

# THE LEGALITY OF LEGACY BUSINESS PRACTICES IN ANTITRUST

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*There is void in the literature at the intersection of antitrust law and legacy business practices. This issue has come to forefront with Epic Games' antitrust suit against Apple for its App Store policies, which have been in place ever since the online marketplace opened in 2008. The same*

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*issues are at the center of the current Apple v. Pepper litigation and in regulatory proposals to alter Apple's business practices both at the state and federal levels. Legacy conduct has also played a role in the Supreme Court's controversial Ohio v. American Express decision and the Ninth Circuit's FTC v. Qualcomm decision.*

*This raises a question as to how antitrust should treat long-standing business practices—practices that this Article labels “legacy conduct”—that initially were benign or even procompetitive, but which come under heavy scrutiny once the firm employing it obtains considerable market power. The fundamental question raised here is whether the fact that a product has become highly successful turns a previously legitimate business practice into one that antitrust should treat as objectionable.*

*This Article contends that three fundamental considerations should govern the proper assessment of cases involving legacy conduct under a rule of reason analysis. Further, this Article advances a policy recommendation that legacy conduct instituted long before a firm achieves substantial market power (particularly at the time of entry) and is common across competitors who do not themselves possess substantial market power, should be considered probative evidence that the practice is procompetitive. When these conditions are satisfied, defendants should be afforded a substantially reduced burden in proving the restraint is procompetitive under a rule of reason analysis commensurate with the strength of the legacy evidence.*

## INTRODUCTION

On June 8, 2015, Epic Games unveiled a live demo of Fortnite, its popular massive-multiplayer online game, onstage at Apple's Worldwide Developers Conference (WWDC) to illustrate the power of the Mac desktop operating system and graphics processing.<sup>2</sup> On April 2, 2018, Epic and Apple extended their relationship and began to distribute Fortnite on Apple's mobile operating system (iOS) through Apple's App Store.<sup>3</sup> The partnership

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2. Rob Lefebvre, *Everything You Need to Know from WWDC 2015*, CULT OF MAC, (June 8, 2015), <https://www.cultofmac.com/325350/everything-you-need-to-know-from-wwdc-2015/> [<https://perma.cc/V4JM-PV7X>]. See also Benjamin Hiors, *Apple WWDC Keynote 2015: The Highlights*, CREATIVEPOOL, (June 9, 2015), <https://creativepool.com/magazine/leaders/apple-wwdc-keynote-2015-the-highlights.5022> [<https://perma.cc/5K9Q-CCLY>] (“Speaking of games, Apple also brought in ‘Gears of War’ and Fortnite developer Epic Games to showcase what Metal can do in El Capitan.”).

3. Cody Lee, *Fortnite Now Available on iOS for Everyone*, IDOWNLOADBLOG.COM, (Apr. 2, 2018), <https://www.idownloadblog.com/2018/04/02/fortnite-available-to-everyone/> [<https://perma.cc/Q5VA-8LFN>].

on iOS was an immediate, and continuing, success.<sup>4</sup>

Yet, on August 13, 2020, roughly two years after Fortnite first appeared on the iPhone, Epic Games filed a private antitrust suit in the Northern District of California against Apple.<sup>5</sup> Epic alleges that Apple's App Store policies violate U.S. antitrust laws through the use of a series of restraints of trade and monopolistic practices.<sup>6</sup> Specifically, Epic contends that Apple uses control over the iOS mobile operating system to protect its App Store monopoly, which affords Apple exclusive access to iPhone users.<sup>7</sup> The alleged harm from these practices is a reduction in the welfare of consumers through higher prices and less app store variety; a reduction in the welfare of developers, who receive a lower return on their proprietary software; and a reduction in the overall level of innovation in app development and payment processing services.<sup>8</sup> These same issues are also in play in the current *In re Apple iPhone Antitrust Litigation* case,<sup>9</sup> where the Supreme Court has ruled that iPhone users have standing to sue Apple for its App Store policies, and the case has been remanded to the lower courts.<sup>10</sup> Further, regulatory proposals to fundamentally alter how Apple governs its App Store have been made at both the federal and state levels.<sup>11</sup>

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4. See, e.g., Jay Casteel, "Fortnite" Finally Available to All iOS Users, Made \$1.8M So Far, BALLERSTATUS, (Apr. 6, 2018), <https://www.ballerstatus.com/2018/04/06/fortnite-finally-available-to-all-ios-users-made-1-8m-so-far/> [<https://perma.cc/7Q8L-QLBV>] ("Now available to the general public, the official Fortnite iOS app is a smash hit, sitting at No. 1 on Apple's App Store, ahead of Instagram and Facebook, as of press time."). See also Pl.'s Notice of Mot. for a Prelim. Inj. and Mem. of Points and Authorities in Supp. Thereof at 28, *Epic Games v. Apple*, Case No. 4:20-CV-05640-YGR (N.D. Cal., Sep. 4, 2020) ("Over 116 million registered users have accessed Fortnite through iOS—more than any other platform.").

5. Compl. for Inj. Relief, *Epic Games v. Apple*, Case 3:20-cv-05640 (N.D. Cal., Aug. 13, 2020) [hereinafter the Epic Complaint].

6. *Id.* at ¶ 3.

7. *Id.*

8. The stated goal of Epic's lawsuit is injunctive, rather than monetary, relief, so that app developers can bypass both the App Store and Apple's payment processing system. See Epic Complaint, *supra* note 5, at ¶ 6.

9. *In re Apple iPhone Antitrust Litigation*, Docket No. 4:11-cv-06714 (N.D. Cal. Dec 29, 2011).

10. *Apple v. Pepper*, 139 S. Ct. 1514, 1519 (2019) (holding that iPhone users were direct purchasers under the Court's prior precedent in *Illinois Brick Co. v. Illinois*).

11. See MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY 16 (2020) [hereinafter the Majority Staff House Report] ("Apple leverages its control of iOS and the App Store to create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings."). See also Proposed House of Representatives Amendments to H.B. 2005, 55th Leg., 1<sup>st</sup> reg. Sess. (Ariz. 2021) <https://www.azleg.gov/legtext/55leg/1R/proposed/H.2005COBB.pdf> [<https://perma.cc/3CAA-E35W>]

This case has brought to the forefront an understudied “gray area” in antitrust. An area of uncertainty due not so much to the fact-intensive nature of such cases, but due to uncertainty in the state of the law itself.<sup>12</sup> Specifically, the Epic complaint raises the following question: What role does, and should, legacy play in determining antitrust liability? If a practice has been in place since a product’s entry, or before a product obtained substantial market power, when does that practice become anticompetitive as the firm’s market power increases? What are the considerations that help make this determination?

Apple’s introduction of the App Store on July 10, 2008,<sup>13</sup> involved, by all accounts, an innovative and closely controlled delivery of first-party and third-party software for mobile devices.<sup>14</sup> While perhaps hard to believe today, before its release, there were calls for Apple to “pull the plug” on the iPhone as the mobile phone market was then dominated by Nokia and Motorola.<sup>15</sup> In 2008, Apple’s market share in the U.S. for mobile operating

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(proposing the ability for app developers to pick their own payment processor and bypass Apple’s commission on all transactions).

12. See Philip Elman, *Antitrust Enforcement: Retrospect and Prospect*, 53 AM. BAR ASSOC. J. 609, 609 (1967) (“[T]he vast and largely unexplored middle of the antitrust spectrum, however, lie the difficult and complex gray problem areas.”).

13. See, e.g., Jason Snell & Peter Cohen, *Apple Opens iTunes App Store*, MACWORLD (July 10, 2008), [https://www.macworld.com/article/1134380/app\\_store.html](https://www.macworld.com/article/1134380/app_store.html) [https://perma.cc/HT7P-KLG8] (“At launch the App Store included 552 apps, including 135 free programs.”).

14. See Seth Weintraub, *Apple’s Biggest Innovation for 2008? The iPhone App Store*, COMPUTERWORLD, (Aug. 7, 2008), <https://www.computerworld.com/article/2478691/apple-s-biggest-innovation-for-2008---the-iphone-app-store.html> [https://perma.cc/7C73-B5NS] (commenting on the most important Apple innovation that year:

I know 2008 is far from over and we have many more Apple products to look forward to. It just seems to me that Apple has already profoundly changed the technology landscape again, and people are starting to realize it. In a few years time when we are drawing up the yearly Apple timeline, 2008 will be known for one thing . . . the game changer isn’t some shiny, sleek hardware or innovative new ways of making an operating system hum, it is the way that Apple’s third-party developer environment has been set up. The iPhone App store simply makes the old way of distributing software seem primitive.)

15. E.g., John C. Dvorak, *Apple Should Pull the Plug on the iPhone*, MARKETWATCH: JOHN DVORAK’S SECOND OPINION, (Mar. 28, 2007), <https://www.marketwatch.com/story/apple-should-pull-the-plug-on-the-iphone/> [https://perma.cc/42NJ-TBEM] (“[T]he mobile handset business . . . is not an emerging business. In fact it’s gone so far that it’s in the process of consolidation with probably two players dominating everything, Nokia Corp. . . . and Motorola Inc.”). Cf., Ben Thompson, *Apple, Epic, and the App Store*, STRATECHERY, (Aug. 17, 2020), <https://stratechery.com/2020/apple-epic-and-the-app-store/> [https://perma.cc/ZX5W-ZT7Y] (noting that:

[I]n 2013, the media was filled with predictions of the iPhone’s imminent demise

systems was approximately fifteen percent.<sup>16</sup> Today, Apple's U.S. share stands at forty five percent.<sup>17</sup> Since its inception, distribution through the App Store involved a transaction fee of thirty percent for paid apps, which, with a few notable exceptions, has remained the same since.<sup>18</sup> While the history of a firm's challenged practice is something that courts routinely examine when determining liability,<sup>19</sup> there is a void in the literature on how to systematically assess legacy conduct, that is, practices that have been in place well before a firm obtained substantial market power. Relevant to this inquiry, and an issue that is discussed in some detail below, is whether the firm's use of the practice in question has been an important contributor to the firm's success over time. Has the practice helped legitimately drive market success and consumer benefits, or does it constitute an artificial barrier to competition whose primary consequence is to harm consumers and the competitive process?

The goal of this Article is twofold. The first is to offer a three-factor assessment to govern the assessment of legacy conduct. The intent is to

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at the hands of Android: there were simply too many other manufacturers making too many smartphones at too many price points that Apple could not or would not match, which would inevitably lead to developers fleeing iOS and Apple fighting for its life.

16. iClarified, *The History of the Smartphone Market From 2005-2012 [Chart]*, ICLARIFIED (Mar. 21, 2013), <https://www.iclarified.com/28457/the-history-of-the-smartphon-e-market-from-20052012-chart/> [https://perma.cc/V7Y4-X724].

17. S. O'Dea, *iPhone users as share of smartphone users in the United States 2014-2021*, STATISTA (Mar. 31, 2021), <https://www.statista.com/statistics/236550/percentage-of-us-popu-lation-that-own-a-iphone-smartphone/> [https://perma.cc/H8UM-TYET].

18. See Def. Apple's Opp'n to Epic Games Mot. for T.R.O. and Order to Show Cause Why a Prelim. Inj. Should Not Issue at 4, *Epic v. Apple*, Case No. 4:20-cv-05640-YGR (N.D. Cal. Aug. 21, 2020) ("[I]n 2016, Apple lowered its commission from 30% to 15% on subscriptions that renew after the first year."). Recently, however, Apple has reduced the fee to 15 percent for developers that earn less than \$1 million annually. See, e.g., Tim Higgins & Sarah E. Needleman, *Apple Slashes App Store Fees for Smaller Developers*, WALL ST. J., Nov. 18, 2020, <https://www.wsj.com/articles/apple-under-antitrust-scrutiny-halves-app-store-fee-for-smaller-developers-11605697203/> [https://perma.cc/R6DU-J9JF].

19. See *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts . . . because knowledge of intent may help the court to interpret facts and predict consequences."). See also *Kimble v. Marvel Entertainment*, 135 S. Ct. 2401, 2408 (2015)

Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by 'taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect.' *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L.Ed.2d 199 (1997).

establish a reliable, and systematic, heuristic to guide agencies and courts and to contend that legacy evidence, when applicable, should be an integral part of antitrust fact finding. The second is to assert that legacy conduct instituted long before a firm achieved substantial market power (particularly at the time of entry), which is common across competitors within a relevant market,<sup>20</sup> should be taken as evidence that the practice is highly likely to be procompetitive. Consequently, defendants should be afforded a substantially reduced burden in proving the restraint is procompetitive under a rule of reason analysis commensurate with the strength of the legacy evidence.

This Article proceeds in four Parts. Part I provides background on the rule of reason framework and the role of presumptions in administering antitrust cases—focused primarily on the Sherman Act.<sup>21</sup> Presumptions aid courts in navigating the often difficult task of weighing the potential anticompetitive and procompetitive effects from various business practices. The discussion will tee up how an analysis of legacy business practices fit into the larger rule of reason framework.

Part II proposes and develops a justification for applying a three-factor assessment to evaluate legacy conduct. The first factor determines whether a practice was instituted before substantial market power was achieved, and, if so, how long before. The second factor considers the commonness of a practice within a relevant market. Do competitors across the market power spectrum engage in the same, or similar, practices? If so, when did the other competitors adopt the practice? What level of market power do those competitors have, or did have, when they adopted the practice? The third factor examines whether there is credible evidence that market conditions have changed to the degree that the prior procompetitive justification no longer obtains (or is, at the very least, significantly weaker). Taken together, these factors offer courts a framework to determine how much weight to afford a firm’s procompetitive justification for a particular restraint.

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20. *Brown Shoe v. United States*, 370 U.S. 294, 293-294 (1962); *See United States v. E. I. Dupont*, 351 U.S. 377, 395 (1956) (explaining a “relevant market” is a specific legal and economic construct designed to delineate the competitive boundaries of a playing field, so courts can assess the competitive effects of a disputed practice); *See generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007) (providing a review of various economic approaches to delineate relevant markets).

21. *See* 15 U.S.C. § 1 (2018) (“Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *see also* 15 U.S.C. § 2 (2018) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .”).

Part III considers when there are sufficient elements to establish a marginal presumption that a given practice is likely to be procompetitive.<sup>22</sup> In practice, this proposal would not disturb the three-step rule of reason framework.<sup>23</sup> Rather, it would impact the degree and quality of proof required at each step—particularly at the stage where defendants offer a procompetitive justification.<sup>24</sup> Legacy should be considered a fact in favor of defendants, which ought to be afforded weight in proportion with the strength of the legacy evidence. Courts routinely establish presumptions in order to operationalize the rule of reason framework and economize on a cost-benefit assessment of a restraint—as the goal is to determine whether the restraint is reasonably necessary to achieve greater output, lower costs, enhanced quality, and greater innovation.<sup>25</sup>

Part III also discusses a key caveat and a moral hazard concern regarding this proposal. The caveat is that courts should only consider the commonness of a practice when it is within a relevant market, that is, intra-

22. See Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards*, (SSRN, Working Paper Nov. 6, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3068157/](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068157/) [<https://perma.cc/4UR4-69KL>] at 45 (stating that within the rule of reason framework, a “marginally procompetitive presumption would place only a marginal ‘thumb on the scale.’”).

