Francis, Comments on the 2023 Draft Merger Guidelines 18–19 (Sept. 12, 2023), https://ssrn.com/abstract=4569469, [https://perma.cc/7LME-F6TT] (arguing that the presumption has no economic basis). But see Fed. Trade Comm'n v. IQVIA Holdings Inc., No. 1:23-cv-06188-ER, 2024 WL 81232, at *33 (S.D.N.Y. Jan. 8, 2024) (discussing reasons to question the presumption, but nonetheless applying it).

355. See Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984) (holding a hospital's 30% market share insufficient for "the kind of market power that justifies condemnation of tying"), abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) (holding that a business with 30% market share presumptively does not hold market power); Hardy v. City Optical Inc., 39 F.3d 765, 767 (7th Cir. 1994) (describing a 30% market share as the minimum for inferring market power in tying cases).

356. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (finding an 80% market share sufficient to survive summary judgment on the issue of monopoly power); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (holding that 87% market share "leaves no doubt" of monopoly power if the underlying market is valid); Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 n.5 (9th Cir. 2022) (holding that a 65% market share is sufficient to create a presumption of monopoly power).

357. See, e.g., United States v. Gen. Dynamics Corp., 415 U.S. 486, 506 (1974) (finding evidence rebutting the presumption of market power); *Baker Hughes*, 908 F.2d at 982–83

And none of them preclude other, more direct, proof of the claimed effect when the structural presumption is not satisfied or cannot sensibly be applied.[358]

Here, the claimed effect for which foreclosure share is a proxy is the impairment of rival ability to compete through the imposition of a significant cost increase (or some equivalent). And the structural move is the inference of meaningful impairment from the share of inputs, etc., denied to the affected rival, on the basis that the rival will likely be confined to fewer, higher-priced, or lower-quality inputs. Needless to say, structural analysis like this is more useful when output in the market is more homogeneous. In the presence of real differentiation, the utility of counting heads and treating them alike declines rapidly. In differentiated markets, in principle, harm can result from restriction or denial of access to shares of inputs, etc., significantly below the usual share thresholds, if what remains available to the rival is relevantly worse.[359]

As a result, it is vital to preserve the independence of the qualitative path to proof of exclusion, regardless of whether quantitative thresholds are met. A plaintiff must always be permitted to try to show that a practice has actually hindered rivals by raising costs of access to some input, etc., regardless of the share foreclosed.[360] Several commentators have made this point forcefully.[361]

Tampa Electric itself comfortably bears this reading. The Court in that case evidently regarded the qualitative and quantitative tests as

(describing the burden-shifting framework applicable to the presumption of anticompetitive effects, allowing for rebuttal); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 128 (2d Cir. 1981) (finding that market share is relevant but not dispositive for determining market power); United States v. AT&T Co., 552 F. Supp. 131, 171–72 (D.D.C. 1982) (finding no monopoly power despite a large market share because of countervailing evidence).

358. See, e.g., PLS.com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 838 (9th Cir. 2022) (confirming viability of direct proof of anticompetitive effects under Section 1); United States v. Microsoft Corp., 253 F.3d 34, 56–58 (D.C. Cir. 2001) (en banc) (confirming possibility of proving monopoly power by direct evidence); Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (same); Fed. Trade Comm'n v. Meta Platforms Inc., 654 F. Supp. 3d 892, 925–41 (N.D. Cal. 2023) (analyzing potential merger for potential-competition concerns without the use of the merger structural presumption).

359. See United States v. Microsoft Corp., 253 F.3d at 64 ("[A]lthough Microsoft did not bar its rivals from all means of distribution, it did bar them from the cost-efficient ones.").

360. See Elhauge, Loyalty Discounts, supra note 131, at 218 (supporting a share test "where direct evidence of rival efficiency impairment is not present").

361. See, e.g., Jacobson, Consumer Harm, supra note 157, at 362–63 (arguing that "if price, output, quality, choice, or innovation have been harmed, the lack of percentage foreclosure is no defense"); Steuer, supra note 119, at 116–124 (arguing that quantitative "measures alone are no longer an adequate measure of foreclosure" (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Beltone Elec. Corp., 100 F.T.C. 66 (1982))).

coterminous.[362] One way of understanding the Court's meaning is that foreclosure must be enough to have a significant effect on rivals, and whatever foreclosure results in a competitively significant burden on rivals is, ipso facto, a sufficiently "substantial share."

c. *Conditioning and the Economics of Exclusion.* — There is an important objection to consider at this point. Surely, the objection goes, some conditions really involve discounts or other benefits rather than harms. So why label such practices "exclusionary" when we do not treat regular discounting the same way, and when the practice may be net beneficial?[363]

The answer turns on both the specificity and the generality of the exclusion concept in monopolization theory. Exclusion is specific, in that it is one small part of the inquiry into the antitrust legality of a practice. Exclusion analysis is just an effort to figure out whether the practice has the necessary impact on the ability or incentive of rivals to meet demand in the market of competitive concern.[364] At this stage of the analysis, a court is not yet concerned with whether that impact is significant enough to make a real contribution to monopoly power, or whether the practice is net beneficial, or whether the behavior is of a kind that should be immunized from antitrust scrutiny. And for the purposes of this analysis, nothing turns on whether the practice is "really" a threat or a bribe, a penalty or a discount. This will matter at the justification stage: for example, when a defendant argues that a condition is a means of expanding output and promoting welfare, like a simple discount.

In many familiar monopolization theories, the basic exclusion concern is that demand is being affected by an exogenous force: exogenous in that it has nothing to do with the cost or quality of the competitive product. In a tying case, for example, the inducement is the prospect of access to another (tying) product that is more valuable than its competitors; in bundling cases, it is a discount on other products; in a price-predation case, it is a subsidy from a deep pocket.[365]

In each of these cases, the economic effect in the market of competitive concern is the same regardless of the origin of the force. The exclusion is the fact that the force drives demand toward the product of competitive concern and away from rivals, for reasons that are unrelated to their respective production cost or quality.[366] The same effect would be

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362. *Tampa Elec.*, 365 U.S. at 327–29 (mingling discussion of quantitative and qualitative standards).

363. See section I.B for a discussion of the potential benefits and harms of exclusionary conduct.

364. See Francis, Making Sense of Monopolization, supra note 15, at 804–06 (proposing exclusion as a "definitional element of monopolization law").

365. See supra section II.A.

366. Note the pliability of the idea of exogeneity. There is a normative idea in the background that it is in some sense improper to use one product to boost demand for another: that "pure" competition is market-specific, and that we define a "distortion" as a demand effect unrelated to the single-market cost and quality of output. But it is not very

generated by any subsidy: from an annuity, an ice cream business, or a mutual fund. Whether the underlying effect is labeled "conditioning," "leverage," "foreclosure," or "predation," and whether the practice is overall welfare-beneficial or welfare-harmful, the effect on demand in the market of concern works the same way.[367]

And this brings us to the generality of exclusion. Exclusionary effects, in this narrow antitrust-economics sense, are tremendously common.[368] This includes effects of practices that do not significantly contribute to monopoly, practices that are privileged, and practices that are net beneficial.[369] Among other things, exclusion is certainly not limited to cases in which the source of the inducement is itself market or monopoly power. Greater monopoly power must be the result, but such power need not be the means: A business can commit monopolization by fraud on the Patent Office,[370] sham litigation,[371] business torts,[372] and misrepresentation,[373] none of which involve use of monopoly. Nor does exclusion require that prices be below anyone's costs. The common thread is that demand is affected by forces unrelated to the cost or quality of the product of competitive concern or of its substitutes.

So why is it appropriate to have a special monopolization framework for tying when we do not have one for, say, simple subsidies from general revenue, if both are exclusionary in the same way? The key difference is probably that the policy case for intervention is vastly, vastly better for tying than for cross-subsidization. Subsidies from general revenue are

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clear why this should be so, and in evaluating procompetitive benefits we routinely take the opposite view. See, e.g., Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (noting that procompetitive effects can include "greater product interoperability"); Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008) (procompetitive benefits include "facilitating economies of scale in the market for complementary goods"). Systems competition often takes place in parallel with component competition: When and why should we insist on competition among components rather than among ties, bundles, and deep pockets? The best explanation is probably simple: Sometimes we think we can improve welfare by doing so. But there is plenty of proximate-cause-style policy work being done by the neutral-sounding idea of exogeneity. See Mark A. Geistfeld, Proximate Cause Untangled, 80 Md. L. Rev. 420, 424–49 (2021) (explaining the policy considerations underlying proximate cause).

