AVOIDING MARKET DEFINITION UNDER SECTION 1 OF THE SHERMAN ACT

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The 2018 U.S. Supreme Court decision in Ohio v. American Express Co. *was at odds with a trend among antitrust commentators and enforcement authorities away from dependence on formal market definition as part of plaintiffs' burden of proof. Reliance on market definition as a dispositive issue has been ubiquitous in antitrust cases, but the costs from errors, inefficiency, and uncertainty inherent in that approach are glaring. The issue is ripe for clarification, and this Note suggests a new rule to that end. The proposed rule aims to delineate a set of cases in which formal market definition can confidently be dispensed with, in the hopes of reducing uncertainty in antitrust cases and streamlining their administration.*

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INTRODUCTION

The most heavily litigated issue in modern antitrust cases is market definition: the question of what boundaries to set for the slice of economic activity considered in evaluating whether a given agreement, merger, or other action is anticompetitive.[1] Courts often require antitrust plaintiffs to prove that defendants possess a certain level of market power[2]—best described as the ability to profitably raise prices well above marginal costs[3]—to meet their burden of proof. If a firm raises the price of its product above the competitive level, but in so doing sacrifices sales to the point that the price hike is not profitable, that firm lacks market power.[4] If it can maintain a supracompetitive price without sacrificing demand and maintain or increase profits, it possesses market power.[5] Of course, market power is not a binary issue, it is a sliding scale from zero to monopoly.[6] What antitrust practitioners and commentators mean when they ask whether a firm possesses market power is whether it possesses the requisite level of market power to cause anticompetitive effects in the relevant market.[7]

The standard approach for district courts confronted with an antitrust case is to (1) define the relevant market by including or excluding possible substitutes for the product; (2) determine defendants' market share; (3) use that information to infer whether defendants possess market power; and only then (4) decide whether defendants have used that power to cause anticompetitive effects in the relevant market—namely, an increase in price, decrease in output, or decrease in quality of the product.[8] The upshot of using this particular approach is that market definition is often dispositive.[9] The issue is so amorphous, however, courts can usually construe it in a way that leaves defendants with a market share below the threshold and thus avoid analyzing the nature of the agreement itself, or its likely effects.[10] The lack

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1. Louis Kaplow, *Why (Ever) Define Markets*, 124 HARV. L. REV. 437, 439 (2010).

2. *See, e.g.*, Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 137 (1992).

3. *See, e.g.*, 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 501 (4th ed. 2013).

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. *See, e.g.*, Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 762 (2012); Richard A. Posner & William M. Landes, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938 (1980).

9. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992) ("Because market power is often inferred from market share, market definition generally determines the result of the case.").

10. *See, e.g.*, Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1404 (2017); Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 638–39 (2012); Robert Pitofsky,

of clear rules leaves those who favor more lenient antitrust enforcement an opening to argue that defendants lack market power in almost any case.[11]

The 2018 U.S. Supreme Court decision in *Ohio v. American Express Co.*[12] ("*Amex*") is an apt example of this dynamic. The Court affirmed the Second Circuit's reversal of a district court ruling that antisteering agreements between American Express and the merchants that accepted its cards were anticompetitive.[13] The agreements prohibited merchants from steering consumers away from using their American Express cards by offering incentives or merely requesting they use a different card.[14] Merchants were inclined to do this because the swipe fees—percentages taken from each transaction by the credit card company—that American Express charges are significantly higher than those of the other major cards.[15] The district court found that these agreements prevented other card companies from competing by offering lower fees to merchants.[16] The merchants' inability to steer customers towards other cards inhibited price competition for merchants among card issuers, which inflated prices across the board, or so found the district court.[17]

The Second Circuit reversed on the grounds that plaintiffs had not addressed the two-sided nature of the relevant market or the effects of antisteering agreements on the cardholder side of that market,[18] and the Supreme Court affirmed.[19] The Court found that card issuers competed for merchants to accept their cards and for consumers to use them, and that one form of competition cannot be considered independent from the other.[20] Furthermore, it found that the product at issue was not the card itself but rather the transaction because both a consumer and a merchant are required for either to use the card.[21] Because the two sides of the market may affect one another, merely showing that the agreements caused anticompetitive effects on the merchant side was not enough—plaintiffs needed to show that the overall effect on both sides of the market was anticompetitive, and they failed to do so.[22] According to the Second Circuit and the Supreme Court, the district court erred in defining the relevant market.

Antitrust in the Next 100 Years, 75 CALIF. L. REV. 817, 825 (1987) ("[M]easurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement.").

11. *See* Pitofsky, *supra* note 10, at 22–23 (describing the market power requirement as a central component of a "minimalist" antitrust policy).

12. 138 S. Ct. 2274 (2018).

13. *Id.* at 2283.

14. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 149–50 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016).