23. See *Ohio v. Amex*, 138 S. Ct. 2274, 2284 (2018) (“To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies.”). See also Herbert Hovenkamp, *The Rule of Reason*, 70 FLA L. REV. 81, 103–04 (2018). See *infra* Section I.A. for a detailed discussion of the administration of the rule of reason framework.

24. See *Cal. Dental Ass’n. v. Federal Trade Com’n*, 119 S. Ct. 1604, 1617 (1999) (quoting Professor Phillip Areeda’s insight that “[t]here is always something of a sliding scale in appraising reasonableness. . . .”). See also PHILLIP AREEDA, *AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 302 (1978) (“The law might vary the necessary proofs . . . according to the sanctions at issue and according to the relationship of the defendant’s power to his conduct.”). Cf., Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1771 (1994) (explaining that:

[T]o determine the substantive economic effect of defendants’ conduct . . . the courts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed analysis because their competitive impact is more ambiguous.

25. See, e.g., Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 9 (1984) (“The judge should employ some presumptions and filters that will help to separate pro- and anti-competitive explanations.”); JONATHAN B. BAKER, *THE ANTITRUST PARADIGM* 74 (2019) (“Many of the rules that courts have developed for deciding antitrust cases can be interpreted as presumptions.”). See also Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors: Causes and Consequences*, 23 GEO. MASON L. REV. 1205 (2016) (describing how presumptions can evolve over time including the rise and fall of antitrust safe harbors).

market commonness—not whether it is also common across other industries or markets, that is, inter-market commonness. This is not to suggest inter-market commonness is irrelevant for the decision-maker or for antitrust policy more generally—far from it—but, as far as implementing a presumption founded on legacy considerations in a particular case, it should be based on intra-market practices. The basic rationale is that inter-market use of a practice is more likely to violate the *ceteris paribus* assumption and have confounding factors that make the information value noisier.

The moral hazard concern is that having a marginally procompetitive presumption could incentivize firms to stick with a legacy practice—even if it would be welfare-enhancing to deviate from it—lest the firms lose the benefit of reducing the burden of production to demonstrate efficiencies. In other words, can such a presumption inefficiently disincentivize innovative or evolutionary business practices? While a legitimate concern, ultimately, the disincentive effects are likely to be minimal because the alternative is that the practice is considered under a full rule of reason. Thus, if a practice is truly welfare-enhancing, then the firm will have ample opportunity to demonstrate that in court.

Finally, Part IV evaluates recent cases that involved issues of legacy conduct. The first case is *Ohio v. American Express*, where the Supreme Court ruled that American Express' ("Amex") anti-steering provision was not an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.<sup>26</sup> The Court began its assessment by noting that Amex had its anti-steering provision in place since the 1950s.<sup>27</sup> The second case is *Federal Trade Commission (FTC) v. Qualcomm*, where the FTC alleged that Qualcomm engaged in anticompetitive licensing practices regarding its modem chipsets and standard essential patents (SEPs).<sup>28</sup> While the case involves a fairly intricate theory of harm, a central element of Qualcomm's defense was that it had engaged in the same licensing practice for three decades—namely charging an ad valorem royalty rate (an amount based on the value of the product) on the final price of the mobile phone.<sup>29</sup> The third case is *Broadcast Music v. Columbia Broadcasting System*, which involves

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26. 138 S. Ct. at 2274 (2018). Anti-steering provisions prevent merchants from incentivizing cardholders to switch to a different credit card at the point-of-sale (namely, to a card that the merchant pays a lower transaction, or "swipe," fee).

27. *Id.* at 2283 ("Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants.").

28. 969 F.3d 974 (9<sup>th</sup> Cir. 2020).

29. Opening Brief for Appellant Qualcomm at 27, *F.T.C. v. Qualcomm*, 969 F.3d 974 (9<sup>th</sup> Cir. Aug. 23, 2019) (No. 19-16122) ("Qualcomm has not changed its practices. It has always recovered the value of its intellectual property through OEM licensing, while (as a result) its chip rivals have had only non-exhaustive access to its SEPs.").

a “compromised” legacy.<sup>30</sup> The case is best known for the Supreme Court’s ruling that collective, “blanket” music licenses for the copyrighted works of member artists is not a per se illegal price fixing scheme.<sup>31</sup> It is perhaps less well known that the formation of these music licensing collectives in the early 20<sup>th</sup> century was almost immediately challenged by the Department of Justice (DOJ) as anticompetitive.<sup>32</sup> This led to a series of consent decrees designed to minimize the potentially harmful effects of these collectives, while preserving the potential benefits from economizing on transaction costs.<sup>33</sup> When the Court assessed the antitrust claims of the plaintiff, Columbia Broadcasting System (CBS), in 1979, it properly afforded no weight to the long history of the licensing practice—as the collective action behind the formation of these licensing cooperatives surely gave them substantial market power. Thus, blanket licenses were never a legacy practice in the first place, as defined in this Article.

Ultimately, legacy and commonness are important to the extent that they give information to antitrust decisionmakers. In the language of empirical economics, legacy conduct provides “time series” data, and commonness provides “cross sectional” data.<sup>34</sup> If a practice has both a long legacy and is common across firms within a market, then there is “panel” data.<sup>35</sup> The fundamental idea is that if the evidence leads to opportunities to reduce judicial burdens without substantially sacrificing accuracy, whether it be for finding harm or showing benefits, then we should explore those possibilities.

## I. RULE OF REASON AND PRESUMPTIONS IN ANTITRUST

This Part provides a brief background on the three-step rule of reason framework utilized by courts to administer antitrust cases that fall outside of a per se condemnation. In order to prevent each antitrust inquiry from turning into a full-blown cost benefit analysis and the associated administrative costs, courts have adopted presumptions to help assess various business practices. What is of particular interest, for the purposes of

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30. 999 S. Ct. 1551 (1979).

31. *Id.*

32. *Id.*

33. *Id.*

34. See ORLEY ASHENFELTER, PHILLIP B. LEVINE, & DAVID J. ZIMMERMAN, STATISTICS AND ECONOMETRICS: METHODS AND APPLICATIONS 246 (2003) (explaining time series data as a set of time ordered observations of the same variable, such as the price of a product over time); *id.* at 262 (explaining cross-sectional data is a set of observations for multiple subjects at a point in time, such as the price of a product on a given day for all the firms in the market).

35. See *id.* (explaining panel data is a set of observations for multiple subjects over time).

this Article, is how presumptions are formed and changed. What type of evidence is required? This will inform the subsequent discussion regarding if or when courts should use presumptions as it relates to legacy conduct.

A. *The Three-Step Rule of Reason Framework*

U.S. antitrust laws are governed under the consumer welfare standard.<sup>36</sup> Under this standard, courts assess the legality of various practices, whether it be for mergers, joint ventures, or unilateral conduct, based on the ultimate impact on consumers and the competitive process. Since the beginning, antitrust laws have always had an adaptability driven by new economic learning and insights.<sup>37</sup>

Within this standard, certain types of conduct are considered per se illegal as they are almost always harmful to consumers and the competitive process.<sup>38</sup> The canonical example is price fixing among rivals—as there is little redeeming social value in allowing competitors to set the joint terms of trade to the detriment of consumers.<sup>39</sup> Of course, some categories of coordination, such as, joint ventures and other cooperatives, can lead to innovative products that would not exist but for the coordination and, thus, are not per se illegal.<sup>40</sup>

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36. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (“A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”). *See also Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (explaining the consumer welfare standard as the “lodestar that shall guide the contemporary application of the antitrust laws”). *See generally* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405 (2013) (detailing the evolution of antitrust jurisprudence to the current consumer welfare standard).

37. *See, e.g., Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–60 (1933) (explaining that antitrust laws have always had an evolutionary character that is more in-line with the common law: “As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”); *United States v. Topco*, 405 U.S. 596, 620–21 (1972) (Burger, J., dissenting) (“Senator Sherman [stated] ‘I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.’” (quoting 21 *Cong. Rec.* 2457, 2460)).

38. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432–36 (1990).

39. *See United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150 *passim* (1940).

40. *See, e.g., Broadcast Music v. Columbia Broadcasting System*, 999 S. Ct. at 1564 (“Joint ventures and other cooperative arrangements are also not usually unlawful, at least not

Everything outside of a per se condemnation, however, falls under the rule of reason umbrella.<sup>41</sup> Conceptually, this means the conduct is neither per se illegal nor per se legal. In practice, rule of reason is more of a “sliding scale.”<sup>42</sup> Depending on the nature of the conduct and established precedents, the slide can move very close to a per se condemnation<sup>43</sup> or to one closer to a per se legality.<sup>44</sup>

While the plaintiff always maintains the burden of persuasion, in order to administer the rule of reason, courts have developed a three-step burden shifting framework.<sup>45</sup> Step One is a determination of whether there is harm to competition from a practice,<sup>46</sup> where the burden of production is on the plaintiff. If this burden is met, then the plaintiff has met its *prima facie* burden. In Step Two, the burden of production shifts to the defendant, who

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as price-fixing schemes, where the agreement on price is necessary to market the product at all.”); *American Needle v. National Football League*, 130 S. Ct. 2201, 2206–07 (2010) (ruling that NFL merchandise licensing activities, when coordinated across all the teams in the league, should be considered under a rule of reason).

41. See *Standard Oil Co. v. United States*, 222 U.S. 1, 58 (1911); *Cal. Dental Ass’n*, 526 U.S. 756, at 758 (1998) (“What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”). Notably, one could frame per se illegality as a presumption within a larger rule of reason framework. See also Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107, 2117 (2017) (“A more precise statement of the ‘per se rule,’ for example, is ‘per se unreasonableness’—an application of the rule of reason that involves an irrebuttable presumption that the conduct is highly likely to unreasonably restrain competition.”); GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST 277* (2020) (calling the per se rule “a special case of the rule of reason.”).

42. See *Cal. Dental Ass’n v. Federal Trade Com’n*, 526 U.S. 1604, 1617 (1999).

43. See, e.g., *Nat’l Soc’y of Pro. Engineers v. United States*, 435 U.S. 679 (1978). See also Hovenkamp, *supra* note 23, at 128 (“While the Court [in *Engineers*] did not speak of a ‘quick look’ or articulate its mode of analysis, it was clearly applying something that fell between per se and full rule of reason analysis.”).

44. See, e.g., *Verizon Commc’n v. Law Off. of Curtis Trinko*, 124 S. Ct. 872, 881 (2004) (“[T]he few existing exceptions from the proposition that there is no duty to aid competitors.”).

45. See, e.g., *Amex*, 138 S. Ct. at 2284. See generally Hovenkamp, *supra* note 23, at 103–04.

46. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (explaining that anticompetitive harm is an injury that impairs the competitive process, which focuses on consumers and not competitors); see also *id.* (“The antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (“[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.”).

offers evidence of procompetitive efficiencies.<sup>47</sup> Finally, if such efficiencies are identified, the burden of production shifts back to the plaintiff in Step Three to argue that the benefits from Step Two could be achieved through less restrictive means. There is arguably a Step Four, where the court weighs these various effects.<sup>48</sup>

The three-step rule of reason framework is a useful paradigm for courts to order and consider the various anticompetitive and procompetitive evidence. Yet, this ordering is more of a conceptual idea rather than a strict blueprint on how cases proceed.<sup>49</sup> For example, if there is a strong efficiency justification, then this will color how courts will consider the anticompetitive harm and vice versa. Inevitably, there will be a degree of backwards induction, where the defendant will anticipate the plaintiff's rebuttal in Step Three and, thus, will incorporate that anticipated rebuttal in Step Two. In turn, in Step One, the plaintiff will anticipate and incorporate the defendant's rebuttal to the rebuttal.<sup>50</sup> All the while, the court is likely continually updating its priors, perhaps in a Bayesian manner, based on the evidence developed at each stage.

### B. *Developing Presumptions*

While the basic infrastructure and scaffolding of an antitrust case is the three-step burden shifting framework, how do courts actually weigh all the various pieces of evidence? One approach is to explicitly consider all the relevant benefits and costs from a given practice. Even so, rarely would such an exercise boil down to a precise mathematical balancing.<sup>51</sup> On this point, Judge Robert Bork explained that “[w]eighing effects in any direct sense will

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47. See generally Gavil & Salop, *supra* note 41, at 2110:

The plaintiff, public or private, must meet an initial burden of production sufficient to show that the conduct is likely to be anticompetitive. If it makes that showing, the burden of production shifts to the defendant, who can undermine the plaintiff's evidence . . . and/or offer affirmative evidence showing a recognized procompetitive justification likely to eliminate any anticompetitive tendency of its conduct.

48. See Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50–55 (2019).

49. See, e.g., Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 373 (2016) (“[B]alancing is a very poor label for what courts actually do.”).

50. *Id.* at 381 (“[W]hen the government makes a prima facie case, it already takes into account what might be considered ‘ordinary’ or typical efficiency gains that mergers are likely to produce.”).

51. See, e.g., Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 139–140 (2017) (“[T]he rule of reason asks only which competitive effect from a restraint predominates . . . the determination of a restraint's predominant effect on competition need not be quantitative or precise.”).

usually be beyond judicial capabilities.”<sup>52</sup>

Given the limitations of courts, and even agencies, to fully consider the benefits and costs of a given practice, the real question for antitrust jurisprudence is how to best determine the impact of various practices on consumer welfare knowing these limitations.<sup>53</sup> This is where presumptions come into play.<sup>54</sup> When should courts adopt presumptions, and, given a presumption, how should courts assess their efficacy and value? Currently, the most widely held normative approach is the error cost framework.<sup>55</sup> This involves considering the administrative cost savings as well as the probability and costs of falsely condemning a procompetitive practice, that is, a Type I error, against the probability and costs of improperly allowing anticompetitive practices, that is, a Type II error.

Under this framework, the clearest case for implementing a presumption is when it would lower administrative costs while not changing, or even perhaps lowering, the likelihood of a false positive or negative.<sup>56</sup> The harder cases are when presumptions significant lower administrative costs while increasing the likelihood of either a false positive or negative. Naturally, presumptions should be based on readily available information.<sup>57</sup>

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52. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 230 n.11 (D.C. Cir. 1986).

53. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983). As Justice (then Judge) Breyer stated:

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

54. *See generally* Salop, *supra* note 22, at 3 (“Many antitrust presumptions are based on and represent the court’s view of the likely competitive impact of a category of restraint inferred from market facts.”).