367. For versions of this point, see, e.g., Crane, Mixed Bundling, supra note 124, at 447; Klein & Lerner, Price-Cost Tests, supra note 120, at 666.

368. See supra notes 179, 275 and accompanying text.

369. See supra sections I.B.2, II.A.1.

370. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177–78 (1965) (confirming that antitrust liability may be imposed for fraud on the Patent Office).

371. See Pro. Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc. 508 U.S. 49, 56–61 (1993) (discussing antitrust petitioning immunity and the "sham" exception to it).

372. See Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783–88 (6th Cir. 2002) (affirming a finding of monopolization resulting from tortious conduct).

373. See Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys, 850 F.2d 904, 915–17 (2d Cir. 1988) (discussing monopolization claims "based on misleading advertising").

ubiquitous, difficult and costly to detect and measure, almost certainly benign or beneficial most of the time, impossible to micromanage without doing much more harm than good, and within a zone of conduct (unilateral unconditional pricing) that implicates long-recognized freedoms from antitrust supervision.[374] By contrast, tying practices are less common, more easily detected, more likely to be harmful, less plausibly regarded as privileged or immune from scrutiny within our antitrust tradition, and more tractable to judicial intervention than cross-subsidization.[375] So, for these and other reasons, one can sensibly think that antitrust intervention at the point of a tie can do more good than harm, while simultaneously thinking the reverse about cross-subsidization.

And that brings us back to conditioning. From the perspective of this policy choice, conditioning looks just like tying. It involves an avoidable practice that raises obvious grounds for concern; it is reasonably easy to tell when it is happening; it may give rise to either harms or benefits, and we have a pretty good handle on what these might be; and we can reasonably think that—just as with tying—intervention in provably harmful cases could result in real social good, and that a rule to that effect probably will not do much harm. So antitrust scrutiny seems a wiser, safer bet than antitrust immunity.

3. *Contribution to Monopoly and Equally Efficient Rivals.* — Exclusion of rivals cannot amount to monopolization unless, among other things, it is sufficiently likely to increase or entrench monopoly power.[376] This corresponds to the long-standing requirement that the conduct must be "reasonably" capable of making a significant contribution to power.[377] This contribution turns both on the magnitude of the exclusionary impact on affected rivals and on the magnitude of the constraint exerted by those rivals on the monopolist.[378]

This causal test is a bit more plaintiff-friendly than the default civil litigation balance-of-probabilities standard, and it certainly does not require quantification of effects on price, output, or anything else.[379]

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374. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1077 (10th Cir. 2013) (disclaiming any interest in scrutinizing profits and margins business line by business line).

375. See supra section II.A.3.

376. See, In re EpiPen, 44 F.4th 959, 986 (10th Cir. 2022) (noting that liability requires that the challenged conduct would contribute to the defendant's power over price or output); Jacobson, Consumer Harm, supra note 157, at 347–48 (noting that monopolization liability requires contribution to monopoly power).

377. See, e.g., McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 833 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc); C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1247 n.7 (5th Cir. 1985).

378. See, e.g., *McWane*, 783 F.3d at 838–40 (assessing both the direct impact of challenged conduct on the injured rival and the ultimate consequences for the defendant's pricing power).

379. See Francis, Making Sense of Monopolization, supra note 15, at 807–11 (discussing the requisite degree of "contribution to monopoly").

Emphasizing "the need for courts to infer 'causation' from the fact that a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power,'" the D.C. Circuit has underscored that "[t]o require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."[380]

Nevertheless, the test is an important and meaningful screen. It weeds out cases in which the exclusion did not really impair rivals' ability to compete, or in which the impacted rivals are minnows with no prospect of impairing the monopolist's power.[381]

This formulation implies that monopolization liability might be imposed in cases involving practices that might not exclude an equally efficient rival. Some courts and commentators have suggested that antitrust liability ought to be off the table in such cases, lest antitrust end up shielding weak rivals from market discipline.[382]

To be sure, it is easy to see the appeal of a test that requires a plaintiff to prove that the challenged practice would impair an equally efficient rival as a precondition for monopolization liability.[383] After all, one way of paraphrasing our core concern in a monopolization case is to ask whether, if a cheaper or better alternative came along, it would be able to flourish. An antitrust law that helps less efficient rivals stay in the market looks a lot like corporate welfare for weak businesses.

But on a closer look the equally efficient yardstick becomes less interesting. For one thing, real monopolists generally do not have symmetrical rivals. If they did, they would probably not be monopolists in the first place.[384] Equal efficiency often cannot be gained without similar

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380. United States v. Microsoft Corp., 253 F.3d at 79 (first and second alterations in original) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651c, at 78 (1st ed. 1996)).

381. See Krattenmaker & Salop, supra note 118, at 243–45 (explaining that "even if excluded rivals' costs increase significantly, the purchaser of an exclusionary right still may not gain power over price").

382. See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) ("[N]othing in the record indicates that an equally efficient competitor was unable to compete with Sanofi."); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 270 (6th Cir. 2015) ("Kodak's differential pricing was unlawful only if it might have forced a more efficient competitor out of business.").

383. See Richard A. Posner, Antitrust Law 193–97 (2d ed. 2001) (proposing such a standard); Daniel A. Crane & Graciela Miralles, Toward a Unified Theory of Exclusionary Vertical Restraints, 84 S. Cal. L. Rev. 605, 639 (2011) (same).

384. Monopoly power generally requires preeminence of a kind that can be inferred from roughly 70% of a defined market protected by entry barriers. See supra note 356 (collecting cases). So actual symmetrical rivals are almost certainly not already present. And if other businesses could readily enter at similar levels of efficiency, monopoly power is generally excluded. See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)

scale, or at least the kind of scale that would preclude the defendant from holding monopoly power. And "efficiency" in the fullest sense reflects many things beyond productive technology, including factors like know-how and goodwill that develop over time.[385] So the equally efficient rival paradigm supposes a world that has little to do with the one found in a real Section 2 case.

But the core problem is that a practice can inflict serious harms, in all the ways that antitrust cares about, even if all affected rivals are less efficient than the monopolist. Weaker rivals and imperfect substitutes often make significant contributions to social welfare by constraining monopolists.[386] They may be close competitors in a differentiated market, or they may simply be the only rivals around. And, given that today's less efficient competitor may be tomorrow's equally efficient one, practices can also inflict harm by ensuring that no rival attains equal efficiency.[387] Courts have recognized as much. In *Microsoft*, most famously, the targets—Netscape Navigator, Sun's Java, and the businesses that might use them to compete with Windows—were not even rivals yet, let alone equally efficient ones.[388]

The equally efficient rival test also proves far too much. A fully symmetrical rival can always match the monopolist's practice blow-for-blow and will therefore never be excluded.[389] And if the idea is to hypothesize some kinds of symmetry, like identical productive technology, but not others, like integration into multiple markets or deep pockets, it is not at all clear how one ought to pick the symmetries or why one would think that this arbitrary thought exercise tells us anything interesting.[390] If antitrust objects to excluding a rival that simply "does not sell as many

(finding that market power requires that "new rivals are barred from entering"). So potential symmetrical rivals are probably not present either, if monopoly exists.

385. See Kaplow, supra note 130, at 530, 538 (discussing long-run dynamic effects on competition).

386. See Steven C. Salop, Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard, 73 Antitrust L.J. 311, 328–29 (2006); see also In re EpiPen, 44 F.4th 959, 970–71 (10th Cir. 2022) (describing the reduction in the price of certain drugs following the entry of an admittedly weaker competitor). Indeed, as the *Cellophane* fallacy illustrates, a profit-maximizing monopolist that has succeeded in excluding or acquiring its near competitors may be constrained only by imperfect or distant substitutes. See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 399–404 (1956) (noting that the dominant cellophane manufacturer had priced itself into competition with products of a very different nature).

387. See A. Douglas Melamed, Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles? 73 Antitrust L.J. 375, 388 (2008) (noting that "a rival that is less efficient today might become equally or more efficient" in time).

388. See United States v. Microsoft Corp., 84 F. Supp. 2d 9, 28–30, 51 (D.D.C. 1999) (outlining the relevant findings of fact and imposing liability).

389. See Calzolari & Denicolò, supra note 246, at 4 (modeling this dynamic).

390. See Salop, Paradigm, supra note 114, at 393 (criticizing the equally efficient competitor standard).

products as the [monopolist]"[391]—the central premise of bundling doctrine—it is not obvious why it should not also be willing to object, in appropriate cases, to excluding a rival that simply has yet to lower its costs down to the monopolist's level.