15. *Id.* at 205.

16. *Id.* at 213–15.

17. *Id.* at 212.

18. United States v. Am. Express Co., 838 F.3d 179, 206–07 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

19. Ohio v. Am. Express Co. (*Amex*), 138 S. Ct. 2274, 2283 (2018).

20. *Id.* at 2287.

21. *Id.* at 2286.

22. *Id.* at 2287.

The *Amex* opinion was at odds with a trend among antitrust scholars and enforcement authorities, who are increasingly wary of courts' intense focus on market definition.[23] In particular, they are critical of the use of market definition as an early screen to dismiss cases before considering other aspects of the behavior at issue.[24] There is much ambiguity and confusion among practitioners regarding what plaintiffs must show to pass through that screen.[25] One author has gone so far as to argue that, due in part to confusion over market definition, current antitrust doctrine may violate the rule of law because market participants cannot foresee with sufficient certainty what courts and enforcement authorities will view as an antitrust violation.[26] This Note shares that skepticism of market definition and argues that courts' emphasis on the issue is largely undue. The process of evaluating market power by defining the market and calculating defendants' market share is fraught with error costs, especially when used as a threshold inquiry, and is often not the most efficient way to uncover anticompetitive behavior.[27] The usefulness of this approach is at its nadir in cases under section 1 of the Sherman Act, which prohibits collusion among market participants to restrain trade.[28] This type of behavior is inherently more dangerous than actions by a single firm, which are covered by section 2 of the Sherman Act.[29] Where two or more actors who formerly pursued their interests separately decide to work together, at least one form of competition is necessarily lessened.[30] Additionally, the Supreme Court has held explicitly that formal market definition is not a requirement under section 1.[31] But the Court has not provided any clear guidelines for when market definition may be avoided.[32] In the absence of such guidance, lower courts continue to proceed with the standard, error-prone approach.[33]

This Note argues that under section 1 of the Sherman Act, plaintiffs should be able to make a prima facie showing of anticompetitive effects without

23. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7–8 (2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [https://perma.cc/K4H8-JXBP] [hereinafter HORIZONTAL MERGER GUIDELINES] (describing market definition as one tool among many at the disposal of antitrust enforcers, rather than a necessary first step, as past versions of the guidelines had framed it); *see also* Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 32 (2014); David S. Evans, *Lightening Up on Market Definition*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 53, 55–58 (Einer Elhuage ed., 2012); Kaplow, *supra* note 1, at 502–06.

24. *See* Evans, *supra* note 23, at 72–73; Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1425–26 (2009); *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 23, at 7.

25. Stucke, *supra* note 24, at 1425–26.

26. *Id.* at 1425–26, 1465.

27. *See infra* Part II.B.

28. 15 U.S.C. § 1 (2012).

29. *See, e.g.*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768–69 (1984) ("Concerted activity inherently is fraught with anticompetitive risk.").

30. *Id.* at 769.

31. FTC v. Ind. Fed'n of Dentists (*IFD*), 476 U.S. 447, 460 (1986).

32. *See* Gavil, *supra* note 8, at 754–59.

33. *See* Crane, *supra* note 23, at 32; Evans, *supra* note 23, at 55–56.

defining the relevant market when there is evidence that an agreement prevents a class of economic actors from engaging in some competitive strategy they otherwise would have pursued. This finding may be rebutted if defendants can demonstrate other procompetitive effects of the agreement, but market definition should not be used to dispose of cases at the outset where these conditions are present. This argument finds ample support in the history of the Sherman Act itself,[34] in Supreme Court precedent,[35] and in the academic literature.[36] Following this rule would significantly reduce error costs in antitrust cases, increase their efficiency, and provide businesses with more certainty to make strategic decisions.[37]

Part I begins with a brief examination of the stated goals of the Sherman Act's drafters. It then turns to the rule of reason, the burden-shifting test courts use in most cases under section 1, and the role of market power in that analysis. Part II examines how market definition fits into that process, why it has become so central to many antitrust cases, and whether its role is proper. Part III introduces the proposed rule as a tool to contain market definition, discussing how it would apply and its likely implications. It concludes with a close look at how the proposed rule might operate in pharmaceutical pay-for-delay lawsuits, a convenient set of test cases.

I. MARKET POWER UNDER THE RULE OF REASON

The specter of market power hangs over all antitrust jurisprudence, but the nuances of its relationship to competition are little understood and its effects are often vastly oversimplified.[38] Furthermore, there is evidence that the commonly used measurements of market power often do not reflect the significance or direction of its effect on competition.[39] Where key assumptions in an issue as decisive as market power rest on an uncertain foundation, a brief wide-angle look at the issue in the context of the broad purposes of antitrust law is worthwhile.