55. *See* Easterbrook, *supra* note 25, at 4. *See generally* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

56. *See* Jonathan B. Baker, *Promoting Innovation Competition through the Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495, 495 (1999) (“[I]n some cases bright-line rules can reduce the transactions costs of operating the judicial system without markedly increasing the likelihood or costs of judicial errors.”).

57. *See id.* at 495–96 (“The key to developing good truncated rules is to base them on readily observable conduct whose presence or absence is highly correlated with the conclusion a court would reach were it to conduct a full analysis.”). *See also* C. Frederick

What is the impact of a presumption on error costs?<sup>58</sup> These debates are almost never ending<sup>59</sup> and have only intensified with the growth of digital markets.<sup>60</sup> Undoubtedly, a principled presumption has to be based on some estimate on error costs: the better the estimate, the better the presumption. For example, economic research—both theoretical and empirical—can be a catalyst to either develop new presumptions, discard old ones, or defend existing ones. The point is that courts need some basis to adopt or modify a presumption that go beyond mere conjecture and speculation.

One of the most fundamental presumptions is that conduct should be considered under a different lens when a firm has substantial market power.<sup>61</sup> This presumption is logically based on the recognition that the presence of substantial market power implies a non-trivial probability that business practices can be used to achieve anticompetitive ends—whereas, without market power, these practices are not able to achieve that same effect. A related presumption is that courts can infer substantial market power from market shares.<sup>62</sup> Thus, in monopolization cases, a plaintiff can meet its prima

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Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999) (detailing decision theory and the process of making decisions with imperfect information).

58. This Article uses the phrase “error costs” to broadly capture both the social harm from a false positive or negative as well as the probability that the error will occur.

59. See, e.g., Dennis W. Carlton & Robert H. Gertner, *Intellectual Property, Antitrust, and Strategic Behavior*, 3 INNOVATION POL’Y & ECON. 29, 47 (2003) (“Analyses and arguments over the choice of the best rule for particular types of conduct have filled volumes of law and economics journals.”).

60. See, e.g., Gavil & Salop, *supra* note 41, at 2112 (“Continued reliance on what are now exaggerated fears of ‘false positives,’ and failure adequately to consider the harm from ‘false negatives,’ have led courts to impose excessive demands of proof on plaintiffs that belie both established procedural norms and sound economic analysis.”); Majority Staff House Report, *supra* note 11, at 395 (“Furthermore, the Subcommittee should examine the creation of a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller, and a market share of 25% or more constitute a rebuttable presumption of dominance by a buyer.”).

61. See *Broadcast Music v. Columbia Broad. Sys.*, 99 S. Ct. 1567 at 1567 (“And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.”). See also *Areeda*, *supra* note 24, at 301 (“A given act might be significantly anticompetitive only when the actor possesses substantial market power.”). See *infra* Section II.A for a detailed discussion of antitrust market power.

62. See, e.g., *Baker*, *supra* note 25, at 74 (“In monopolization cases . . . courts often presume that defendants with high market share have monopoly power[.]”). Importantly, while market share is often used as a proxy for market power, it is only that—a proxy. See *W. Parcel Express v. UPS*, 190 F.3d 974, 975 (9th Cir. 1999) (finding that although a firm owns a dominate share in the market, it does not possess market power unless there are significant barriers to enter that market); see also *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005).

facie burden by (a) showing high market shares and (b) demonstrating that the conduct at issue “has a tendency to be anticompetitive.”<sup>63</sup>

In sum, substantial market power gives a firm the “capability” to inflict antitrust injury under the Sherman Act. However, what if the firm engaged in the same practice before and after obtaining market power? While this fact does not negate the proposition that the practice, coupled with market power, can be used for an anticompetitive end—all else equal, it reduces the likelihood. In effect, the presence of legacy lowers the suspicion relative to the counterfactual where the practice was solely adopted after the firm achieved market power. The history of a firm’s conduct *is* the empirical evidence that is directly applicable to case, market, and industry at hand. This is the “time series” data. A fuller discussion of presumptions for legacy conduct is reserved for *infra* Section III.A.

## II. THREE FACTOR ASSESSMENT OF LEGACY CONDUCT

At the core of antitrust law is an attempt to understand the effect of various business practices on consumer welfare. Given this objective, a rule of reason analysis can involve intricate economic modeling and empirical studies, which significantly increase litigation and administration costs.<sup>64</sup> Consequently, courts benefit from having reliable, conceptual guidelines to evaluate conduct without having to generate a full welfare analysis from the ground up for each case.

This Part explores whether examining the history and commonness of a practice reduces litigation costs without increasing judicial error. While the role of legacy is already part of antitrust, its use is often without a clear blueprint.

In *Grinnell*, the Court explicitly invoked legacy when it explained what is required if conduct is to be considered an antitrust violation under a monopolization claim: “The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant

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63. See Gavil & Salop, *supra* note 41, at 2116.

Courts also recognized that a plaintiff could meet its burden of production for competitive harm with a ‘double inference’: courts could infer market power from high market shares and other factors in a defined market; combining this inference with conduct that has a tendency to be anticompetitive, competitive harm could then be inferred—precisely because that tendency increases in the presence of market power.

64. See, e.g., Note, *A Suggested Role for Rebuttable Presumptions in Antitrust Restraint of Trade Litigation*, 1972 DUKE L.J. 595, 596 (1972) (“Thus, the typical suit involves the presentation by the Government or by a private party plaintiff of a massive collection of material, a presentation by the defendant of equally massive amounts of rebuttal material, followed by an exhaustive legal-economic analysis of all the evidence by the court.”).

market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>65</sup> This oft-quoted language is central to our understanding of the enforcement of antitrust law. In essence, legitimately obtained market power, in of itself, is not a violation.<sup>66</sup>

According to *Grinnell*, legitimate market power is business success “as a consequence of a superior product, business acumen, or historic accident.” Could practices that were in place well before “the possession of monopoly power” be reasonably considered part of the growth or development of product as a consequence of superior product, business acumen, or historic accident? This is the key question and a potential justification for a procompetitive presumption for firms who have market power and are accused of engaging in unreasonable restraints of trade.

This Part proposes three considerations that should govern the proper assessment of cases involving legacy conduct under a rule of reason: (1) the genesis of a practice and its relationship to when a firm obtained market power; (2) the commonness of the practice within the market at issue; and (3) the degree to which market conditions have changed over time and whether such changes weaken efficiency claims that may once have been compelling. While we can never reduce uncertainty to zero,<sup>67</sup> these factors can help courts reduce the need for more costly and complex analyses.

#### A. *Factor One: Genesis*

Legacy conduct can serve as a defense under the Sherman Act, Section 2 because the conduct was practiced before substantial market power was achieved by the firm.<sup>68</sup> Historic information can provide valuable insight

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65. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

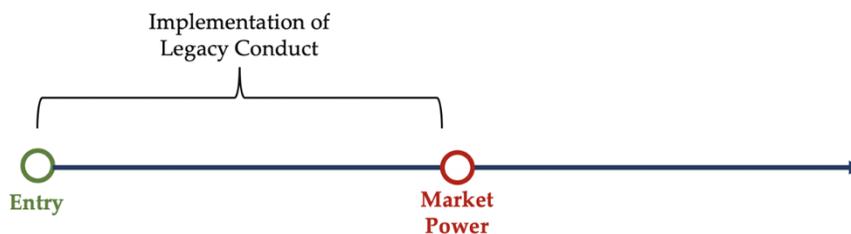
66. *See also* *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179–83 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 60–62 (1911); *United States v. United States Steel Corp.*, 251 U.S. 417, 450–51 (1920); *United States v. Int’l Harvester Co.*, 274 U.S. 693, 708 (1927); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 429–32 (2d Cir. 1945); *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“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.”).

67. *See, e.g.*, Joseph Farrell, *Complexity, Diversity, and Antitrust*, 51 ANTITRUST BULL. 165, 170 (2006) (“[I]n a complex market, even diligent enquiry will not bring the posterior probability close to zero or to one: there will often be irreducible uncertainty, as scholars in complexity science stress.”).

68. *Cf.*, Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 324 (2012). Nevertheless, competition law should not somehow declare closed platforms illegal, or make every successful platform a utility. There

into a business practice and, in particular, whether its use is efficient and procompetitive, rather than anticompetitive. To that end, determining precisely *when* the practice was implemented—relative to when a firm achieved market power—is the first consideration. Figure 1 provides a visualization of this idea.

Figure 1: Business Practice Over Time



All practices that are implemented before a firm achieves market power are legacy practices. Of course, this begs the question: what is “market power”? Within antitrust, the term means more than simply having control over one’s own price—as most firms with differentiated products have this ability.<sup>69</sup> Rather, it is the ability to control significant parts of commerce within a relevant product market, which includes the ability to raise the market price and exclude competitors.<sup>70</sup> Thus, the term “monopoly” does

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must be important allowances for both non-arbitrary exclusion and for platforms that are closed or semi-closed to begin with, and stay that way. The platform that declares itself closed from the outset does not gain the advantages of inviting development on an open platform.

69. See Benjamin Klein, *Market Power in Aftermarkets*, 17 *MANAGERIAL & DECISION ECON.* 143, 156 (1996)

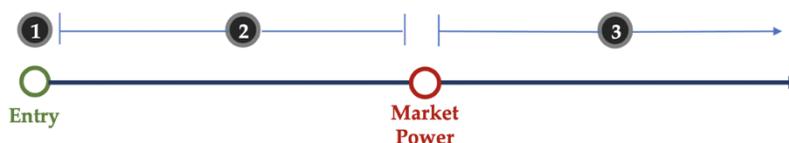
[I]nstead of defining the degree of antitrust market power possessed by a firm in terms of the firm’s *own* elasticity of demand, it is more useful to define a firm’s antitrust market power in terms of whether changes in the firm’s prices have any significant effect on *market* quantities and prices.

70. The threshold to have market power is not a specific market share number; although, courts and agencies use a general rule of thumb of fifty percent or more in a well-defined relevant market. See FED. TRADE COMM’N, *GUIDE TO ANTITRUST LAWS: SINGLE FIRM CONDUCT: MONOPOLIZATION DEFINED*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined/> [https://perma.cc/T22H-M69U] Courts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power—that is, the long term ability to raise price or exclude competitors. . . . In addition, that leading position must be sustainable over time: if competitive forces or the entry of new firms could discipline

not necessarily mean a single seller but a firm with substantial and durable market power.

The reality is that market power is a continuum with no set threshold. Nonetheless, a central component of monopolization claims under Section 2 of the Sherman Act involves precisely this question: does a firm have substantial market power or not?<sup>71</sup> With this question in mind, we can delineate the establishment of a practice into three possible zones of implementation.

*Figure 2: Zones of Implementation*



The first zone captures practices that are associated with market entry. All else equal, this is where a legacy defense would be the strongest.<sup>72</sup> The second zone is still legacy conduct, but the strength of the legacy diminishes as the gap between implementation and the obtaining of market power gets smaller.<sup>73</sup> Finally, the third zone represents practices implemented after market power is achieved. These are not legacy practices. Similar to the second zone, for the third zone, the gap between market power and implementation might matter. An example of a practice implemented in the third zone is Microsoft's response to Netscape's entry, documented in *U.S. v. Microsoft*, which involved, inter alia, exclusive agreements and tying.<sup>74</sup> Of course, even if a practice is instituted after substantial market power is

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the conduct of the leading firm, courts are unlikely to find that the firm has lasting market power.

71. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71.

72. *See Areeda, supra* note 24, at 301 (“If a practice can be harmful, the magnitude of the firm’s power bears on the magnitude of the harmful effects. And the less the actor’s power, the greater the likelihood that any claimed legitimate purpose is the defendant’s true motivation and the conduct’s true effect.”).

73. Implementing a practice in the second zone does not necessarily mean the legacy defense is more marginal. For instance, suppose a firm entered and did not do all that well for a while, but then employed the practice at issue and its success skyrocketed. Thus, focusing solely on practices that facilitated the original entry can be unduly limiting.

74. *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001).

achieved, this does not create a presumption of anticompetitive harm. For instance, the practice could be a procompetitive response to entry, which benefit consumers while harming less efficient rivals.<sup>75</sup>

We can think of condemning a practice as anticompetitive as weighing two outcomes—the gains from stopping the practice if it is anticompetitive (G) and the social loss from stopping the practice if it is actually procompetitive (L):  $EV = pG + (1-p)L$ , where  $p$  is the probability that the practice is anticompetitive.<sup>76</sup> Under this simple framing, agencies and courts should intervene when the expected value (EV) is positive. Various evidence, however, can provide us with insights into the values of G, L, and  $p$ . All else equal, the longer and stronger the legacy (that is, the greater the gap between implementation and market power), the lower the probability that the practice is anticompetitive,  $p$ .

In *Epic v. Apple*, Apple instituted the App Store and its various policies one year after its entry. Thus, Apple's practices would be considered to have occurred in the second zone of Figure 2 (though pretty close to the first zone). Did Apple have substantial market power in 2008? This is the key consideration in assessing the relevance of legacy conduct—as it is for virtually all Sherman Act allegations. Assuming Apple did not have substantial market power in 2008, then the App Store policies of exclusivity and a 30 percent transaction fee would be considered legacy practices.<sup>77</sup> While Apple has modified its App Store policies since 2008, the changes have been to loosen the original restrictions rather than implement new ones.<sup>78</sup>

There are two possibilities for a practice that was instituted long before a firm achieved substantial market power. The first is that the practice was procompetitive and remains procompetitive. The second is that the practice

75. See, e.g., *Olympia Equip. Leasing v. W. Union Tel.*, 797 F.2d 370, 375 (7th Cir. 1986) (“[T]he emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency.”).

76. Farrell, *supra* note 67, at 169.

77. Sven B. Völcker & Daniel Baker, *Why there is No Antitrust Case against Apple's App Store, A Response to Geradin & Katsifis*, working paper at 6, July 26, 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3660896](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660896) [<https://perma.cc/PS7J-LCNL>]

Apple has consistently applied a commission since the launch of the App Store in 2008, shortly following the release of the original iPhone in 2007. At that point, by definition, Apple lacked market power. . . . Indeed, it is a hallmark of effective competition that commercial terms do not change depending on the market power of the actor.

78. *Id.* at 7 (“The few changes that Apple has made to its App Store policies—notably the reader rule and lower rates for subscriptions—have tended to facilitate competitive entry and expansion of third-party apps on the iOS platform rather than the reverse.”).

was procompetitive and is now anticompetitive.<sup>79</sup> This latter possibility is similar to a point made by Justice Antonin Scalia when he wrote his dissent in *Eastman Kodak*.<sup>80</sup> While Justice Scalia was not discussing legacy practices per se, he highlights the fundamental point that the same practice can have different effects depending on the level of market power.<sup>81</sup>

Certainly, an exclusive agreement practiced by a monopolist should be viewed through a different lens due to the monopolist's market position and ability to exclude others. Yet, there is no magical mechanism that moves a previously procompetitive practice to an anticompetitive one.<sup>82</sup> The possibility remains that a previously procompetitive practice remains procompetitive. That is the point of assessing legacy. It is one thing to implement a new practice after achieving substantial market power, and it is quite another to have implemented that same practice before reaching the aforementioned market power. Assessing legacy offers more information to a court and can lower the probability that a practice is anticompetitive.<sup>83</sup> The ultimate goal of assessing the strength of a legacy practice is not to prove that it is procompetitive but to add an element to a court's inquiry.