So there is not much of a reason to care about whether a challenged practice would succeed in winning business from an imaginary rival imbued with an arbitrary and incomplete set of symmetries. Real harms are the concern.

4. *Privilege and the Price-Cost Test.* — Some unilateral practices are per se legal. This includes, for example, at least some refusals to deal,[392] above-cost unconditional pricing,[393] mere product improvements,[394] market entry or exit,[395] and so on.

Courts have struggled mightily with the question of whether and when conditioning is protected by this privilege or immunity. As we have already seen, some courts have reasoned that, because a monopolist is generally free to price and refuse to deal as it likes, it may exercise those freedoms by disfavoring rivals through conditioning.[396]

These courts have misunderstood the nature of the privilege. To the extent that unconditional refusals and unconditional above-cost prices are per se legal, it is not because they do not ever exclude rivals or create welfare harms.[397] Instead, it is because in unconditional form they are common, generally (though not always) benign, and unsuited to judicialization.[398] (And because they have long been treated that way.[399]) Subjecting unconditional refusals and above-cost unconditional pricing to antitrust scrutiny would impose huge costs, bring little real value, and drown the courts in abjectly valueless litigation.

But not one word of that can be said of conditioning, whether it involves supply cutoffs, prices, both, or neither. Unconditional refusals or

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391. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 909 (9th Cir. 2008).

392. See supra section II.A.1.

393. See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasizing the legality of monopoly pricing).

394. See, e.g., Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 999–1000 (9th Cir. 2010) ("[P]roduct improvement by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result.").

395. See, e.g., In re Asacol Antitrust Litig., 233 F. Supp. 3d 247, 268 (D. Mass. 2017) (holding that neither product introduction nor product withdrawal violate Section 2).

396. See, e.g., New York v. Meta Platforms, Inc., 66 F.4th 288, 305 (D.C. Cir. 2023) ("To consider Facebook's policy [forbidding developers from using its platform to create competitors] as a violation of § 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors.").

397. See Harold Demsetz, The Intensity and Dimensionality of Competition, *in* The Economics of the Business Firm: Seven Critical Commentaries 137, 166 (1995) (noting that the exclusionary effect of pricing has nothing to do with a "cost-based standard").

398. See Francis, Making Sense of Monopolization, supra note 15, at 811–14 (explaining and defending this view of the privilege under Section 2).

399. See supra notes 204–205, 236–237 and accompanying text.

unconditional pricing are ubiquitous and effectively mandatory for every business: No one can deal with everyone, and virtually everyone has to set prices. By contrast, conditioning involves an affirmative choice to go out of one's way to set up a scheme involving categories that specifically deter trading partners from competing or dealing with competitors.[400] This is no more ubiquitous or unavoidable than resorting to tying or exclusivity. There is no injustice in expecting a monopolist to be on notice that there is antitrust risk in setting up a conditional tariff that punishes and deters competition or dealing with competitors.[401] In fact, what minimally counseled monopolist wouldn't appreciate that antitrust risk from the get-go?

Moreover, unlike routine pricing and trading decisions, conditions are at least as likely to result in harm as tying or exclusivity: In fact, as noted above, they seem more likely to result in harm than tying, and less likely to generate benefits than paradigm exclusivity.[402] And, as already noted, a host of traditional forms of monopolization could readily be reformulated into conditional dealing practices if the latter were systematically accorded lenient treatment.[403]

So monopolization's privilege does not cover conditioning, ever. The immunity accorded to many simple refusals, and to unconditional above-cost pricing, has no application to conditional practices. There is more to be gained in this area, and less to be feared, from careful intervention than from immunity of the kind accorded unconditional above-cost pricing.[404]

5. *Justification and the Role of Free Riding.* — Once a plaintiff shows that a monopolist has engaged in conditioning that has excluded rivals and augmented monopoly power, the defendant has the opportunity to show that the practice is beneficial overall.[405] This is the stage of the analysis at which, for example, a defendant monopolist may argue that the condition allows it to charge lower overall prices, make valuable investments, and so on, compared to the likely counterfactual.[406]

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400. See, e.g., Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1076 (10th Cir. 2013) (explaining that refusal to deal law "doesn't seek to displace doctrines that address a monopolist's more direct interference with rivals").

401. See Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 275 (6th Cir. 2015) ("In setting prices, it is important for companies to have clear guidelines." (citing Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 453 (2009))).

402. See supra notes 263, 302–303 and accompanying text (describing tying and exclusivity justifications, respectively).

403. See supra sections II.A.1–.2.

404. See Moore & Wright, supra note 235, at 1219–20 (rejecting the price-cost approach in foreclosure cases); see also Pulse Network, L.L.C. v. Visa, Inc., 30 F.4th 480, 493 (5th Cir. 2022) (finding no immunity when the plaintiff "isn't challenging [the defendant's practice] because it imposes low or below-cost pricing," but rather "argues that [the practice] abuses [the defendant's] market power, specifically by imposing supra-competitive prices . . . in a way that excludes competitors from the market").

405. See cases cited supra note 357.

406. See supra section I.B.2.

The normal rules apply to this assessment. It is not enough to show some positive directional effect or a good subjective purpose: All monopolization generates some benefits,[407] and antitrust is concerned with effects, not subjective intentions.[408] Nor is it enough to show merely that the challenged practice drives some business to the monopolist rather than rivals, or increases profits, as *all* monopolization does.[409] What is needed is a showing that the benefits of the practice tend to outweigh its harms.[410] This analysis is also subject to the normal rule that a benefit only counts if there is no reasonable less restrictive way to attain it.[411] For example, a defendant cannot proffer the metering of demand in order to maximize output as a procompetitive justification if it is reasonably possible to meter demand in less harmful ways.

Some cautionary and limiting principles may be worth bearing in mind. First, as noted in Part I, conditioning is not identical to paradigm exclusivity: Among other things, there is usually no strict commitment to exclusivity in a conditioning case. This tends to limit the force of benefit claims that depend on a high degree of confidence that the monopolist's trading partner will not, in fact, compete or deal with competitors.[412]

Second, given the prominence of free-riding arguments in defenses of exclusivity and similar practices,[413] it may be worth underscoring that it is not enough to prove that a condition reduces free riding.[414] The elimination of free riding as such is a neutral fact. Indeed, free riding is central to many basic competitive processes, including imitation.[415] At the highest level of generality, for example, almost every business makes some contribution to the ability of its trading partners to cover their fixed costs,

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407. See supra note 157 and accompanying text.

408. See McWane, Inc. v. Fed. Trade Comm'n, 783 F.3d 814, 840 (11th Cir. 2015) (clarifying the role of intent). But see infra section III.B (discussing attempted monopolization, including the relevance of intent to that offense).

409. See Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 38 (D.C. Cir. 2005) ("A restraint cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product . . . .").

410. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (noting that the defendant's low prices were "not irrelevant" but "not dispositive").

411. See C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law, 116 Colum. L. Rev. 927, 937 (2016) (describing the standard less-restrictive-alternative analysis).

412. See supra section I.B.2.

413. See Benjamin Klein & Andres V. Lerner, The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty, 74 Antitrust L.J. 473 *passim* (2007) [hereinafter Klein & Lerner, Expanded Economics].

414. Not all third-party benefits are unpriced. When the monopolist's investment makes a trading partner's services more valuable to the monopolist's rivals, the trading partner may be able to exclude the rivals from the benefits (and thus charge for the benefit), and the monopolist may be able to charge the trading partner in turn. Such cases involve no free ride.

415. The maker of each "better mousetrap" is generally free riding on the effort of the first mousetrap maker. As Milton Handler once put it, "The right to compete means the right to imitate." Milton Handler, Unfair Competition, 21 Iowa L. Rev. 175, 189 (1936).

and to that extent subsidizes its own rivals.[416] There is not much reason to think that overall welfare would be higher if this was brought to an end.[417] The relevant benefit for justification purposes is the social value of the quantum of additional investment that is causally contingent on protection against free riding.