#### B. *Factor Two: Commonness*

The second consideration in assessing legacy business practices is determining its commonness or ubiquity. What information does commonness give to courts? Even on its own, commonness indicates a

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79. Of course, this is a simplification. A practice could be competitively neutral both before and after market power—such as being part of a price discrimination scheme. *In Re Brand Name Prescription Drugs Antitrust Litigation*, 288 F.3d 1028 (7th Cir. 2002).

80. *Cf. Eastman Kodak v. Image Technical Services*, 112 S. Ct. 2072, 2093 (1992) (“Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”).

81. In fact, initially, Kodak did not have its restrictive policy regarding aftermarket servicing. Indeed, the fact that it changed its policy is what led to the litigation and, ultimately, liability. *Id.* Of course, the facts in *Kodak* are the opposite of maintaining a legacy practice that gets challenged only after the firm obtains market power.

82. For instance, undoubtedly, a diaper manufacturer with a ninety percent share that uses exclusive agreements presents very different issues from a manufacturer that has a ten percent share. In this assessment, however, efficiency justifications are materially more credible if the manufacturer with a ninety percent share originally implemented the agreements when it had a ten percent share.

83. *Cf., Gavil & Salop, supra* note 41, at 2117 (“In moving away from reliance on bright line approaches, the courts continued to use probability assessments to apply the rule of reason flexibly, depending on the strength of the evidence presented by the parties and by recognizing appropriate presumptions.”).

practice has the potential to be welfare-enhancing and not associated with attempts to maintain or expand antitrust market power. Some academics have even suggested that ubiquitous practices used *across* markets should be given considerable leeway when considering antitrust liability.<sup>84</sup> Further, the U.S. antitrust agencies also highlight the relevance of ubiquity when assessing a business practice as it relates to intellectual property (IP) bundling.<sup>85</sup> A fortiori, these arguments would hold for ubiquitous practices *within* a market. Even falling short of ubiquity, practices that are common can indicate, with very little informational requirements, the potential to be efficient and beneficial to social welfare. A key caveat, however, is that commonness cannot be the result of industry coordination.<sup>86</sup>

The primary informational value from commonness is foundationally based on whether a practice is observed across the market power spectrum. If only firms with substantial market power engage in a specific practice, then this can create a much different prior than if the practice is used by smaller and dominant firms alike. This observation is not infallible,

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84. See, e.g., Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundles Discounts: An Experimental Analysis*, 75 ANTITRUST L.J. 399, 406 (2008) (“[I]t seems unwise to condemn a ubiquitously used business practice because of a possibility of harm that is not formally modeled, much less empirically demonstrated.”); Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, 1 COMP. POL’Y INT’L 115, 145–46 (Autumn 2005) (“[W]ithout a reliable way to distinguish pro- and anticompetitive uses, any rule that condemns ubiquitous business practices without a showing of likely harm to competition would result in the widespread condemnation of efficient practices.”).

85. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, 114 (2007)

[A]s a matter of their prosecutorial discretion, the Agencies will apply the rule of reason when evaluating intellectual property tying and bundling agreements. Given the ubiquitous use of these arrangements by businesses lacking in market power and the efficiencies that such arrangements can often entail, these practices usually are not anticompetitive.

86. See *infra* Section IV.C. discussion of *Broadcast Music* and *NFL v. Ninth Inning*. See also Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 ANTITRUST L.J. 659, 661 (2001) (“[I]n general, the laws treat collective action differently (more harshly) than unilateral action, implicitly adopting the view that collective action is more likely to create a competitive harm than is the action of a single firm.”). If there is a coordination concern, then, naturally, commonness could be an indicator coordination rather than efficiency. See *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705, 2719 (2007) (“Resale price maintenance, it is true, does have economic dangers. . . . For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel.”). See also Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984) (discussing how the uniformity of a vertical control could be an indicator of collusion).

however. Additionally, a lack of commonness is not necessarily an indicator of something amiss.<sup>87</sup> As Professor Joseph Farrell provocatively asks, “Isn’t diversity of approach one of the benefits of competition?”<sup>88</sup> Further, industry-wide practices might not signal an efficient practice but rather a practice that thrives due to coordination—either explicitly or tacitly.<sup>89</sup> With these caveats in mind, observing that firms with and without market power engage in the same, or very similar, practices can strongly suggest a procompetitive rationale.

An example of a case that involves a common, or even near ubiquitous, practice is the FTC’s Google Search investigation from 2010 to 2013.<sup>90</sup> The agency investigated a series of antitrust allegations including “search bias,” a term used to indicate anticompetitive misbehavior on the part of Google in terms of how it displays its search results. The FTC ultimately closed its investigation, as did several State Attorneys Generals.<sup>91</sup> Yet, in 2015, the European Commission (EC) issued formal charges against Google alleging search bias and fined Google 2.42 billion euros for abuse of dominance in Google Shopping.<sup>92</sup> The issue of search bias, and more generally platform

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87. See *FTC v. Qualcomm*, 969 F.3d 974, 990–91 (“Furthermore, novel business practices—especially in technology markets—should not be ‘conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.’ *Microsoft*, 253 F.3d at 91 (citing *N. Pac. Ry. Co.*, 356 U.S. at 5, 78 S. Ct. 514).”). See also Ronald H. Coase, *Industrial Organization: A Proposal for Research*, in 3 *ECONOMIC RESEARCH: RETROSPECT AND PROSPECT: POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION* 66, 68 (Victor R. Fuchs, ed., 1972) (“[T]he association of the study of industrial organization with antitrust policy has created a disposition to search for monopolistic explanations for all business practices whose justification is not obvious to the meanest intelligence.”).

88. See, e.g., Farrell, *supra* note 67, at 166; see Farrell, *supra* note 67, at 168 (“Diversity is most valuable in complex markets, because in simple markets everyone knows what to do.”).

89. See, e.g., *Nat’l Football League’s Sunday Ticket Antitrust Litig. v. DirecTV, LLC*, 933 F.3d 1136 (9th Cir. 2019) (demonstrating competing corporations working together to exclusively license a bundled NFL Sunday Ticket package rather than individually licensing their games); *Ice Cream Liquidation, Inc. v. Land O’Lakes, Inc.*, 253 F. Supp. 2d 262 (D. Conn. 2003) (showing conspiracy among dairy cooperatives to inflate the wholesale price of dairy used to make ice cream through a manipulation of the price formula used across the industry).

90. FED. TRADE COMM’N, FILE NO. 1110-0163, STATEMENT REGARDING GOOGLE’S SEARCH PRACTICES, IN THE MATTER OF GOOGLE INC. (Jan. 3, 2013).

91. The states of Texas and Ohio closed their respective investigations in 2014. Zach Miners, *Ohio Closes Google Antitrust Investigation*, PCWORLD (Feb. 9, 2015), <https://www.pcworld.com/article/2882072/ohio-closes-google-antitrust-investigation.html> [<https://perma.cc/H93J-Y3MV>].

92. European Commission Press Release, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own

bias, continues to garner significant antitrust attention.

Since Google introduced its online search engine in 1998, it has undergone numerous technological and design changes.<sup>93</sup> One of the most prominent changes, and the basis for much of the antitrust allegations, occurred in 2007, when Google introduced the concept of “universal search.”<sup>94</sup> Universal search involves the integration of specialized (or “vertical”) search results, which are results within a narrow category such as news, videos, and local businesses, with the unadorned “horizontal” search results, that is, the plain blue links. Google created a composite results page combining these two types of search results. The primary antitrust concern was that Google was favoring its own specialized search results (e.g., YouTube, Google Maps), which necessarily pushes down the blue links of sites with competing content (e.g., Yelp, TripAdvisor).

In 2007, Google likely already had substantial market power, so universal search is not a legacy practice. However, the practice was soon adopted by other search competitors, including Bing, Yahoo, and DuckDuckGo, and now is ubiquitous across search engines.<sup>95</sup> Of course, precisely how each search engine engages in the practice matters immensely.<sup>96</sup> Nonetheless, the fact that a search engine such as DuckDuckGo, which has no market power, also utilizes universal search is important. While it does not prove Google’s implementation of universal search is definitely procompetitive or legal under the antitrust laws, it provides valuable information that the practice has the potential to increase welfare and gains from trade given its ubiquity.

Like legacy, commonness can be helpful in assessing probabilities.

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Comparison Shopping Service (June 27, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm) [<https://perma.cc/6U8R-B6BY>]. Christian Bergqvist, *The Google I Decision in a Nutshell*, (Dec. 19, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3090645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090645) [<https://perma.cc/3VB2-LRYT>].

93. See *From the Garage to the Googleplex*, GOOGLE, <https://www.google.com/intl/en/about/our-story/> [<https://perma.cc/SXP2-D3LN>] (discussing Google’s evolution over the years).

94. Danny Sullivan, *Google Launches “Universal Search” & Blended Results*, SEARCH ENGINE LAND (May 16, 2007), <http://searchengineland.com/google-20-google-universal-search-11232/> [<https://perma.cc/L3VE-A49N>].

95. For example, on Google, Bing, Yahoo, and DuckDuckGo, the query “bbq restaurants near me” (searched on Jan. 21, 2021, at 1:20 pm EST in Arlington, VA) all produced search results pages that prominently featured a map with restaurant locations—along with pictures and reviews for those various restaurants. Apparently, however, based on the results, DuckDuckGo prefers Korean BBQ over American BBQ.

96. See, e.g., Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence* (George Mason Law and Econ. Research Paper Series, No. 12–14, 2011) (describing a study that found that Bing preferences its own content more than Google).

When a practice is common across the market power spectrum—particular a practice that is virtually ubiquitous—then this lowers the likelihood of anticompetitive harm,  $p$ , from the practice and likely raises the social loss from stopping the practice if it is actually procompetitive ( $L$ ). Thus, coupled with a long legacy, widespread market use of a practice gives even further information that a practice is more likely to be procompetitive than if the practice was neither longstanding nor ubiquitous.

This is an argument that Apple arguably could make in the *Epic* case—with some important complications. The primary competitor to examine is Google with its Android operating system and policies regarding the Google Play Store. While Google is more permissive in its app store policies,<sup>97</sup> the effect on the platform does not seem to be materially different.<sup>98</sup> For instance, in 2018, when Epic launched Fortnite on Android, it initially chose to bypass Google Play entirely.<sup>99</sup> However, Epic’s announcement created uncertainty and immediate questions.<sup>100</sup> Eventually, Epic chose to move Fortnite to the Google Play Store after complaining that Android warnings and other hinderances “puts software downloadable outside of Google Play at a disadvantage.”<sup>101</sup>

What to make of these facts? While Google’s policy is not as restrictive

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97. Users can download apps onto Android phones without going through the Google Play Store, which is called “sideloading.” See, e.g., Chris Hoffman, *5+ Ways to Install Android Apps on Your Phone or Tablet*, HOW-TO GEEK, July 11, 2017, <https://www.howtogEEK.com/161366/5-ways-to-install-android-apps-on-your-phone-or-tablet/> [<https://perma.cc/J6KE-S7TU>]. However, users must go through a series of steps to alter their phone settings to allow for sideloading, which could expose them to risk. *Id.* (“Note that this can be a security risk, as it allows installation of apps from outside the Play Store, which could potentially contain malware. If you enable this setting, it’s your job to install applications responsibly—stay away from pirated games and other apps that may contain Android malware.”).

98. See Damien Geradin & Dimitrios Katsifis, *The Antitrust Case Against the Apple App Store*, (Tilberg Univ. Working Paper No. 035, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3744192](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744192) [<https://perma.cc/69ZP-NWE7>], at 9 (“Google, on the other hand, does not prohibit alternative app stores, and users may choose to use e.g., Samsung’s Galaxy Store or Aptoide. However, users rarely do so in practice, instead preferring to access apps through the pre-installed Google Play.”).

99. Nick Statt, *Fortnite for Android Will Ditch Google Play Store for Epic’s Website*, THE VERGE (Aug. 3, 2018), <https://www.theverge.com/2018/8/3/17645982/epic-games-fortnite-android-version-bypass-google-play-store/> [<https://perma.cc/V2NV-Z2Q7>].

100. *Id.* (“Reasonably, there are some concerns about how exactly this will work, and whether it opens up Android users to any potential security or data privacy risks since running third-party software outside the Play Store involves removing certain protections on Android devices.”).

101. Lucas Matney, *Epic Games Launches Fortnite on the Google Play Store and They’re Not Happy About It*, TECHCRUNCH, Apr. 21, 2020, <https://techcrunch.com/2020/04/21/epic-games-launches-fortnite-on-the-google-play-store-and-theyre-not-happy-about-it/> [<https://perma.cc/EC24-HAJ9>].

as Apple's, all apps must effectively go through the Google Play Store. With this policy in place, Android grew its share from zero percent in 2009 to its current market leading position.<sup>102</sup> Thus, both Google and Apple obtained their market leading positions, overtaking incumbents Nokia and Motorola, with similar practices regarding how third-party software is downloaded and interacts with their respective mobile operating systems. Can these same practices now be a violation of U.S. antitrust laws based on a reduction in consumer welfare? There are certainly arguments to be made by both sides to address this question; however, explicitly weighing legacy and commonness can aid in that determination.

### C. Factor Three: Changing Market Conditions

The third consideration when assessing legacy practices is whether market conditions have sufficiently changed as to make the initial procompetitive justification(s) no longer valid. This factor is really an extension of examining the genesis of a practice. While the first factor is primarily concerned with comparing two events, that is, (a) when a practice was implemented and (b) when a firm achieved market power, this second factor gets at the heart of the procompetitive justification.

Particularly in dynamic industries, there can be regulatory, legal, and technological changes that render a previously legitimate justification invalid. For instance, suppose that, shortly after entering, a seller implemented exclusive agreements with distributors to solve a free-rider problem. Without the exclusives, distributors would use the seller's promotional data to help sell other products for which the distributor enjoyed a higher margin. If, over time, the industry solves this free-rider problem without exclusives—for instance, with a big data analytical approach, then the original exclusivity justification is no longer valid.<sup>103</sup>

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102. See, e.g., iClarified, *supra* note 16 (showing the smartphone market over time); John Callahan, *From Android Market to Google Play: A Brief History of the Play Store*, ANDROID AUTHORITY, (Mar. 6, 2017), <https://www.androidauthority.com/android-market-google-play-history-754989/> [<https://perma.cc/MCF3-56F7>] (discussing the trajectory of the play store).