The free-riding door also swings both ways. Classic treatments of free riding and exclusivity suggest that, when an exclusive arrangement is justified as a response to free riding, the social harm from foreclosing rivals must be balanced against the social value of additional incremental investment that the monopolist would only undertake with exclusivity.[418] But in such cases there is sometimes an additional harm from exclusivity that does not always get much attention: the social harm from the loss of free riding that would occur—albeit on a smaller quantum of investment—absent exclusivity. In other words, in the counterfactual world in which exclusivity was prohibited or not used, there would be a social gain from the free ride in the form of the externalized benefit itself (if any), which would be lost as a result of the exclusivity (or other practice). This should be included in any assessment of welfare harms from the relevant conduct.

C. *Conditioning in the Antitrust Canon*

Recognizing conditioning as a monopolization shoebox of its own has a secondary benefit: It helps us spot conditioning at work in some classic or canonical cases, in which it may have been mislabeled or not squarely analyzed at all. This section will briefly highlight a couple warhorse precedents that turn out, on examination, to have involved conditioning all along.

First and perhaps most obviously, *Lorain Journal*[419] is a crystal-clear example of vertical conditioning, not an example of paradigm exclusivity. That case involved an incumbent monopolist newspaper that declined to accept advertising from any advertiser that also traded with a new-entrant radio station.[420] "Numerous [local] advertisers wished to supplement their local newspaper advertising with local radio advertising," the Court explained, "but could not afford to discontinue their newspaper advertising in order to use the radio."[421] It is not at all clear that these facts would survive the predilection of some modern courts to ask in paradigm

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416. See Steuer, supra note 119, at 129 (explaining the mutual benefits of free riding).

417. For one thing, in such a world it is not at all clear how any supplier would cover its fixed costs—at least without costly and controversial cost accounting, and perhaps at all.

418. See Klein & Lerner, Expanded Economics, supra note 413, at 480 (explaining this account).

419. Lorain J. Co. v. United States, 342 U.S. 143 (1951).

420. Id. at 148–49.

421. Id. at 153.

exclusivity cases about long-term commitments, terminability, and so on.[422] But as a vertical conditioning case it is perfectly, archetypally clear.

Likewise, the leading appellate case on bundled discounts—*PeaceHealth* from the Ninth Circuit,[423] which is currently winning a circuit-split war against *LePage's* from the Third[424]—turns out on close examination to be a conditioning case, not a mere bundling case at all. Paradigm bundling involves offering a discount on a purchase of a bundle of separate products.[425] Indeed, the *PeaceHealth* court said as much.[426] But the conduct of the defendant hospital system in *PeaceHealth* went much further: The discount was conditional not just upon purchase of a package of services but also upon exclusivity. Specifically, the plaintiff alleged that the defendant hospital "offered insurers discounts of 35% to 40% on tertiary services *if the insurers made PeaceHealth their sole preferred provider for* all *services*."[427]

This appears to have involved a conditional-dealing policy rather than paradigm exclusivity. During negotiations with a Blue Cross Blue Shield affiliate, for example, the defendant hospital system quoted two prices: a discounted, loyal price if the insurer refrained from adding a rival hospital—that is, the plaintiff—as a preferred provider, and a higher, disloyal price if the insurer chose to do so.[428] Another insurer added the plaintiff as a preferred provider, alongside the defendant, and the defendant promptly increased its prices to that insurer as a result.[429] In sum, while the case does not appear to have involved actual commitments to exclusivity, "[t]he evidence showed that insurers who made PeaceHealth their exclusive preferred provider across all services . . . paid lower [prices] than insurers who purchased . . . at least some . . . services from [the plaintiff]."[430]

Now, whatever one's view about how antitrust should treat a pure bundled discount,[431] it seems perfectly clear that inducing customers to

422. See supra section II.A.5.

423. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008).

424. LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc); see also Simon & Simon, PC v. Align Tech., Inc., No. CV 19-506 (LPS), 2020 WL 1975139, at *8 (D. Del. Apr. 24, 2020) ("The *LePage's* standard for bundled discounts has not been adopted by any other Circuit, and it has not been expanded in the Third Circuit.").

425. See Francis & Sprigman, supra note 113, at 401–10.

426. *PeaceHealth*, 515 F.3d at 894 ("A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually.").

427. Id. at 892 (emphasis added).

428. Id. at 892–93.

429. Id. at 893.

430. Id.

431. See supra section II.A.4 (describing the circuit split in bundling law).

abjure one's rivals by offering a conditional discount is a different, and more dangerous, creature than simple bundle pricing.[432]

It is hard to make this point more clearly than the Ninth Circuit did in *PeaceHealth* itself when it commented, in support of its analysis, that "[b]undled discounts are pervasive, and examples abound. Season tickets, fast food value meals, all-in-one home theater systems—all are bundled discounts."[433] Those are indeed all pure bundled discounts. But the New York Yankees do not make season-ticket discounts conditional on fans staying away from the Mets. Nor, for that matter, do McDonald's or Sony impose similar conditions on consumers that want to get a Happy Meal or 10% off a matched set of speakers. It is only by ignoring this critical distinction that the Ninth Circuit was able to treat *PeaceHealth* as a "case in which a plaintiff challenges low prices as exclusionary conduct," rather than a case involving a monopolist inducing exclusivity through a conditional discount[434]—and only by doing so could it purport to rely on "the endemic nature of bundled discounts in many spheres of normal economic activity."[435] What the *PeaceHealth* court lacked was an analytical and doctrinal frame for recognizing the distinctive threat to competition presented when defendants monopolize by conditioning.

Finally, a conditioning practice can be spotted lurking in the complex facts of *Microsoft*.[436] In that case, Microsoft, an incumbent operating system monopolist, used a variety of practices to exclude two incipient products that threatened to undermine its Windows monopoly: Netscape's Navigator internet browser and Sun's Java technologies.[437] One of these practices concerned Intel, which had begun cooperation with Sun and Netscape on a "cross-platform [Java Virtual Machine]," which would operate across multiple operating systems and therefore make it easier for developers to produce software that was compatible with rivals to Windows.[438]

So Microsoft presented Intel with a threat. If Intel was going to work with Sun and Netscape on the Java project, Microsoft would work with one of Intel's key rivals in the processor-chip market, AMD, to support a rival processor technology.[439] It was a simple eye-for-an-eye threat: If you support our competitors in one market, we'll support your competitor in another market. Microsoft CEO Bill Gates made it clear: "If Intel has a real problem with us supporting this then they will have to stop supporting Java

432. See supra section II.A.4 (describing differences between paradigm bundling and vertical conditioning).

433. *PeaceHealth*, 515 F.3d at 894.

434. Id. at 901.

435. Id. at 903.

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

437. Id. at 51–54.

438. Id. at 77.

439. Id.

Multimedia the way they are. I would gladly give up supporting this if they would back off from their work on [Java]."[440] Intel promptly capitulated.[441]

This allegation is dealt with in a brief, ride-along element of the *Microsoft* opinion, and the court labeled the practice "exclusionary" without much analysis or discussion.[442] But it is a clear example of vertical conditioning: a conditional punishment imposed by a monopolist for dealing with the monopolist's competitor. Moreover, it neatly illustrates that the punishment in a conditioning case need not have anything to do with the terms of dealing between the monopolist and the trading partner but can involve anything else that matters to the trading partner: in this case, a threat to support the trading partner's key competitor. Vertical conditioning analysis thus offers a fully adequate rationale and analytical framework to justify and explain the D.C. Circuit's treatment of the threat to Intel.

D. *Special Cases*

Some applications of this framework are worth special attention, either because of their policy significance or because they involve some intricacy.

1. *Tech Monopoly and the Adjacency Threat.* — There may be value—for agencies and courts alike—in keeping a particular eye on horizontal conditioning by digital monopolists aimed at what one might call "adjacent" threats.[443]

In many cases, a monopolist's closest substitutes are its most important competitive threats. But in markets with very strong network effects—that is, when products become more valuable to users as the number of other users, or intensity of their activity, increases[444]—an incumbent firm may be least concerned about very close substitutes.[445] Those are precisely the firms that will find it hardest to gain scale in the face of the network effects, even if they have a superior product.[446]

In such cases, a particularly important source of competition may be the threat of entry from businesses that are complementary to the incumbent.[447] The incumbent's scale makes it easier, not harder, for a

440. Id. (internal quotation marks omitted).

441. Id.

442. Id. at 78.

443. See Francis, Making Sense of Monopolization, supra note 15, at 826 (making this point briefly).

444. See Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, J. Econ. Persps., Spring 1994, at 93, 94 (describing network effects); Catherine Tucker, Network Effects and Market Power: What Have We Learned in the Last Decade?, Antitrust, Spring 2018, at 72, 72 (same).