103. One real-world example of changing market conditions is the shifting landscape to license music, which was the subject of *Broadcast Music v. CBS*, 999 S. Ct. 1551. While music cooperatives such as BMI and ASCAP can significantly lower transaction costs, recent changes in digital technology appear to be weakening this justification. See Bruce H. Kobayashi, *Opening Pandora's Black Box: A Coasian 1937 View Of Performance Rights Organizations In 2014*, 22 GEO. MASON L. REV. 925, 926 (2015) (describing how "recent attempts by large music publishers to withdraw their 'new media' rights from the [music cooperatives] . . . can be explained by the lower costs of market transactions brought on by digital technology.").

In some instances, examining the commonness of a practice (factor two) can indirectly address this question of whether market conditions have sufficiently changed. If firms without market power also presently engage in the same practice, then this fact points to a significantly greater likelihood that the practice is being used for procompetitive purposes—rather than harming competition.

As for the App Store, how much has changed since 2008? Are market conditions different? If so, in what way? Fundamentally, since its introduction, the iPhone is a “closed system.” This means that its primary components, that is, hardware, operating system, and app delivery, are tightly controlled by one entity, in this case, Apple.<sup>104</sup> In fact, Apple’s closed nature is arguably part of its “brand.”<sup>105</sup> In the early 2000s, there were strong normative priors among some antitrust scholars that open systems were superior to closed ones as measured by consumer welfare.<sup>106</sup> The intuition is straightforward: open systems represent modularity, flexibility, and freedom, while closed systems represent uniformity, control, and captivity.

Yet, the success of the iPhone and its closely controlled delivery has put a damper on that ideal.<sup>107</sup> Market experience has demonstrated that strong vertical controls and governance over one’s “system” is not necessarily a sign of market power and, most certainly, is not necessarily a

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104. See, e.g., Jonathan Zittrain, *A Fight Over Freedom at Apple’s Core*, FINANCIAL TIMES, Feb. 3, 2010, [https://www.ft.com/content/fcab720-10fb-11df-9a9e-00144feab49a/\[https://perma.cc/M9CW-QKT2\]](https://www.ft.com/content/fcab720-10fb-11df-9a9e-00144feab49a/[https://perma.cc/M9CW-QKT2]) (“Despite outsiders being invited to write software, the iPhone thus remains tightly tethered to its vendor—the way that the Kindle is controlled by Amazon.”). The distinctions between open and closed systems, however, are not always clear cut. See Hanno F. Kaiser, *Are “Closed Systems” an Antitrust Problem?*, 7 COMP. POL’Y INT’L. 91, 94 (2011) (“Open versus closed is therefore not a binary distinction but a matter of degree. All real-world systems are open in part and closed in others.”).

105. See, e.g., Zittrain, *supra* note 104 (“‘We define everything that is on the phone,’ said Mr. Jobs. ‘You don’t want your phone to be like a PC. The last thing you want is to have loaded three apps on your phone and then you go to make a call and it doesn’t work any more.’”).

106. See, e.g., TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 6 (2010) (“History shows a typical progression of information technologies . . . from a freely accessible channel to one strictly controlled by a single corporation or cartel—from open to closed system.”); Carlton & Gertner, *supra* note 59, at 31–32 (“We argue that winners in early stages of competition often have the incentive and ability to close the system and thereby reduce subsequent competition.”).

107. See, e.g., Thompson, *supra* note 15 (“The App Store changed all of that: Apple effectively extended the trust it had earned with users over the years to all developers in the App Store. Users could install whatever they wanted, confident the app would not mess up their phone, rip them off, or be a virus.”); Majority Staff House Report, *supra* note 11, at 17 (acknowledging that since its launch “in 2008, the App Store revolutionized software distribution on mobile devices, reducing barriers to entry for app developers and increasing the choices available to consumers.”).

sign of anticompetitive injury. Fundamentally, a closed system is one where the proprietor implements strong vertical restraints as part of its governance of the platform or ecosystem—often coupled with a degree of vertical integration. As Hanno Kaiser explains: “In its path-breaking 1977 *Sylvania* decision, the Supreme Court acknowledged that modular market structures are also vulnerable to systemic market failures stemming from transaction costs, lack of coordination, opportunism, free-riding, and double marginalization among others.”<sup>108</sup> As with almost every economic organization, there are trade-offs between open and closed systems. While strong vertical restraints such as absolute control over all downloaded software on the iPhone restricts, by its very nature, the freedom of some suppliers to do what they want, the procompetitive effects from such a restraint could be significant.<sup>109</sup>

Thus, returning to our question, arguably, market conditions are changing, but in a manner that would suggest greater concern for privacy violations and software intrusions rather than less.<sup>110</sup> A closed system such as the iPhone can internalize and prevent negative externalities that could be present in more open systems.<sup>111</sup> Further, research suggests that the 30 percent ad valorem tax on each transaction in the App Store has no impact on the final price that consumers pay.<sup>112</sup>

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108. Kaiser, *supra* note 104, at 95.

109. See, e.g., Kevin J. Boudreau & Andrei Hagiu, *Platform Rules: Multi-Sided Platforms as Regulators*, in *PLATFORMS, MARKETS, AND INNOVATION* 163, 163 (Annabelle Gawer, ed., 2009) (describing the fall of Atari’s dominance in video games in the 1980s “because it had not developed technology for locking out unauthorized games, Atari was unable to prevent the entry of opportunistic developers, who flooded the market with poor-quality games.”).

110. Cf., Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RESEARCH CENTER, Nov. 15, 2019, <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/> [https://perma.cc/H3JC-NUZW] (detailing how many users feel an overall lack of control over their online privacy).

111. See Kaiser, *supra* note 104, at 99

[L]ow-quality contributors do not fully internalize the costs that they impose on the more committed platform participants and might therefore have incentives to release poor products, turn a quick profit, and have other platform constituents suffer the consequences. Quality control has thus long been recognized as a bona fide business justification for vertical restraints and refusals to deal.

112. See Bruce H. Kobayashi & Joshua D. Wright, *What’s Next in Apple Inc. v Pepper? The Indirect-Purchaser Rule and the Economics of Pass-Through*, *CATO SUP. CT. REV.* 249, 266 (2018–19) (finding that Apple’s ad valorem royalty rate does not cause a pass-through charge to iPhone users compared to a world with a competitive app store market).

### III. CONDITIONS TO JUSTIFY A PROCOMPETITIVE PRESUMPTION, A CAVEAT, AND AVOIDING MORAL HAZARD

#### A. *When a Procompetitive Presumption is Merited*

In current policy discussions regarding the digital economy, there is certainly no shortage of proposals for new presumptions to make it easier for plaintiffs to win.<sup>113</sup> It is easy to understand why. There is a sense that “big tech” platforms are getting too big and powerful.<sup>114</sup> Certainly, presumptions allow courts to more nimbly navigate through often complex business practices and economize on the weight of evidence needed to make sound decisions.<sup>115</sup> Yet, presumptions need to be grounded in market realities.

This leads to the question: What legal treatment should legacy and common or ubiquitous conduct receive? This Article proposes that a structured inquiry into the genesis, commonness, and consistency of the practice and market conditions should be integrated into each step of the rule of reason framework. Further, this Article proposes that legacy business conduct that (i) was instituted long before a firm achieved substantial market power—particularly at the time of entry—and (ii) is common across competitors and degrees of market power indicates that the practice is likely to be procompetitive, though not inevitably so. When these conditions are satisfied, defendants should be afforded a substantially reduced burden in proving efficiencies under a rule of reason analysis commensurate with the

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113. See, e.g., Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets*, 2020, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) [https://perma.cc/Z8RV-YSGM], at 395 (“[T]he Subcommittee should examine the creation of a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller . . . .”); STIGLER COMM. ON DIGIT. PLATFORMS, FINAL REPORT (2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> [https://perma.cc/A98F-LK27] at 93 (recommending that legislation “implement a recalibration . . . by prescribing rebuttable presumptions that would ease the high proof requirements currently imposed on antitrust plaintiffs and place on defendants a more rigorous burden of proving efficiencies.”).

114. See generally John M. Yun, *Does Antitrust Have Digital Blind Spots?*, 72 S.C. L. REV. 305 (2021) (detailing and assessing some of the bases premises and priors of those advocating for more aggressive antitrust in the digital sector).

115. See, *infra* Section I.B. See also Easterbrook, *supra* note 25, at 14 (“Courts should use the economists’ way out. They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability.”).

strength of the legacy evidence—that is, they should be afforded a marginally procompetitive presumption.

A parallel can be found in the evidentiary standards under the Sherman Act, Section 1, to determine whether observed parallel conduct across firms within a market stems from collective action or from unilateral decisions. The type of circumstantial evidence which can be used to establish collective action are referred to as “plus factors.” These are factors that tip the scale in favor of finding coordination—acting, in a sense, like a tiebreaker.<sup>116</sup>

Notably, this proposal falls short of a rebuttable presumption of legality.<sup>117</sup> Part of the reason is practical. While this Article has argued that considering the three-factor approach to legacy conduct economizes on adjudicating complex antitrust cases, a legacy review still involves some degree of inquiry and fact-finding. Thus, in practice, this proposal would not disturb the three-step rule of reason framework, but it would impact the degree and quality of proof required at each step. The argument being made here is that, if a specific fact pattern emerges after examining a practice’s legacy, commonness, and consistency, then this should be considered probative evidence that the practice is procompetitive.<sup>118</sup>

116. See, e.g., William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 393 (2011) (“Plus factors are economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.”).

117. If one accepts Judge Easterbrook’s conjecture that false positives (that is, falsely condemning procompetitive practices) are more harmful in antitrust than false negatives (that is, improperly allowing anticompetitive practices)—and not all do—then, arguably, an alternative proposal is to raise the standard of proof for plaintiffs to something stronger than the preponderance of the evidence. See Joshua Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 YALE L.J.F. 622 (2021) (demonstrating that Easterbrook’s Theorem can seamlessly interface with the existing antitrust infrastructure without disrupting established standards and presumptions).

118. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 399 (2003) (suggesting that commonness, in the context of exclusive dealing, should play an important role for courts. In fact, they argue that commonness across industries is sufficient to grant a procompetitive presumption:

Balancing the costs and benefits of an exclusionary practice that also has efficiency characteristics may well be beyond the capacity of the courts. But here is a possible approach. If the practice is one employed widely in industries that resemble the monopolist’s but are competitive, there should be a presumption that the monopolist is entitled to use it as well. For the widespread adoption of the practice implies that it has significant economizing properties, which implies in turn that to forbid the monopolist to use it will drive up his costs and so (if they are marginal costs) his profit-maximizing monopoly price. The burden should shift to the plaintiff to show that, nevertheless, forbidding the use of the practice will offset the effect of the prohibition on the monopolist’s costs by increasing the rate or speed of new entry. Or, if this is deemed too difficult an issue for a

Specifically, this presumption would have the most impact in Step Two, where the defendant is tasked with presenting evidence that the conduct promotes efficiency.<sup>119</sup> Legacy conduct and commonness would be evidence supporting the defendant's claim. By this point in the proceeding, the question of market power and the potential for the practice to harm consumers will have already been addressed. Having a marginally procompetitive presumption would naturally lighten the burden of production for the defendant to provide a cognizable efficiency justification.<sup>120</sup> The plaintiff in Step One will have (or should have) presented a coherent theory of harm. Whether the legacy and commonness of a practice helps a decisionmaker assess the validity of efficiency arguments will depend on the particular case, and perhaps there will be instances where a legacy determination is not particularly relevant. Such a scenario, however, would seem to be uncommon, given that the history and current use of a practice offer courts real-world information to validate theories of harm and efficiencies. Even if a practice does not fit neatly into a long legacy which is common across the market power spectrum, there is still value in weighing these considerations and adjusting the burden of production according to the strength of the evidence.

*B. A Caveat: Intra-Market v. Intra-Market Commonness*

What if a particular type of conduct is common across industries but not within an industry? That is, what if there is inter-market commonness but little intra-market commonness? For example, suppose that a particular type of vertical restraint such as exclusivity, resale price maintenance (RPM), or

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court to resolve, proof that the challenged practice is widespread in competitive industries should be a complete defense.

119. Notably, as discussed in *infra* Section I.B., in practice, these various steps are all of one piece in determining the legality of a practice. As Gregory Werden clarifies: The popular notion that the rule of reason admits an “efficiencies defense” is misleading because efficiency, as such, cannot justify a restraint. An admissible justification must be a variation on theme that the restraint, when properly viewed, actually promotes competition. Every cognizable justification is a fact-based narrative about the competitive process in which the restraint makes the defendant, or the market as a whole, work better to serve customers. GREGORY J. WERDEN, *THE FOUNDATIONS OF ANTITRUST* 255–56 (2020).

120. This point is strengthened if we recognize the difficulty in providing efficiencies. *See, e.g.,* Carlton, *supra* note 86, at 675 (“Efficiencies are hard to measure, and the benefit of the doubt should go to defendants, not to plaintiffs; otherwise, the continued generation of the large efficiency benefits responsible for raising our standards of living will be jeopardized.”). Of course, just because efficiencies are hard to measure does not mean they are there and are substantial.

bundling is common in similar, albeit different, relevant markets? Certainly, inter-market commonness provides some information about the merits of a practice, and academic policy debates routinely appeal to inter-market commonness when forming presumptions—particularly for vertical restraints.<sup>121</sup> These debates are important as they can lead courts to change legal rules regarding specific conduct, such as moving practices like minimum RPM, maximum RPM, and tying away from a strict per se condemnation to something less.<sup>122</sup>

The question, however, is whether inter-market commonness, coupled with legacy, should be used to establish a procompetitive presumption for a specific case. There are good arguments against this prescription. Inter-industry experiences do less work in helping assess the legality of conduct for a specific case and market.<sup>123</sup> Each market is different, and prior studies that give a broader sense of various restraints are unlikely to perfectly map to the market at issue. Further, each manifestation of conduct is different, e.g., exclusively can differ based on length, scope, and repercussions from violations. Of course, there are also differences across firms within a market but, all else equal, the ability to discern and factor those differences are likely significantly less burdensome than looking across firms in different markets.

In sum, while understanding inter-market commonness is critical for antitrust policy, it is arguably less useful for shifting or reducing the burdens of production for a particular case. Thus, a key caveat is that courts should only consider common or ubiquitous conduct when it is *within* a relevant market, not whether it is also common *across* other industries or markets. This is not to suggest inter-market commonness is irrelevant as an indicium of a procompetitive practice, particularly as it pertains to antitrust policy more generally. But, as far as implementing a legal presumption, the strongest case is for intra-market practices. In essence, this caveat is baking

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121. See, e.g., Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 471 (2001) (“Moreover, in formulating a rule, the prevalence of tying for procompetitive reasons is an important consideration. Because beneficial tying is so pervasive, rules against tying could be harmful even with a small rate of falsely labeling tying as anticompetitive.”).