445. See Francis, Making Sense of Monopolization, supra note 15, at 826 (providing digital markets as an example of this).

446. Id.

447. Id.

complement to achieve scale in its own right.[448] Having done so, a software competitor may be able to push out new functions to existing users, migrating into increasingly close competition with the incumbent—at competitive scale and counting a chunk of the incumbent's users among its own.

This adjacency threat may be illustrated by recent developments in tech competition. For example, when Twitter (now X), the dominant microblogging site, experienced a rocky period in 2023, a new app from an adjacent social competitor—Meta's Threads—picked up more than 100 million users in five days.[449] Likewise, some of the practices described in Part I could be understood as responses to an adjacency threat. For example, the allegations relating to Google's Project Hug may imply that Google's app store faces important threats from established (complementary) game and app developers with large overlapping user bases that can roll out app stores at scale to their users, arriving in the app store market with critical user mass.[450] Similar stories could be told of Google's payments to Apple[451] and Facebook's policies.[452]

None of this implies that digital markets merit a separate legal standard or that any particular practice is harmful. But it spotlights the value of protecting adjacency competition and the urgency of clarifying the law of conditioning.

2. *Contracts Taxing Rivals.* — In some cases, a monopolist may enter an agreement with a trading partner that penalizes deals with rivals by taxing or surcharging such deals.

This is a form of vertical conditioning. It satisfies the hold-constant test because dealing with a rival, holding constant dealings with the monopolist itself, triggers disfavor.[453] And it may result in all the harms described in Part I.[454] A classic example is *Caldera*, which involved an

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448. Id.

449. See Jon Brodkin, Most of the 100 Million People Who Signed Up for Threads Stopped Using It, Ars Technica (July 28, 2023), https://arstechnica.com/tech-policy/2023/07/zuck-says-threads-doing-better-than-expected-despite-losing-over-half-of-users/ [https://perma.cc/GBR4-3ZGD]; Emma Roth, Threads Is Struggling to Retain Users—But It Could Still Catch Up to X, The Verge (Sept. 26, 2023), https://www.theverge.com/2023/9/26/23890592/threads-meta-monthly-users-data-x-twitter [https://perma.cc/WU2F-RUT3]. As these articles emphasize, being able to enter at scale is no guarantee that you can keep your users engaged.

450. See supra section I.A.1.c.

451. See supra section I.A.1.b.

452. See supra section I.A.1.d.

453. The proviso in our definition ensures the forced-purchase cases count as "conditions." See supra section II.B.1.

454. See Carl Shapiro & Keith Waehrer, Using and Misusing Microeconomics: *Federal Trade Commission v. Qualcomm*, *in* Antitrust Economics at a Time of Upheaval: Recent Competition Policy Cases on Two Continents 294, 297–307 (John E. Kwoka, Jr., Tommaso M. Valletti & Lawrence J. White eds., 2023) (providing an economic analysis of harm in the Qualcomm "no license, no chips" case); Joseph Farrell, Janis K. Pappalardo & Howard

allegation that Microsoft licensed its MS-DOS operating system to computer OEMs on condition that they paid a royalty to Microsoft "on every machine the OEM shipped regardless of whether the machine contained [MS-DOS] or another operating system" such that "an OEM who chose to install [a rival product] would pay two royalties on the same machine."[455] The court held that such a practice deterred dealing with rivals and on that basis could violate Section 2.[456] Other examples can be found in the practices of some of antitrust's most famous defendants.[457]

A practice of this kind may be exclusionary even if the "tax" is nondiscriminatory, such that it applies to all purchases by the trading partner, including those from the monopolist. A rational monopolist will not want to charge an effective price above the profit-maximizing level so will adjust its nominal price to eliminate any effect of the tax.[458] Rivals cannot do the same.

Because there is no economic difference between an obligation to pay a $10 fine and an obligation to buy a copper penny from the monopolist for $10.01, cases of this kind may require a court to penetrate labels and grapple with economic substance.

Unhappily, this is what the Ninth Circuit declined to do in *Qualcomm*. In that case, as noted above, the FTC alleged that payments labeled "patent royalties"—payable by Qualcomm's customer-licensees on each device they manufactured—included a surcharge that taxed chip rivals.[459] The Ninth Circuit correctly recognized that all-unit royalties, payable whether the OEM used a Qualcomm chip or a rival's chip, could have an exclusionary effect, citing *Caldera*.[460] But it held that Qualcomm's case was different because, in effect, there were *some* real patent rights in play. "When Qualcomm licenses its [standard essential patents (SEPs)] to an OEM, *those patent licenses have value* . . . regardless of whether the OEM uses Qualcomm's modem chips or chips manufactured and sold by one of Qualcomm's rivals."[461] And the Court noted that "unlike *Caldera* . . . here

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Shelanski, Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior, 37 Rev. Indus. Org. 263, 267–68 (2010) (discussing a "tax-rivals'-sales" theory of harm).

455. Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1249–50 (D. Utah 1999).

456. Id. at 1251.

457. See, e.g., United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) (discussing a "factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors"); Hans B. Thorelli, The Federal Antitrust Policy 93 (1955) (discussing Standard Oil's practice of taxing railroads' deals with rivals); Granitz & Klein, supra note 152, at 9–10 (same).

458. See supra notes 69–70 and accompanying text.

459. See supra section I.A.1.e.

460. Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 1000 (9th Cir. 2020) (citing *Caldera*, 87 F. Supp. 2d at 1249–51).

461. Id. (emphasis added).

OEMs do not pay twice for SEP licenses when they use non-Qualcomm modem chips."[462]

But the existence of some genuine patent rights worth paying for does not preclude the simultaneous presence in the royalty of a significant tax. There is no economic difference between a naked $5 fee and a $10 royalty for patent rights worth $5. And it does not matter whether chip rivals charged for SEP licenses: The allegation was that the surcharge inflated their chip prices.

Part of the point here is that this aspect of *Qualcomm* was not in substance a "patent antitrust" issue at all. The rich complexities of the interaction between IP and antitrust policy[463] are almost entirely irrelevant. Assuming the truth of the alleged facts—as we are concerned here purely with the general principle, not with *Qualcomm* as such—the crux is simply that the economic effect, or legality, of a condition has nothing to do with whether it happens to be located in a patent license.

Antitrust litigator and writer Jon Jacobson has offered three thoughtful objections to the antitrust scrutiny of practices involving the taxing of rivals: First, such practices reduce rivals' revenues rather than raising their costs; second, merely raising rivals' costs in this way is "competition in action," not an antitrust violation; and, third, the implicit theory of concern lacks a limiting principle, as "there needs to be some objective metric to determine how much is too much for antitrust purposes."[464]

But these objections do not quite kill. First, the concern in cases of this kind is not merely that the practice reduces rivals' revenues but that it forecloses their access to trading partners in ways that do raise their costs and which, moreover, result in the kind of welfare harms with which antitrust is routinely concerned.[465] Second, labels like "competition in action" or even "anticompetitive" probably do not shed much analytical light of their own.[466] Practices of this kind can harm consumer welfare by excluding competitors, and there does not seem to be much reason to exempt them from scrutiny. Third, the limiting principle here is the same as any other Section 2 case: Excluding rivals by unprivileged means that sufficiently contribute to monopoly power and are not justified by offsetting benefits is unlawful.[467] No more is needed.

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462. Id.

463. See generally Francis & Sprigman, supra note 113, at 587–656 (detailing the intersection of IP and antitrust).

464. Jonathan M. Jacobson, The Tax Theory in Conditional Pricing Analysis, CPI Antitrust Chron., Sept. 2019, at 2, 4.

465. See supra section I.B.

466. See Francis, Competition, supra note 16, at 356 (arguing that the purported "competition" concept is too indeterminate to be of analytical use).

467. See supra section II.B.

3. *Self-Preferencing*. — Self-preferencing in its pure form involves favoring one's own integrated division unconditionally and disfavoring third parties' unconditionally. No conditional offer is made to anyone, and no one can move between the favored and disfavored categories.[468] As a result, it does not constitute conditioning under this Article's definition. Of course, cases outside this pure core may very well involve conditioning. For example, if favorable treatment is extended not only to one's own division but also to third parties that refrain from competing or from dealing with rivals, it is a conditioning case. The fact that the monopolist's own division is also favored changes nothing.

4. *Unconditional Refusals to Deal*. — Implicit in the foregoing is the proposition that unconditional refusals to deal, like unconditional above-cost prices, should be per se legal. This principle is largely observed in practice by courts and enforcers today,[469] but it is worth saying out loud. These practices are generally benign, extremely common, and unsuitable to judicialization: They are thus per se legal.[470]

It follows that *Aspen Skiing* should be overruled.[471] *Aspen Skiing*, of course, was not a conditioning case. The injured competitor ski resort in that case was not facing any choice about whether to compete with the defendant ski resort—the mountains in question being immobile—and the plaintiff was not being induced to refrain from competition by reason of a conditional threat or bribe. Instead, a competitor was directly complaining about the consequences of an already-executed and unconditional decision to stop cooperating with it.[472]

Courts and scholars have had forty years to try to find a sensible rule within *Aspen Skiing*, and no one seems to have solved the riddle. There is no good reason to treat termination of a deal more harshly than an up-front refusal,[473] nor much reason to care whether a defendant is sacrificing short-run profits,[474] nor much value in parsing the "legitimacy" of various

468. For example, suppose that a general search engine is treating its wholly owned shopping platform more favorably than it treats competing third-party shopping sites (perhaps through more prominent link placement). Suppose further that the third-party shopping sites are not threatening to launch competing general search engines, nor are they being punished for dealing with other search engines. Instead, they are simply being treated worse. This constitutes "pure" self-preferencing, as the shopping sites are not being incentivized to behave loyally through a condition.

469. See supra section II.A.1 (discussing courts' skepticism of refusal to deal claims).

470. See supra section II.B.4.

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

472. Id. at 607–08 ("Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated.").

473. See Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986) (declining to impose liability for a monopolist's "withdrawal" of a "helping hand").

474. Many practices that cause welfare harm and fit into long-recognized categories of illegal conduct are profitable in both the long run and the short run, while plenty of desirable practices involve short-run sacrifice, including R&D. Kaplow & Shapiro, supra note 138, at 1192–93. The real value of the profit-sacrifice test—which is more valuable as it

subjective flavors of the profit-maximization motive. Doubtless these and other problems drive the near-zero liability rate in refusal cases[475] by inducing courts to find for defendants: It surely can't be that monopolists are selling to all comers at prices, and on terms, that they like.

The surrender of an imaginary cause of action is not much of a loss for plaintiffs. *Aspen Skiing* is not doing any useful work for plaintiffs or anyone else,[476] and the pretense to the contrary is a pure cost in the antitrust system. Better to acknowledge what everyone already knows: An absolute refusal to supply, to a particular entity or at all, is not illegal. Firms need not "lend . . . rivals a helping hand,"[477] license to them,[478] or design products to help them out.[479]

Note that we are dealing here only with *mere* refusals. If the monopolist has made false statements, prior representations or promises, and so on that have contributed to harm, immunity is much less plausible.[480] And if the refusal includes an offer to sell if the victim ceases to be a rival, then of course it is an example of horizontal conditioning of the kind discussed above.[481] As Professor Carl Shapiro testified almost two decades ago before the Antitrust Modernization Commission, there is no contradiction here: One can simultaneously accept that "vertical unconditional refusals to deal [should] never trigger antitrust liability" while also embracing the need for careful effect-based scrutiny of conditional refusals.[482]

Moreover, giving up *Aspen Skiing* does not mean throwing out everything plausibly regarded as a refusal to deal. Some appealing cases—

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embraces more long-term effects—is that it highlights a highly suspect subset of practices. See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, Cheap Exclusion, 72 Antitrust L.J. 975, 979–81 (2005) (noting that such practices are appealing targets for enforcement action). They may be particularly clear examples of monopolization, but they do not necessarily reflect either its outer bounds or its ideal type.

475. See supra section II.A.1.

476. See Hovenkamp, Big Tech, supra note 14, at 1490 n.26 ("No plaintiff has won a [refusal to deal] case since *Trinko*.").

477. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013).

478. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 993–95 (9th Cir. 2020) (finding no obligation to license at the component level).

479. See Simon & Simon, PC v. Align Tech., Inc., No. 19-506 (LPS), 2020 WL 1975139, at *7 (D. Del. Apr. 24, 2020) (holding that a defendant does not violate Section 2 merely because it designs its product in a manner that hinders rivals).

480. See, e.g., Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("Deception in a consensus-driven private standard-setting environment harms the competitive process . . . .").

481. See Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, supra note 212, at 17–18 ("[A] wholly unconditional refusal to deal on any terms cannot be reframed as a conditional refusal.").

482. Carl Shapiro, Professor, Univ. of Cal., Berkeley, Testimony Before the Antitrust Modernization Commission: Exclusionary Conduct 13 (Sept. 29, 2005), https://faculty.haas.berkeley.edu/shapiro/amcexclusion.pdf [https://perma.cc/JWP8-347B].

including the recent *Viamedia* litigation and the landmark *Terminal Railroad*—are really consummated vertical merger cases. In *Viamedia*, the challenged foreclosure arose from Comcast's acquisition of control over vital Interconnects needed by its ad rivals;[483] in *Terminal Railroad*, the problem was the acquisition by a group of railroads of all the bridges across a river.[484] These were bad mergers crying out for good remedies, not for contortions in conduct law.[485]

III. Reinforcing Monopolization Doctrine

This Article's core claim has been that conditioning should be recognized as an independent form of actual monopolization. This very brief final Part offers two more tools with a role to play in fighting anticompetitive conditioning. They are, respectively: quick look monopolization and attempted monopoly maintenance.

A. *Quick Look Monopolization*

For a long time, the law of anticompetitive agreements under Section 1 of the Sherman Act[486] has made room for "quick look" analysis, also called "intermediate scrutiny" or the "inherently suspect" standard.[487] The core idea is that a plaintiff may establish a prima facie case by reference to the basic nature and context of an agreement, without having to laboriously piece together evidence of actual market impacts.[488] For this purpose it is enough to show that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."[489] If a plaintiff can do so, the burden flips to the defendant to show that things are more complicated, or that there are redeeming benefits.[490]

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483. See Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 443 (7th Cir. 2020).

484. See United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 391–94 (1912).

485. The rule of per se immunity described in the text is limited to cases of nondiscriminatory refusals. Many discriminatory refusals, by contrast, will likely take the form of policies that make the availability of a product or service conditional upon refraining from competition with the monopolist. In such cases, per se immunity is inappropriate.

486. 15 U.S.C. § 1 (2018).

487. See Francis & Sprigman, supra note 113, at 193–201, 260–70. Quick look analysis has not always found a warm reception in lower courts. See Edward D. Cavanagh, Whatever Happened to Quick Look?, 26 U. Mia. Bus. L. Rev. 39, 64 (2017) (explaining that in recent years "lower courts have been quite reluctant to invoke quick look in private antitrust litigation").

488. See Francis & Sprigman, supra note 113, at 193–94.

489. Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

490. See Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

Broadly speaking, this has been applied to cases: (1) in which the apparent benefits are facially far outweighed by the apparent harms,[491] (2) in which the link between benefits and harms is so attenuated that the harms could not be plausibly necessary to obtain the benefits,[492] and (3) in which there seems to be no serious justification but the practice is so novel that per se condemnation is inappropriate.[493] This approach has not been applied under Section 2,[494] perhaps because its contours are so murky or because the fear of chilling procompetitive conduct casts such a long shadow in monopolization law.[495]

But the case for a quick look framework under Section 2 is identical to that under Section 1. If harms are obvious and conduct is facially unrelated to procompetitive benefits, and if no privilege is implicated, the same commonsense inference can and should be drawn for the same reasons. In conditioning cases that fill this category—cases of "naked conditioning"—a court should presume the illegality of the condition and flip the burden, without requiring detailed proof of exclusionary impact or contribution to monopoly. It is then for the defendant to rebut the presumption by showing that the practice is justified or less harmful than it looks. This is most likely to apply in cases of horizontal conditioning, but there is no reason to preclude it in any sufficiently clear cases of vertical conditioning.

This may sound unduly aggressive. It is not. It is really just an endorsement of commonsense inferences in clear cases—and neither common sense nor clear cases are unique to Section 1. Sometimes, after all, the threat of harm is "so blatant that a detailed review of the surrounding marketplace would be unnecessary."[496] In such cases, a defendant can fairly be invited to explain itself—under Section 1 *or* 2.

The zone of special scrutiny this Article proposes is bounded in some very important ways. First, monopolists are rare: a small subset of businesses in the economy, with which competition may be most socially

491. See, e.g., id. at 38 (pointing out that the launch of a new joint-product SUV by car manufacturers would not justify collusion on price and advertising across all models of car).