122. See generally *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (moving minimum RPM away from a per se condemnation to a rule of reason); *State Oil Co. v. Khan*, 522 U.S. 3, 15–18 (1997) (moving maximum RPM away from a per se condemnation to a rule of reason); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–16 (1984) (narrowing the scope of a per se condemnation of tying).

123. See, e.g., Baker, *supra* note 25, at 86 (“This literature mistakenly infers that firms cannot readily use these practices to harm competition, either at all or on balance after accounting for efficiencies.”).

in the principle of subsidiarity.<sup>124</sup>

*C. Does a Marginally Procompetitive Presumption Create a Moral Hazard Problem?*

If a firm enjoys a marginally procompetitive presumption for a legacy business practice, then this, in a sense, provides some degree of “insurance” to the firm from antitrust liability—as long as it keeps the practice relatively the same. Consequently, a firm might be reticent to change a legacy practice, lest it lose its insurance. In other words, the procompetitive presumption would create a moral hazard problem.<sup>125</sup> This is certainly a potential concern.<sup>126</sup>

We can consider the problem with a simple example. Suppose that a firm with market power has restrictive terms of service that include a requirement of exclusivity to interface with its product, but the exclusivity provision has remained unchanged since the firm first entered the market. Given a procompetitive presumption, let us assume that the probability of antitrust liability from continuing the practice is ten percent and damages would be \$500 if the firm was found liable. Further, suppose that the firm enjoys an incremental profit of \$1,000 each period that is directly attributable to the exclusivity provision. In expectation, the firm’s expected damages from antitrust liability are fifty dollars (= \$500 x 0.10). Given that the benefit of the practice is \$1,000 and the cost (in expectation) is fifty dollars, it is optimal for the firm to continue to engage in the practice.

Now suppose that the firm is contemplating an expansion of the scope of the exclusivity, such as including another class of consumers. This expansion would negate the legacy protection and, consequently, would

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124. Subsidiarity is “the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country.” *Subsidiarity*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/subsidiarity/> [<https://perma.cc/9J8Q-TKR6>] (last visited Oct. 6, 2021).

125. See, e.g., Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. ECON. 541, 541 (1979) (“Moral hazard refers here to the tendency of insurance protection to alter an individual’s motive to prevent loss.”).

126. There is also the possibility that firms, anticipating perhaps becoming very successful, will inefficiently adopt anticompetitive practices “early,” thereby creating a track record of legacy use and strengthening a procompetitive presumption. While possible, engaging in injurious practices without substantial market power is likely to hinder becoming very successful in the first place. Nonetheless, this could be a concern if the success of a product is in some ways “inevitable” and the only downside to instituting an anticompetitive practice too early is that it somewhat delays success but does not stop it or significantly reduce its likelihood.

increase the probability of liability to, let us assume, fifty percent. If we hold damages constant at \$500, then the expected damage would become \$250 (= \$500 x 0.50). This is a \$200 increase in the expected cost from engaging in the practice. If the additional benefit to the firm from making the change was less than \$200, then the firm would not make the change, even if it would increase social welfare. However, if the firm never enjoyed the legacy protection and always faced a probability of liability of fifty percent, then the firm would make the change. Why? Because, without the presumption, the probability of liability from the practice would be fifty percent both before and after the change.<sup>127</sup> Thus, the expected damage would be \$250 both before and after the change in conduct. Consequently, changing the exclusivity provision would not result in a change in expected antitrust costs. As long as the expected benefit from the change is positive, the firm will make the change.

Of course, the above example is highly stylized. If we introduce additional assumptions and values, we could get a different result. Nonetheless, it points to the fact that making any change that directionally is more restrictive can result in large increases in expected marginal costs because of the potential loss of the legacy protection. There are, however, a number of factors that potentially mitigate this concern.

First, this concern is only applicable when a practice becomes more restrictive. In contrast, a firm would still enjoy a marginally procompetitive presumption if it relaxed the restriction, which might eliminate any cause for a case in the first place. For instance, if Apple began to allow some limited distribution for software outside of the App Store, it would still enjoy a legal presumption for the software that still must go through the App Store. Thus, firms are certainly free to relax or even abandon a specific practice all together.

Second, the loss of a procompetitive presumption means the practice will be assessed under a fuller rule of reason. Consequently, practices that legitimately and significantly increase welfare for both consumers and producers will not be unduly disincentivized because firms will still have the ability to defend the conduct in court.

Finally, as with most legal rules, there are tradeoffs. The current per se illegality for price fixing almost certainly will prevent a few efficiency-enhancing practices from being implemented. Nonetheless, the per se rule minimizes administrative costs and avoids lengthy litigation over

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127. We could also incorporate a slightly higher probability of liability after the change, e.g., fifty-five percent instead of remaining at fifty percent.

determinations of market power and competitive effects.<sup>128</sup> Thus, while *per se* illegality may cause some false positives, the tradeoffs are almost certainly in favor of keeping the *per se* rule. Complex business practices often take a great deal of resources and time to explain in court, which increases the level of uncertainty and likelihood of errors. To the extent that legacy practices that were implemented well before market power was achieved and are ubiquitous within a market are generally procompetitive, having a marginally procompetitive presumption has the potential to significantly reduce administrative and legal costs without too much concern for perverse incentive effects.

#### IV. LEGACY CONDUCT IN RECENT ANTITRUST CASES

This Part examines a number of recent antitrust decisions that involve, to one degree or another, determining the legality of various legacy business practices. What emerges is that courts treat legacy issues somewhat indiscriminately and often fail to explicitly relate market power with the genesis of the practice (factor one). This indicates that a systematic framework for assessing legacy and commonness could materially facilitate a court's determination of antitrust liability.

##### A. *Ohio v. American Express*

In *Ohio v. American Express*, the Supreme Court considered the antitrust legality of Amex's "anti-steering" policy, which prohibits merchants from steering customers, at the point of sale, away from Amex to other credit cards.<sup>129</sup> For instance, suppose a customer at a high-end jewelry shop selects just the right Omega Seamaster watch and pulls out her American Express card. The merchant knows that he will have to pay a six percent transaction fee to Amex and therefore prefers to "steer" the cardholder to her Visa card, since the transaction fee will be something

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128. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable. . .").

129. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018)

If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee.

lower, say, four percent. This two percent differential will be split between the merchant and cardholder in some manner (perhaps with the merchant keeping most of the surplus). In order to prevent such behavior, Amex requires merchants who wish to be part of the American Express network to abide by its anti-steering provision.<sup>130</sup>

In a 5-4 decision, the Supreme Court affirmed the appellate court's decision and ruled that Amex's anti-steering provision did not violate Section 1 of the Sherman Act.<sup>131</sup> Writing for the majority, Justice Clarence Thomas observed that Amex had been using the same policy for over sixty years: "Amex has prohibited steering since the 1950s by placing anti-steering provisions in its contracts with merchants."<sup>132</sup> If we consider that Amex entered the credit card market in 1958,<sup>133</sup> the fact that the steering provisions have been in place since the 1950s suggest that they were present since the beginning. Before Amex's entry, credit cards were a nascent industry marked with some successes, such as the Diners Club, and many failures.<sup>134</sup> It was not until 1958, when American Express, Bank of America, and Chase Manhattan entered, that the industry achieved widespread profitability.<sup>135</sup>

At the time of the case, Amex's market share was 26.4%.<sup>136</sup> Visa, MasterCard, and Discover had a forty-five percent, 23.3%, and 5.3% share,

130. Amex does not prevent merchants from steering cardholders to other payment methods including cash, checks, or debit cards. *See id.* at 2283.

131. *Id.* at 2283 ("In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate § 1 of the Sherman Act."); *id.* at 2280 ("In this case, we must decide whether Amex's antisteering provisions violate federal antitrust law. We conclude they do not.").

132. *Id.*

133. *Our History*, AMERICAN EXPRESS, <https://about.americanexpress.com/our-history/> [<https://perma.cc/M83N-K4K9>] (last visited Oct. 6, 2021).

134. Timothy Wolters, "Carry Your Credit in Your Pocket": *The Early History of the Credit Card at Bank of America and Chase Manhattan*, 1 ENTER. & SOC'Y 315, 318-24 (2000).

135. Wolters summarizes the state of the early credit card industry:

Diners' Club became a profitable enterprise and remained so until the late 1960s. Commercial banks entered the charge card field in 1951. . . . Despite optimistic performance predictions, however, many of these early charge card programs suffered significant losses. . . . Such obstacles proved insurmountable for many of the early credit card programs, and by 1957, only twenty-seven banks continued to offer such plans to their customers. The following year, however, management at the two largest banks in the United States concluded that they could overcome these obstacles. . . . Those two banks were Chase Manhattan and Bank of America.

*Id.* at 322, 324.

136. *Ohio v. Am. Express Co.*, 138 S. Ct. 2247, 2282 (2018).

respectively.<sup>137</sup> While Visa and MasterCard also implemented anti-steering requirements for their merchants, they both entered into a consent decree prior to the Amex decision.<sup>138</sup> The practice, however, was not universal given that Discover did not adopt such a policy.<sup>139</sup> Of course, it is fairly easy to understand why Discover had no interest in adopting an anti-steering provision—Discover had some of the lowest swipe fees, so it stood to benefit the most from merchant steering.<sup>140</sup>

While the Court found the legacy of Amex’s anti-steering practices relevant enough to mention early in the decision, the Court never returned to it. Perhaps Justice Thomas felt the weight of the economic and legal evidence was sufficient to dismiss the anticompetitive claim without a need to explore the implications of its longstanding use.

Yet, the legacy of the conduct mattered to Amex, which prominently made note of it.<sup>141</sup> Amex also, unsurprisingly, characterizes the legacy practice as procompetitive.<sup>142</sup> It is important to note, however, the concession by Amex that it “strengthened these non-discrimination [anti-steering] provisions in the 1990s following successful campaigns by Visa to encourage merchant steering.”<sup>143</sup> This is highly relevant. Any change that strengthens the restrictions long associated with a business practice significantly mitigates legacy defenses along the lines of “we’ve always done this.” In effect, the legacy is “reset” if a business practice is made more restrictive. While this does not completely negate the relevance of previous legacy behavior, it puts a significant asterisk next to the defense, and courts should rightly reset the legacy clock.

The Court never fully addressed whether Amex had substantial market

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137. *Id.*

138. *Id.* at 2293 (Breyer, J., dissenting).

139. *Id.* at 2293–94 (Breyer, J., dissenting).

140. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 213 (E.D.N.Y. 2015) (“Discover pursued its low-price strategy by pricing its network services ‘very aggressively for merchants,’ setting all-in discount rates significantly below those of its competitors.”).

141. *See* Brief for Respondents at 1, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16–1454) (“For decades, these nondiscrimination provisions [anti-steering provisions] have enabled Amex to innovate and compete effectively against the dominant payment networks.”).

142. *Id.* at 5 (“Industry output has increased dramatically while Amex’s nondiscrimination provisions have been in place.”).

143. Brief for Respondents at 10, *Am. Express Co.*, 138 S. Ct. 2274 (No. 16–1454). This change was also noted by the Second Circuit. *See United States v. Am. Express*, 838 F.3d 179, 191 (2d Cir. 2016) (“These restraints, known as non-discriminatory provisions (‘NDPs’), had existed in Amex’s card-acceptance agreements in some form or another since the 1950s, but Amex tightened them considerably in the late 1980s and early 1990s to ensure that merchants could not state a preference for any payment-card network other than Amex.”).

power, although the district court concluded that it did.<sup>144</sup> Importantly, would the Court have treated the conduct differently if Amex more clearly had substantial market power—for example, if the case involved Visa rather than Amex? We can see why Amex’s strategy was to allege that, with a market share of less than thirty percent, it did not have market power. For vertical restraints, the law is quite favorable to such businesses accused of anticompetitive conduct,<sup>145</sup> and the Court may have concluded—at least implicitly—that Amex was legally blameless because it had too little market power to cause harm, irrespective of Amex’s legacy conduct defense.

Overall, the *Amex* decision illustrates a number of relevant considerations. First, both Amex and the Court prominently noted the legacy of the conduct, although the Court did not pursue it further. Second, whether a legacy practice has changed also matters. Finally, if it has not been proven that a firm has market power, then there is no point in dwelling on legacy, as arguments based on a lack of market power generally suffice to exonerate the defendant. If the firm is found to have substantial market power, however, or if it is unclear whether the firm possesses substantial market power, then legacy can play a valuable role in determining whether the conduct has contributed to the firm’s attractiveness and success in the marketplace, rather than being inherently objectionable under the antitrust laws.

#### B. *FTC v. Qualcomm*

Legacy also played a key role in *Qualcomm*.<sup>146</sup> The facts are more muddled, however, and the theory of harm is more multifaceted. The first legacy issue is Qualcomm’s historic practice of licensing its standard essential patents (SEPs) to original equipment manufacturers (OEMs) of mobile phones at a five percent royalty rate based off the price of the final

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144. *See* *Am. Express Co.*, 88 F. Supp. 3d at 151 (“American Express possesses sufficient market power in the network services market to harm competition. . . .”).

145. *See* *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) (stating that a vertical restraint “may not be a serious concern unless the relevant entity has market power”); *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348 n.18 (1982) (“[H]orizontal restraints are generally less defensible than vertical restraints.”).

146. *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2019).

device.<sup>147</sup> Qualcomm engaged in this practice for three decades.<sup>148</sup> The second legacy issue is Qualcomm's licensing policy regarding chipset suppliers, who compete with Qualcomm in providing chipsets to handset OEMs.<sup>149</sup> Qualcomm maintained that it had not changed its practice of licensing primarily to OEMs and only licensing to chipset suppliers if the license did not exhaust the patent.<sup>150</sup> Once the legal environment regarding patent exhaustion changed, Qualcomm stopped licensing to chipset suppliers.<sup>151</sup> Qualcomm put a great deal of weight on the fact that it felt these legacy practices were part of the reason why it grew its business and, more generally, the mobile handset industry. Importantly, these practices were instituted long before Qualcomm had market power in chipsets, which is the market that the FTC alleged was the root of Qualcomm's anticompetitive behavior.<sup>152</sup>

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147. See Opening Brief for Appellant Qualcomm at 14, *Qualcomm*, 969 F.3d 947 (No. 19–16122) (“By the time Qualcomm began selling chips, its model of licensing its technology to OEMs on the basis of the entire cellphone was already well established. . . . Qualcomm elected to maintain that model, and therefore sold its chips at prices that are independent of the licensing fees.”). More specifically, Qualcomm explains:

Over time, Qualcomm's licensing rates have been relatively stable . . . even as its patent portfolio has exploded in size and breadth. . . . In 1991, Qualcomm began licensing its full portfolio to OEMs, including SEPs and Non-SEPs, at around 5% of the net selling price of licensed cellphones. . . . More recently, Qualcomm established a 3.25% rate for a license to cellular SEPs only. . . . And, when Qualcomm recently added its 5G patents to the scope of its SEP licenses, it chose not to raise this rate despite the increased scope of the licensed technologies.