492. See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 98–113 (1984) (condemning a restraint that, while in some sense related to the legitimate joint activity of a football league, was not reasonably necessary for that desirable activity).

493. See, e.g., Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 457–61 (1986) ("[W]e have been slow to . . . extend *per se* analysis to restraints . . . where the economic impact of certain practice is not immediately obvious.").

494. See Thomas Brown, Katherine Robison & Ian Simmons, Joint Ventures and the Sherman Act: The Problem Revealed by *American Needle* and How Best to Address It, CPI Antitrust J., Mar. 2010, at 1, 9 ("[S]o far as we are aware there are no 'quick look' monopolization cases . . . .").

495. See, e.g., Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 990–91 (9th Cir. 2020) (emphasizing chilling concerns "*especially* in technology markets").

496. Food Lion, LLC v. Dean Foods Co. (In re Se. Milk Antitrust Litig.), 739 F.3d 262, 274–75 (6th Cir. 2014) (citing Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–70 (1999)).

precious.[497] Second, at least as applied to naked conditioning in particular, we are dealing with practices that cry out for justification. After all, horizontal conditioning is perilously close to market allocation, while vertical conditioning presents all the dangers of paradigm exclusivity while being much less likely to elicit exclusivity's traditional benefits.[498] Third, and perhaps most importantly, naked conditioning is rare (among other things, it is a small subset of all conditioning practices) and it is obviously dangerous. In any case in which the condition is linked to some plausibly beneficial joint investment or venture—no doubt the majority of conditions—quick look will simply not apply. After all, competitor collaborations, too, are also often procompetitive, but courts seem to be able to tell the flagrantly bad ones, suitable for quick look review, from the rest, all without the sky falling on our heads.[499] There is no reason not to do the same thing in the same way, in the same small set of the most facially troubling cases, under Section 2.

This approach resonates with a thoughtful strand of scholarship condemning "cheap exclusion": that is, harmful conduct with no substantial procompetitive benefits.[500] It is also a gentle riff on the "no economic sense" and similar tests endorsed by some.[501] If the only plausible reading of a practice is a harmful one, it is fair to place the first burden of explanation on the defendant.[502]

B. *Attempted Monopoly Maintenance*

Section 2 of the Sherman Act prohibits not just monopolization but also attempts and conspiracies to monopolize.[503] The Supreme Court has explained that the attempt offense requires "predatory or anticompetitive conduct," a "specific intent to monopolize," and a "dangerous

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497. The special salience of monopolists in our antitrust system is reflected in the existence of Section 2 itself: a specific statute dedicated to the scrutiny of acquisition and maintenance of monopoly.

498. See supra section I.B.

499. See DOJ & FTC, Antitrust Guidelines for Collaborations Among Competitors 1 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/L39S-K5D6] (noting that collaborations are "often" procompetitive).

500. See supra note 474 and accompanying text. In a thoughtful contribution in a similar vein, Professor Jon Baker has proposed that a "truncated" rule of reason might be employed to analyze certain exclusionary practices. See Jonathan B. Baker, Exclusion as a Core Competition Concern, 78 Antitrust L.J. 527, 548–56 (2013).

501. See Gregory J. Werden, The "No Economic Sense" Test for Exclusionary Conduct, 31 J. Corp. L. 293, 293 n.4 (2006) (describing DOJ's support for the test).

502. See Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1077 (10th Cir. 2013) ("The point of the profit sacrifice test is to isolate conduct that has *no* possible efficiency justification.").

503. 15 U.S.C. § 2 (2018).

probability" of successful monopolization.[504] Both monopoly acquisition and monopoly maintenance can be unlawfully attempted.[505]

Most modern accounts of the attempt offense present it as actual monopolization in miniature. On this view, a defendant is guilty if it engaged in successful actual exclusion of rivals, giving it a position dangerously close to monopoly.[506] This flows mainly from courts' practice of assessing dangerous probability of success mainly by reference to the defendant's market share: If it is at or above monopoly levels, the defendant has actually monopolized, but if it is somewhat less, then it has only attempted to monopolize.[507] On this account, the attempt offense is simply a modified version of actual monopolization, with a lower market-power test and an additional requirement of intent.[508]

But this is an awfully odd way to conceptualize an attempt offense. Most attempt offenses—even criminal ones[509]—do not require actual infliction of some lesser quantum of harm. The offense of attempted

504. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 459 (1993).

505. See, e.g., Lorain J. Co. v. United States, 342 U.S. 143, 154 (1951); Chase Mfg., Inc. v. Johns Manville Corp., 84 F.4th 1157, 1170 (10th Cir. 2023); New York v. Meta Platforms, Inc., 66 F.4th 288, 302 (D.C. Cir. 2023); In re EpiPen, 44 F.4th 959, 981 (10th Cir. 2022); Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 315 (4th Cir. 2007). But see LePage's Inc. v. 3M, 277 F.3d 365, 385–88 (3d Cir. 2002) (doubting the existence of an attempted monopoly maintenance offense), opinion vacated on reh'g en banc, 324 F.3d 141, 169 (3d Cir. 2003) (pointedly expressing no view).

506. See, e.g., BRFHH Shreveport, LLC v. Willis-Knighton Med. Ctr., 49 F.4th 520, 529 (5th Cir. 2022) ("Attempted monopolization . . . is similar [to actual monopolization] but allows for liability even if the monopoly never came to fruition."); M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 166 (4th Cir. 1992) ("An attempt to monopolize employs 'methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" (quoting Am. Tobacco Co. v. United States 328 U.S. 781, 785 (1946))).

507. See, e.g., *Spectrum Sports*, 506 U.S. at 459 ("[D]emonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."); Trone Health Servs., Inc. v. Express Scripts Holding Co., 974 F.3d 845, 857 (8th Cir. 2020) ("Dangerous probability of success is examined by reference to the offender's share of the relevant market." (internal quotation marks omitted) (quoting HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 550 (8th Cir. 2007))); Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 (10th Cir. 1989) ("The likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market." (citing Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161 (10th Cir. 1986))).

508. See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 994 F.3d 1166, 1172 (10th Cir. 2021) (holding there is sufficient overlap between monopolization and attempt to evaluate the claims together); Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd., 989 F.3d 1224, 1241 n.9 (11th Cir. 2021) (explaining that the only difference between the two offenses is attempt's specific intent requirement).

509. Attempted monopolization is a crime too. See Press Release, DOJ, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization [https://perma.cc/386A-G687].

murder, for example, does not generally require proof of injuries that come "dangerously close" to fatal or indeed any actual injury at all.[510] Instead, the law's general approach to attempt offenses suggests that attempted murder has been committed if the defendant shoots at the victim and misses; if the defendant tries to poison a victim even though the substance turns out to have lost its efficacy; if the defendant hires a "hitman" that turns out to be an undercover cop; and so on.[511] These are all cases in which the defendant intentionally did everything necessary to commit the offense—expecting and believing that facts necessary to the commission of the offense did or would exist—but in which those facts turned out not to exist, so the full offense was not committed.

Standard accounts of the attempt offense support a finding of guilt in these cases.[512] That approach helps to prevent and deter dangerous conduct, punish culpable persons, reflect the social harms caused by attempted wrongs, ensure similarity of treatment among similarly culpable persons, and so on.[513]

But, oddly, the standard framing of attempted monopolization seems to miss these cases. The gap includes the set of cases in which an actual monopolist intentionally sets out to maintain its monopoly by excluding rivals, through means that are generally capable of doing so, but in which the conduct does not seem to have provably contributed to the result. For example, suppose that a monopolist targeted one or more businesses with exclusionary conduct (acquisition, blowing-up-with-dynamite, conditioning, whatever you like) for the sole reason that it believed that the targets were on track to become important rivals and that doing so would enable it to keep prices high and quality low. And suppose that it cannot now be known or proved—after the dynamite has been used—whether the targets were in fact on that track.

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510. See, e.g., People v. Sanders, 522 N.E.2d 715, 723 (Ill. 1988) (explaining that injury is not an element of the attempted murder offense); Harrison v. State, 855 A.2d 1220, 1238 (Md. 2004) (same); People v. Fernandez, 673 N.E.2d 910, 914 (N.Y. 1996) (same); Swenson v. State, 654 S.W.3d 144, 154 n.15 (Tex. App. 2022) (same).