*Id.* at 16–17.

148. *FTC v. Qualcomm, Inc.* 411 F. Supp. 3d 658, 783 (N.D. Cal. 2019) (“A summary exhibit collecting Qualcomm's patent license agreements over the past 30 years shows that Qualcomm has consistently charged OEMs a 5% running royalty for licenses to Qualcomm's patent portfolio. . . . Qualcomm charged Siemens a 5% running royalty in 1996 and charged VIVO a 5% running royalty in 2015.”).

149. Chipsets, or “modem chipsets,” are essential components of mobile phones and allow the phone to communicate with cellular networks. Qualcomm began its foray into chipsets with the CDMA (“3G”) wireless standard and continued with the LTE (“4G”) standards. *Qualcomm*, 969 F.3d at 982.

150. Opening Brief for Appellant Qualcomm at 27, *Qualcomm*, 969 F.3d 947 (No. 19–16122) (“[Qualcomm] has always recovered the value of its intellectual property through OEM licensing, while (as a result) its chip rivals have had only non-exhaustive access to its SEPs.”).

151. *Qualcomm*, 969 F.3d at 984 (“OEM-level licensing allows these companies to obtain the maximum value for their patented technologies while avoiding the problem of patent exhaustion, whereby ‘the initial authorized [or licensed] sale of a patented item terminates all patent rights to that item.’ *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625, 128 S. Ct. 2109, 170 L.Ed.2d 996 (2008).”).

152. *FTC's Complaint for Equitable Relief* ¶ 86, *Qualcomm*, 411 F. Supp. 3d 658 (No.

The challenge is that Qualcomm's legacy arguments are not as clean as those that Amex made for its anti-steering provisions and Apple can make for the App Store. In effect, the FTC challenged whether these were legacy practices at all. Before addressing these arguments in depth, it is worth providing a little background on the case.

The case involves the interplay between two markets in which Qualcomm competes. In the first market, Qualcomm manufactures modem chipsets. In parallel, Qualcomm develops technologies that it hopes will be incorporated into various wireless communication standards set by standard setting organizations (SSOs), also known as standard development organizations (SDOs). SSOs can be thought of as matchmakers that bring together innovators and implementors in order to reduce uncertainty and thereby efficiently speed convergence towards a standard.<sup>153</sup> SSOs commonly declare certain patents as being essential to a given standard, and these are labelled "standard essential patents" (SEPs). Before a standard is adopted, and in order to get approval for the standard from the SSO, SEP holders typically agree to license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms.<sup>154</sup>

The allegation made by the FTC was that Qualcomm violated its commitment to license its SEPs on FRAND terms in two respects.<sup>155</sup> First, the FTC alleges that Qualcomm's royalty rate to its OEM customers was

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5:17-cv-00220) ("To maintain access to Qualcomm's baseband processors, OEMs have accepted royalty and other license terms that they would not otherwise accept."); *See also* Qualcomm, 969 F.3d at 994 (noting that evidence of alleged anticompetitive behavior occurred "in 1999, seven years before Qualcomm gained monopoly power").

153. *See* Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157, 183 (2015) ("SSOs . . . balance both sides of the market—that is, to attract contributors while balancing the needs of adopters."); *see also* Josh Lerner & Jean Tirole, *A Model for Forum Shopping*, 96 AM. ECON. REV. 1091, 1092 (2006) ("Despite the copious research on standards, little work has addressed the question of how SSOs should be organized or how firms should choose between competing SSOs.").

154. Much has been written regarding what "FRAND" precisely means. Ultimately, there is a compelling argument that FRAND is purposely vague. *See* Tsai & Wright, *supra* note 151, at 183 ("[T]he available data constitute a prima facie case against the presumption underlying some policy proposals that the incompleteness of SSO contracts represents market failure in need of regulatory gap-filling or expanded antitrust enforcement."). *See generally* Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1 (2005) (offering mechanisms to determine whether a royalty rate is "reasonable" and "non-discriminatory").

155. FTC's Complaint for Equitable Relief at 2, Qualcomm, 411 F. Supp. 3d 658 (No. 5:17-cv-00220); *FTC v. Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017.

supra-FRAND.<sup>156</sup> While the rate did stay the same in percentage terms, the FTC contends that, due to changing features of mobile phones and the composition of Qualcomm's patent portfolio, "a 5% royalty on a 2006 phone is not economically equivalent to a 5% royalty on a 2017 smartphone."<sup>157</sup> Second, the FTC claimed that Qualcomm's refusal to license to its chipset rivals, such as Intel and MediaTek, was a violation of its FRAND obligation.<sup>158</sup> Licensing SEPs to chipset suppliers is considered "component-level" licensing—whereas licensing to OEMs is considered "device-level" licensing.<sup>159</sup>

Importantly, the FTC also alleged that Qualcomm's FRAND violations

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156. FTC's Complaint for Equitable Relief at 3, *Qualcomm*, 411 F. Supp. 3d 658 (No. 5:17-cv-00220)

Qualcomm's 'no license-no chips' policy dramatically increases customers' costs of challenging Qualcomm's preferred license terms before a court or other neutral arbiter—including on the basis that those terms are non-FRAND—or to negotiate royalties in the shadow of such a challenge. This leaves Qualcomm's customers in a markedly different position than they would be in a typical patent licensing negotiation. As a result, Qualcomm's customers have accepted elevated royalties and other license terms that do not reflect an assessment of terms that a court or other neutral arbiter would determine to be fair and reasonable.

FTC v. *Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017, at 3 ("Qualcomm uses its dominant position in the CDMA and premium LTE chip markets to distort license negotiations and secure elevated non-FRAND royalties."); FTC v. *Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017, at 4 ("Qualcomm's conduct has raised its royalties above FRAND levels, so that the royalties incorporate an additional increment (or 'tax') reflecting Qualcomm's chip monopoly power.").

157. FTC v. *Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017, at 7 ("Moreover, Qualcomm assumes that if its rate was ever FRAND, it must remain FRAND today because it has not changed. But the complaint alleges that 'handsets today offer a number of features' not offered by older handsets, and 'many of Qualcomm's patents related to CDMA technology have expired.' (¶ 77.) Thus, a 5% royalty on a 2006 phone is not economically equivalent to a 5% royalty on a 2017 smartphone.").

158. FTC's Complaint for Equitable Relief at 3, *Qualcomm*, 411 F. Supp. 3d 658 (No. 5:17-cv-00220) ("Qualcomm has consistently refused to license its cellular standard-essential patents to its competitors, in violation of Qualcomm's FRAND commitments."); *id.* at 23 ("In breach of its FRAND commitments, at odds with its recognition that other industry participants 'will require' a license to its FRAND-encumbered SEPs, and in tension with its practice of securing patent licenses for the benefit of its own customers, Qualcomm has consistently refused to license its SEPs to competing suppliers of baseband processors.").

159. *FTC v. Qualcomm, Inc.* 411 F. Supp. 3d 658, 814 ("Licensing at the component level refers to licensing to modem chip suppliers."); *id.* at 755 ("To license at the 'device level' means to license the OEM, not the modem chip supplier.").

violated the antitrust laws.<sup>160</sup> How? While the full description of this theory of harm is fairly intricate, it largely amounts to a price squeeze.<sup>161</sup> By charging supra-FRAND rates on its SEPs to handset makers, in effect, Qualcomm was squeezing the margins of chipset rivals because the elevated licensing royalties to OEMs leave less money to pay for chipsets.<sup>162</sup>

The district court agreed with the FTC and ruled that Qualcomm violated its FRAND commitment and, in doing so, also violated Section 2 of the Sherman Act.<sup>163</sup> The court focused on Qualcomm's prior episodes of licensing to chipset rivals.<sup>164</sup> According to the court, Qualcomm had a prior profitable course of dealing with chipset rivals and withdrew that based on opportunism.<sup>165</sup> Therefore, the court concluded that Qualcomm had a "duty to deal" with its rivals under the doctrine established by the Supreme Court in *Aspen Skiing*.<sup>166</sup> The Ninth Circuit reversed this finding, stating it was

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160. *FTC v. Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017, at 17 ("Qualcomm's Refusal to License Competitors on FRAND Terms Is Anticompetitive."); *id.* at 24–25

Qualcomm uses its monopoly power to make OEMs pay a royalty overcharge—a tax—when buying modem chips from its competitors. Qualcomm further hampers those competitors by denying them the licenses it promised would be available on FRAND terms during standard setting. . . . Separately, those allegations present a forceful antitrust case.

161. A price squeeze is an antitrust theory of liability that is based on a vertically integrated firm (that is, a firm that has both upstream and downstream business units) (a) selling an input to a downstream competitor at an elevated price and, concurrently, (b) lowering its own downstream price in order to "squeeze" the margins of the downstream competitor. This makes life considerably more difficult for the competitor and can result in hampering their ability to compete on equal footing with the integrated firm in the downstream market. In a unanimous decision, the Supreme Court rejected the price squeeze theory. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 449–52, 457 (2009).

162. *See* Lindsey M. Edwards, Douglas H. Ginsburg & Joshua D. Wright, *Section 2 Mangled: FTC v. Qualcomm on the Duty to Deal, Price Squeezes, and Exclusive Dealing*, 8 J. ANTITRUST ENFORCEMENT 335, 337 (2019) ("[A] particularly troublesome error in the district court's opinion is the acceptance of a price squeeze theory directly contrary to the Supreme Court's holding in *Pacific Bell Telephone Co v linkLine Communications, Inc.*").

163. *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658, 811–12 (N.D. Cal. 2019).

164. *Id.* at 752 ("Qualcomm has previously licensed its modem chip SEPs to rivals and received modem chip-level (as opposed to handset-level) licenses to other patent holders' SEPs.").

165. *Id.* at 753 ("Qualcomm stopped licensing rival modem chip suppliers not because Qualcomm's view of FRAND changed, but rather because Qualcomm determined that it was far more lucrative to license only OEMs.").

166. *Id.* at 762 ("Accordingly, with all three factors from *Aspen Skiing* met, the Court concludes that Qualcomm has an antitrust duty to license its SEPs to rival modem chip suppliers."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, (1985).

inconsistent with the Supreme Court's actual ruling on duty to deal in *Aspen Skiing* and *Trinko*.<sup>167</sup> Thus, the appellate court concluded that Qualcomm had no obligation to license to chipset rivals.<sup>168</sup> Further, Qualcomm's patent-licensing royalties did not "impose an anticompetitive surcharge on rivals' modem chip sales."<sup>169</sup> Rather, the appellate court painted a narrative of frustration, both from OEMs and Qualcomm's chipset rivals, at Qualcomm's success.<sup>170</sup> Holding aside issues of a duty to deal, the district and appellate courts treated the two legacy issues very differently.

First, regarding the five percent royalty rate, while the district court acknowledged that the rate remained unchanged for over three decades, the district court judge agreed with the FTC that the quality-adjusted royalty rate had gone up rather than down due to the composition of Qualcomm's SEPs.<sup>171</sup> The problem is that in order for this inquiry into the royalty rate to be a relevant antitrust concern, the court must tie changes to the quality-adjusted royalty rate to Qualcomm's market power in chipsets, which the theory of harm requires.<sup>172</sup> Absent this explicit tie, at best, Qualcomm

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167. Qualcomm, 969 F.3d at 994

The district court's conclusion that Qualcomm's refusal to provide exhaustive SEP licenses to rival chip suppliers meets the *Aspen Skiing* exception ignores critical differences between Qualcomm's business practices and the conduct at issue in *Aspen Skiing*, and it ignores the Supreme Court's subsequent warning in *Trinko* that the *Aspen Skiing* exception should be applied only in rare circumstances. As a result, the FTC concedes error here. We agree.

168. *Id.* at 1005 ("Qualcomm's practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of § 2, as Qualcomm is under no antitrust duty to license rival chip suppliers.").

169. *Id.* ("Qualcomm's patent-licensing royalties and 'no license, no chips' policy does not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, these aspects of Qualcomm's business model are 'chip-supplier neutral' and do not undermine competition in the relevant antitrust markets.").

170. *Id.* at 985 ("Over the past several decades, as Qualcomm's licensing and modem chip businesses thrived and the company gained more and more market share, its OEM customers and rival chipmakers grew frustrated with the company's business practices.").

171. Qualcomm, 411 F. Supp. 3d at 783 ("Moreover, even though Qualcomm's share of SEPs is declining and Qualcomm's SEPs expire with successive standards, Qualcomm still maintains a constant royalty rate."); *id.* at 784 ("Qualcomm's royalty rate should not stay constant across standards when its patent portfolio has declined with successive standards.").

172. The idea is that, if the elevated royalty rate is due to Qualcomm's market power in chipsets, then royalty rates should be lower in periods when Qualcomm did not have market power in chipsets. This relationship between periods of market power and the royalty rate is precisely what Qualcomm's economic expert, Aviv Nevo, examined. Professor Aviv Nevo tested the hypothesis that, during periods when Qualcomm was alleged to have market power in chipsets, Qualcomm's actual, contractual royalty rates were higher than rates outside these periods. He concluded that the royalty rates did not increase with the advent of the CDMA standard or the LTE standard (two big changes in licensing periods). Transcript of

charged a higher real royalty over time, but there is no evidence the terms were ever supra-FRAND or related to Qualcomm's level of market power in chipsets.<sup>173</sup>

The FTC also asserted that, even if Qualcomm's percentage royalty rate had not changed over time, the rate was supra-FRAND if we consider that the features found on mobile phones have changed as well as the composition of Qualcomm's patent portfolio.<sup>174</sup> Thus, the idea is that Qualcomm should be receiving a lower royalty rate—not the same rate. Qualcomm responded that the value of its SEPs has only increased over time as cellular standards have changed and its portfolio has grown.<sup>175</sup> Ultimately, discerning the validity of these arguments from both the FTC and Qualcomm is quite difficult. Nonetheless, the practice of charging a fixed royalty rate based off a device's price had not changed.

The lesson is that the crucial aspect of examining legacy practices is its relationship to the market power that allegedly is fueling the theory of harm. Consequently, assessing Qualcomm's practices relative to its market power in chipsets is the critical question. Moreover, the argument that the per device royalty amount is increasing because the value of Qualcomm's SEPs has decreased is not a change in practice per se.<sup>176</sup> As Qualcomm's market power in chipsets waxed and waned, the fact that there was no policy change is highly relevant.

Second, regarding the practice of licensing to OEMs and only to chipset

Proceedings at 1865–75, Qualcomm, 411 F. Supp. 3d 658 (No. 5:17-cv-00220).

173. There is also a legitimate question of whether or not the quality of Qualcomm's SEPs declined over time. *See, e.g.*, Douglas H. Ginsburg & Joshua D. Wright, *A Bargaining Model v. Reality in FTC v. Qualcomm: A Reply to Kattan & Muris* 4–5 (May 15, 2019), <https://ssrn.com/abstract=3389476> (noting internal Apple documents supported the view that Qualcomm had, by far, the strongest set of patents).

174. *FTC v. Qualcomm*, Case No. 5:17-cv-00220-LHK-NMC, Federal Trade Commission's Opposition to Qualcomm's Motion to Dismiss, May 5, 2017, at 7.

175. *See, e.g.*, *FTC v. Qualcomm*, Appellant's Unopposed Motion for Leave to File an Enlarged Opening Brief, Aug. 23, 2019, at 88.

The FTC offered no evidence that the value of Qualcomm's patent portfolio is declining. It is undisputed that Qualcomm's licensed patent portfolio has grown, not diminished, because new patents covering more technology areas are added faster than old ones expire. Indeed, Qualcomm has added successive generations of SEPs through 3G, 4G, and now 5G at no extra cost. The portfolio exhibits approximately 30% compound annual growth, on net growing an average of 35 new patents per day—including patents fundamental to both newer generations of cellular communication and key improvements.

176. That being said, the FTC's theory of harm was dependent on an elevated royalty as a violation of FRAND, which then allowed Qualcomm to squeeze the margin of rivals. Thus, changing price/royalties has more relevance in this case than it would otherwise.

suppliers if their patents are not exhausted, did Qualcomm change its practice over time? On the surface, Qualcomm did move from granting a few component-level licenses to granting none at all. On the other hand, Qualcomm had always licensed primarily at the device-level and based its royalties off a fixed percentage of the device price. Further, it only licensed at the component-level to the extent that the license did not inhibit its ability to license to device-level manufacturers. Once the patent law changed in a way that inhibited this, Qualcomm was no longer willing to license to chipset suppliers at the component-level. While this episode illustrates that legacy inquiries require some level of factual weighing, the important point is whether the change occurred before or after Qualcomm achieved market power in chipsets and whether the change was causal with Qualcomm's chipset market power.

Qualcomm's justification for licensing at the component-level only if it did not exhaust its patents is a straightforward efficiency argument based on transaction costs. Patent exhaustion would require Qualcomm to separate its SEPs into chipset- and device-level technologies, which is inherently difficult due to the interconnected nature of its intellectual property. Thus, while Qualcomm conceded that its policies had "evolved," it asserted that the fundamental practice of licensing at the device-level remained unchanged.<sup>177</sup>

Importantly, the appellate court noted that the only evidence cited by the district court of component-level licensing was a license that occurred years before Qualcomm obtained substantial market power in chipsets.<sup>178</sup> Ultimately, the appellate court found that the "FTC offered no evidence that, from the time Qualcomm first gained monopoly power in the modem chip market in 2006 until now, it ever had a practice of providing exhaustive licenses at the modem chip level rather than the OEM level."<sup>179</sup> Given that

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177. Opening Brief for Appellant Qualcomm at 45, *Qualcomm*, 969 F.3d 947 (No. 19-16122)

The precise mechanism by which rival chipmakers have had access to Qualcomm's SEPs has evolved. Early on, Qualcomm entered into non-exhaustive, royalty-bearing agreements with chipmakers that explicitly did not grant rights to the chipmaker's customers. . . . Qualcomm ceased doing so well over a decade ago, in response to evolving court rulings addressing patent law's exhaustion doctrine, which indicated that any license inherently is exhaustive regardless of any contractual provision to the contrary.

178. *Qualcomm*, 969 F.3d at 994 ("In support of this finding, the district court cited a single piece of record evidence: an email from a Qualcomm lawyer regarding 3%-royalty-bearing licenses for modem chip suppliers. But this email was sent in 1999, seven years before Qualcomm gained monopoly power in the CDMA modem chip market.")

179. *Id.*

the record indicates that Qualcomm instituted its policy regarding component-level license well before achieving substantial market power, it should be considered a legacy practice.

In addition to issues of legacy, the case also raised questions of commonness, as both Ericsson and Nokia also licensed and set royalties only at the device-level.<sup>180</sup> Not surprisingly, Qualcomm invoked this fact as part of its defense,<sup>181</sup> and both the district and appellate courts addressed this issue. The district court dismissed its ultimate value by noting that Nokia and Ericsson also had market power due to their portfolio of SEPs.<sup>182</sup> As a general principal, the district court properly examined the market power of rivals when assessing the universality of a practice within a market. Unfortunately, the district court focused on power in the wrong market. According to the theory of harm, the primary driver of Qualcomm's ability to deny component-level licenses and charge supra-FRAND rates to OEMs was Qualcomm's market power in chipsets—not SEPs. Neither Nokia nor Ericsson competed with Qualcomm in the mobile chipset market.<sup>183</sup> Thus, if these two major industry players do not have the chipset monopoly that Qualcomm allegedly had, then how can they still get away with violating FRAND by insisting on device-level licensing? This is a major gap in the district court's reasoning.<sup>184</sup> Further, if denying component-level licensing is a FRAND violation, then why did chipset rivals, such as Intel and MediaTek, not bring a FRAND case against Nokia and Ericsson for denying

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180. *Id.* at 1003 (“Similarly here, companies like Nokia and Ericsson are now ‘[f]ollowing Qualcomm’s lead’ with respect to OEM-level licensing. . . .”).

181. Opening Brief for Appellant Qualcomm at 13, *Qualcomm*, 969 F.3d 947 (No. 19-16122) (“The inefficiencies and impracticality of such a ‘multi-level’ licensing scheme are so serious that no major industry participant uses it. Every major cellular SEP licensor grants exhaustive licenses to OEMs, not to chipmakers.”).

182. *FTC v. Qualcomm, Inc.*, 411 F. Supp. 3d 658, 754–55 (N.D. Cal. 2019) (“Following Qualcomm’s lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly.”); *id.* at 755 (“Nokia and Ericsson’s contemporaneous documents and statements contradict Nokia’s and Ericsson’s self-serving and made-for-litigation justifications for refusing to license modem chip suppliers.”).

183. *Qualcomm*, 969 F.3d at 983 (“Companies such as Nokia, Ericsson, and Interdigital have comparable SEP portfolios but do not compete with Qualcomm in the modem chip markets.”).

184. Specifically, according to the district court, Qualcomm’s market power in chipsets allows it to charge supra-FRAND rates to handset makers. The ability to withhold those vital chipsets from OEMs prevents these OEMs from challenging Qualcomm’s licenses as non-FRAND. *See Qualcomm*, 411 F. Supp. 3d 658, 698 (“ . . . Qualcomm wields its chip monopoly power to coerce OEMs to sign patent license agreements. Specifically, Qualcomm threatens to withhold OEMs’ chip supply until OEMs sign patent license agreements on Qualcomm’s preferred terms.”).

them a license? Neither Nokia nor Ericsson have chipsets like Qualcomm that could be used to squeeze rivals and leverage supra-FRAND rates. Ultimately, the record indicates that device-level licensing is a common industry practice, and the appellate court properly placed significant weight on that fact.<sup>185</sup>

In sum, while *Qualcomm* represents one of the most complex antitrust cases in recent memory, the role of legacy and commonness mattered a great deal and provided a “North Star” to the appellate court. The district court clearly saw things quite differently, and what seemed to be missing was a systematic approach to the question of how to consider legacy and common practices—particularly how they relate to the relevant market power.

### C. *Compromised Legacies*

Thus far, our primary focus has been on cases involving unilateral conduct—given that this is where legacy considerations are typically the most relevant. Yet, looking to cases involving cooperation across firms can also be illustrative as it can show how concerted action can provide even newly formed entities market power. In a nutshell, longstanding and common practices should be viewed with a different lens when examining potential Section 1 violations involving coordination.<sup>186</sup>

Conduct with a long history does not necessarily qualify as a legacy practice, as the practice must be established before achieving substantial market power.<sup>187</sup> Thus, even in situations where a practice is implemented at the time of entry, if that entry is “compromised,” such as coupling the entry with coordination among competitors, then entry and market power are coincident. If so, then a long history tells us very little in regard to the likelihood that the practice is procompetitive.

One example of a compromised legacy is *Broadcast Music v. Columbia Broadcast System*.<sup>188</sup> The case is perhaps best known for the ruling that

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185. *Qualcomm*, 969 F.3d at 984 (“Qualcomm licenses its patent portfolios exclusively at the OEM level, setting the royalty rates on its CDMA and LTE patent portfolios as a percentage of the end-product sales price. This practice is not unique to Qualcomm.”); *id.* at 996 (“Qualcomm’s reasonable, procompetitive justification that licensing at the OEM and chip-supplier levels simultaneously would require the company to engage in ‘multilevel licensing,’ leading to inefficiencies and less profit. Qualcomm’s procompetitive justification is supported by at least two other companies—Nokia and Dolby—with similar SEP portfolios to Qualcomm’s.”).

186. *See, e.g., Am. Needle, Inc. v. NFL*, 560 U.S. 183, 198 (2010) (“[A] history of concerted activity does not immunize conduct from § 1 scrutiny.”).

187. *See supra* Section II.A.

188. *Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 444 U.S. 1 (1979).

music licensing collectives that negotiate a “blanket license” on behalf of its member artists should not be condemned as a per se illegal price fixing scheme under Section 1.<sup>189</sup> Specifically, in 1914 and 1939, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), respectively, formed as agencies to facilitate the licensing of music for its members to economize on transaction costs.<sup>190</sup> The formation of these licensing collectives in the early 20th century was almost immediately challenged as anticompetitive by the DOJ.<sup>191</sup> ASCAP and BMI only survived after a series of consent decrees designed to minimize the potentially harmful effects of these collectives,<sup>192</sup> while preserving their ability to save on transaction costs when licensing music. In evaluating the legality of blanket licenses after the CBS complaint, despite their long history and ubiquity in music licensing, the Supreme Court properly afforded no procompetitive prior to ASCAP’s and BMI’s practices. The collective action behind the formation of both cooperatives surely gave them substantial market power. Thus, blanket licenses were never a legacy practice in the first place, as defined in this Article.

A parallel can be found in *National Football League v. Ninth Inning*.<sup>193</sup> The case involves the question of whether the NFL’s Sunday Ticket Package sold exclusively through the satellite TV provider DirecTV is a violation of

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189. *Id.* at 23–25. Blanket licenses give a licensee the right to publicly perform any or all of the portfolio of music owned by the members of the collective. *See, e.g.*, Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, in 1 ISSUES IN COMPETITION LAW AND POLICY 125, 139 (ABA Section of Antitrust Law 2008)

[T]he Court’s decisions in BMI and Sylvania . . . introduced important core conceptual content to the rule of reason. . . . Sylvania and BMI together appeared to mandate consideration of efficiencies. In fact, the Court concluded in BMI that the presence of plausible efficiencies—cost reducing and output expanding tendencies—could justify moving a case out from under the per se label.

190. *See* Broadcast Music, Inc. 444 U.S. at 5 (“[A]s a practical matter it was impossible for the many individual copyright owners to negotiate with an licensee the users and to detect authorized uses.”).

191. *Id.* at 10 (“In separate complaints in 1941, the United States charged that the blanket license . . . was an illegal restraint of trade. . . .”).

192. *Id.* at 11 (“The case was settled by a consent decree that imposed tight restrictions on ASCAP’s operations.”). *See also* Stephen Calkins, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, in ANTITRUST STORIES 205, 213 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (“Among other provisions, the 1941 ASCAP decree prevented ASCAP from receiving exclusive rights to compositions, prevented discrimination, and required ASCAP to offer a ‘per-program’ license (in addition to its customary blanket license which conveyed rights to all of ASCAP’s music for all programs).”).

193. *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56 (2020).

Section 1 based on a conspiracy among the thirty-two NFL teams to jointly sell the broadcast rights to their games.<sup>194</sup> As the Supreme Court pointed out in their decision denying certiorari (for now), the DirecTV contract has been in place for twenty-six years,<sup>195</sup> as the agreement goes back to 1994.<sup>196</sup> In this case, legacy offers no real information value as the legal question is not whether market power changes a previously procompetitive practice to one that is anticompetitive, but rather whether the initial agreement, whether in place twenty-six years or twenty-six days, is a “contract, combination, or conspiracy” in violation of Section 1.

Finally, in a case that came before Judge Richard Posner, *In re Brand Name Prescription Drugs Antitrust Litigation*, the primary issue was whether a “chargeback” system implemented by wholesalers of prescription drugs was a conspiracy with drug manufacturers to fix prices to the detriment of retail drug stores.<sup>197</sup> Alternatively, was the system part of scheme to prevent arbitrage from price discrimination, in which case, the conduct would be competitively neutral? Notably, this “chargeback” system had been adopted decades earlier in the early 1980s.<sup>198</sup> Based at least marginally on legacy considerations, Judge Posner determined that the scheme was merely part of a price discrimination mechanism.<sup>199</sup> This case is somewhat distinguishable from *Amex* and *Qualcomm* in that assessing legacy was used to demonstrate a practice was competitively neutral (that is, as part of a price discrimination scheme) rather than procompetitive.

## CONCLUSION

Courts operate under limited information. They gather evidence on

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194. *Id.* at 57

Under the existing contract, the 32 NFL teams have authorized the NFL to sell the television rights for out-of-market games to a single buyer, DirecTV. The plaintiffs argue, and the Court of Appeals agreed, that antitrust law may require each team to negotiate an individualized contract for televising only its own games.

195. *Id.* at 56 (“In this antitrust case, the plaintiffs challenged the National Football League’s contract with DirecTV for the television rights to out-of-market games. That contract has been in place for 26 years.”).

196. Babette Boliek, *Antitrust, Regulation, and the “New” Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 541 (2014).

197. 288 F.3d 1028, 1029–30 (7th Cir. 2002).

198. *Id.* at 1030.

199. *Id.* at 1034 (given that “the chargeback system was adopted before the alleged collusion of the manufacturers began,” inferring that the wholesalers knowingly engaged in a collusive scheme “would be particularly shaky here”).

markets and are asked to delineate relevant antitrust markets; assess the degree of antitrust market power that firms enjoy; assess the competitive effects; determine whether entry and exit impact the analysis; and to assess the degree to which efficiencies should be considered. This is a heavy burden.<sup>200</sup> That being said, the fact that cases are complicated and difficult is not an indictment of antitrust. Understanding business practices is a complex undertaking, and firms deserve a fair review. It is more important to properly decide a case than it is to quickly administer decisions and have unacceptably high error costs. Nevertheless, there is a balance. Antitrust should look for opportunities to reduce administrative and litigation costs without compromising accuracy. This Article argues that legacy and common conduct can help to serve that function in certain circumstances.

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200. See, e.g., Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011).