511. See Gideon Yaffe, Criminal Attempts, 124 Yale L.J. 92, 101, 120–21 (2014) (noting that "attempts are often harmless," and discussing the rule, followed in some states, that hiring a hitman is attempted murder).

512. See id. at 102.

513. See Lawrence C. Becker, Criminal Attempt and the Theory of the Law of Crimes, 3 Phil. & Pub. Affs. 262, 270–71, 276 (1974) (noting criminal law's focus on social harms including those "produced by intentional, malicious conduct which is aimed at doing . . . physical or financial damage to persons or property" and arguing that, including for reasons of equal treatment, "attempts [should be] seen as presumptively equal in social harm to successes"); Mark E. Rozkowski & Ralph Brubaker, Attempted Monopolization: Reuniting a Doctrine Divorced From Its Criminal Law Roots and the Policy of the Sherman Act, 73 Marq. L. Rev. 355, 381 (1990) (listing prevention, punishment, equality of treatment, and deterrence as the objectives of attempt liability); Yaffe, supra note 511, at 102 ("[I]f a form of conduct is legitimately criminalized, then so are attempts to engage in that form of conduct." (emphasis omitted)).

This monopolist should be liable for attempted monopoly maintenance, subject to whatever defenses might ordinarily apply (including an assessment of welfare benefits).[514] As noted above, from the perspective of general attempt law, this seems to be a pretty easy case. The monopolist has done all the actions necessary to complete an offense, including actions of a kind that would ordinarily be expected to conduce to the commission of the offense—not just taken a substantial step—with the specific intent to perform that offense.[515] Multiple courts have emphasized that the legality of an attempt should be examined at the time of the relevant act, not with the benefit of hindsight about how things actually unfolded.[516]

Section 2 law should respect the basic principle that the factual impossibility of the full offense—for example, because the target was not really on track to be a successful competitor—is no defense to attempt liability.[517] As one court has already put it in a Section 2 case: "The mere failure to succeed, or the impossibility of success, does not negative an attempt."[518] This even goes, the Fifth Circuit has held, if the offense was never possible. "If a defendant had the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no

514. For some broadly supportive contributions, see, e.g., Am. Acad. Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1320 (7th Cir. 1991) ("Firms found guilty of attempting to monopolize are typically, and in predatory pricing cases must always be, monopolists."); In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 701 (E.D. Pa. 2007) ("I find that defendants may be liable for attempted monopolization even if defendants possessed a monopoly . . . ."); John E. Lopatka & William H. Page, An Offer Netscape Couldn't Refuse?: The Antitrust Implications of Microsoft's Proposal, 44 Antitrust Bull. 679, 706–10 (1999) (making a cautious case for the attempted monopolization offense, apparently including cases involving actual monopolists). The Areeda & Hovenkamp treatise appears somewhat skeptical of attempt liability in cases in which a monopolist threatens with uncertain effect. See Areeda & Hovenkamp, Antitrust Law, supra note 262, § 806a ("[E]xclusionary conduct by a monopolist within its own market, whether successful or not, is best treated as an aspect of the full monopolization offense."); id. § 806b (indicating that "unimplemented threats" should generally be "ignore[d]" unless the threat actually deterred entry, in which case it should be analyzed as actual monopolization).

515. See, United States v. Taylor, 142 S. Ct. 2015, 2020 (2022) (noting that attempt requires specific intent and at least a substantial step taken toward completion); United States v. Fortner, 943 F.3d 1007, 1010 (6th Cir. 2019) (same); United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007) (same).

516. See, e.g., Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 695 n.20 (10th Cir. 1989) ("The capacity of the defendant to monopolize must be evaluated at the commencement of the . . . scheme."); United States v. Am. Airlines, Inc., 743 F.2d 1114, 1118–19 (5th Cir. 1984) ("When evaluating the element of dangerous probability of success, we do not rely on hindsight . . . .").

517. See, e.g., United States v. Reed, 75 F.4th 396, 402–03 (4th Cir. 2023); United States v. Chavez, 29 F.4th 1223, 1227–28 (10th Cir. 2022); United States v. Carter, 15 F.4th 26, 36–37 (1st Cir. 2021); United States v. Burke, 431 F.3d 883, 886 (5th Cir. 2005); see also State v. Logan, 656 P.2d 777, 778 (Kan. 1983) ("Our research has not revealed an instance where an American court has ever recognized factual impossibility as a defense to an attempt charge.").

518. Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 461 (W.D. Pa. 1968).

defense that the plan proved to be impossible to execute."[519] Section 2 should take this principle seriously too, subject to all the usual Section 2 law regarding the expected procompetitive benefits of the challenged conduct.

Accepting this possibility does not require uprooting existing liability theories. Courts should continue to recognize that a dangerous probability of success can be shown, as modern cases agree, through actual but incomplete acts of exclusion that have provably resulted in a lower level of market power. But they should also recognize that attempt liability can be shown by proof of completed conduct by an actual monopolist that is of the right kind to exclude rivals, notwithstanding uncertainty about whether it actually did so.

There remains the usual tricky question of what should count as the necessary intent, given that all businesses try and hope to succeed at rivals' expense.[520] That question is not specific to this reformulation of the attempt offense and deserves full treatment elsewhere. But, consistent with the observations above regarding the purpose and function of the monopolization offense,[521] it would seem sensible to require something like subjective intent to perform the relevant acts combined with subjective intent or belief that overall welfare harm (e.g., increased or maintained prices) will result from unprivileged exclusion of rivals. It is enough to intend and expect that the practice will, on net, harm consumers or other trading partners by enabling the defendant to avoid price decreases, quality improvements, or innovation investments that would otherwise be rational, without intending or expecting sufficient welfare benefits to offset the harm.

Only a small subset of practices, including conditional-dealing policies, present attempted-maintenance concerns of this kind. But that subset contains intentional wrongdoing of a particularly pernicious kind. When a monopolist acts in a manner that is subjectively intended to cause welfare harms through the exclusion of rivals, or through unprivileged means of the right general kind to constitute monopolization, liability is appropriate. That includes, among other things, horizontal or vertical conditions imposed by a monopolist for the purpose of suppressing competitive threats, and that are plausibly capable of having that effect, but that are not redeemed by expected benefits. Society can get along fine without whatever conduct might be deterred by a rule like that.

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519. *Am. Airlines*, 743 F.2d at 1119.

520. See Edward H. Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 373, 394 (1974) (noting the "fundamental difficulty" that "a specific intent to acquire monopoly power may often be entirely legitimate").

521. See supra section II.B.3.

CONCLUSION

Conditional dealing has fallen through the cracks in monopolization law for long enough. Courts have tried to jam such practices into ill-fitting categories and applied tests and measures with little or nothing to do with the real competitive concerns. The result has been indifference to coherent theories and cogent evidence of harm. In vain have economists and others protested the poor fit between doctrine and reality.

The result has been a proliferation of facially troubling conditions, in critical markets from tech to agriculture to healthcare. The terrible disarray in judicial treatment of such practices—overwhelmingly in favor of defendants—is at best no deterrent and at worst an outright invitation to engage in harmful behavior.

This Article has argued that a clean solution can be inferred from existing monopolization law and theory. Anticompetitive conditioning, in both its horizontal and vertical manifestations, is an independent form of exclusionary conduct. It raises many of the same concerns as exclusivity, tying, bundling, and predation but also exhibits meaningful differences from each, meriting a framework of its own. When conditional dealing is challenged, a court should first ask whether a monopolist has in fact implemented a horizontal or vertical condition that satisfies the hold-constant test. If so, the court should evaluate exclusion, contribution to monopoly, and justification under the framework presented above. This entails rejecting the efforts of previous courts to accommodate conditioning through doctrines of "de facto partial exclusive dealing," "negative tying," and similar contortions. It also entails setting aside inapposite tests like coercion, duration, quantitative screens, and price-cost standards.

Two more specialized tools may also have a role to play in the most troubling cases. The quick look device, imported from the law of Section 1, may help to streamline the analysis of particularly flagrant practices. And the neglected offense of attempted monopoly maintenance may play a valuable role in capturing intentionally harmful conduct in complex, dynamic markets.

All the foregoing boils down to a simple proposition. When a monopolist specifically induces its trading partners to refrain from competition or from trading with rivals, and when that inducement materially impairs rivalry to such an extent that it threatens to significantly shore up monopoly power, a defendant must prove that the practice is nevertheless beneficial overall.

It is hard to believe that that is not already—and uncontroversially—the law.