As an initial matter, pinning down the goals of antitrust law is difficult due to its nature as an evolving, amorphous, judge-crafted body. The laws themselves are some of the vaguest on the books.[40] The Sherman Act simply outlaws "restraint[s] of trade"[41] but fails to include a definition for that term, handing the task off to the courts.[42] To a great extent, then, antitrust law is a product of the Supreme Court, and its opinions contain the most important

34. *See infra* Part I.A.
35. *See infra* Part III.A.
36. *See infra* Part II.B.
37. *See infra* Part III.B.
38. *See, e.g.*, Kaplow, *supra* note 10, at 1305.
39. *See* Crane, *supra* note 23, at 37–39.
40. *See, e.g.*, Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2547 (2013).
41. 15 U.S.C. § 1 (2012).
42. *Id.*; *see also The Antitrust Laws*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/2X54-H8KM] (last visited Nov. 12, 2019).

evidence in divining the purpose of the doctrine.[43] The following analysis starts by considering statements made by the drafters of the Sherman Act, and discusses briefly the foundational goals of antitrust law. It then turns to the Supreme Court opinions that have shaped the modern understanding of the antitrust laws and the rule of reason test and seeks to identify common threads regarding overarching purpose. Finally, it assesses the role of market-power measurements under the rule of reason and whether it should be considered as a separate element of the plaintiff's burden.

A. The Foundational Goals of Antitrust Law

Modern courts tend to operate under the assumption that the goal of antitrust law is consumer welfare, i.e., maximum economic efficiency to achieve low prices for consumers and low costs for producers.[44] The term "consumer welfare," as it is used in antitrust, was introduced by then professor Robert Bork in a 1966 law review article.[45] Bork presented a review of the legislative history of the Sherman Act, concluding that "Congress' position with respect to efficiency cannot be explained on any hypothesis other than that consumer welfare was in all cases the controlling value."[46] It did not take much investigation from other scholars to determine, however, that this conclusion resulted from, at best, a selective reading of that history.[47] Bork's analysis focused on the comments of Senator John Sherman, the law's namesake, but the record clearly indicates that the final bill was drafted and shepherded through Congress by others.[48] In fact, Senator Sherman only reluctantly voted for the finished product, believing it would be "totally ineffective."[49]

The principal authors of the law were Senators George Edmunds and George Hoar, members of the Judiciary Committee that redrafted the bill before it passed.[50] There is strong evidence that they, along with other key players, were equally concerned with injury to competitors as they were with injury to consumers, if not more so, and favored lawsuits brought by

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43. *See, e.g.*, 1 AREEDA & HOVENKAMP, *supra* note 3, ¶ 103d; First & Waller, *supra* note 40, at 2547.

44. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 31 (2008); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2254 (2013).

45. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966). Bork defined consumer welfare as "maximization of wealth or consumer want satisfaction," arguing courts should permit agreements that "increase wealth through efficiency" and condemn those that "decrease it through restriction of output." *Id.*

46. *Id.* at 26.

47. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 142 n.35 (2011); *see also* 1 AREEDA & HOVENKAMP, *supra* note 3, ¶ 103; Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993); Orbach, *supra* note 44, at 2256.

48. Orbach, *supra* note 44, at 2259–60.

49. *Id.* at 2260.

50. *Id.*

competitors over those brought by consumers.[51] Senator Hoar offered specific language for the bill, clarifying that if "one of the purposes [of an agreement is] to compel any person, partnership, or corporation to become a party thereto, or to cease from doing any lawful business, or to sell and dispose of any lawful business," the injured party may sue.[52] This view of antitrust as protecting the freedom of economic actors to pursue any competitive strategy, apart from the implications on consumers, is decidedly not in line with Bork's hypothesis or with the views of modern courts.[53]

Another theme evident in the Sherman Act's legislative history is the importance of antitrust law in preserving democracy, resulting from the inseparability of economic and political power.[54] This was not a novel idea at the time; in fact, it reaches back to first years of the republic. In *The Federalist*, James Madison railed against the dangers of factions—groups of citizens united around some common interest—who may seek political power to advance their interests, even where they are adverse to those of the citizenry as a whole.[55] He identified the most dangerous factions as those formed around economic interests, which have a particular propensity to influence government,[56] and recognized the regulation and maintenance of peace among those interests as "the principle task of modern legislation."[57]

Statements by the other principal author of the Sherman Act, Senator Edmunds, indicate that he shared this conception of antitrust law.[58] He argued on the Senate floor that companies must not be able to accumulate power to the point where they become "tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense."[59] Such language, and the invocation of "just riots," reveals a belief that economic suppression resulting from concentration of power could provide a legitimate reason for political revolution. It suggests that Congress meant to not only ensure economic efficiency but to protect political liberty from threats posed by concentrations of economic power.

Some modern antitrust scholars have likewise recognized that where concentration of power constrains liberty in the economic sphere, the true expression of political liberty often suffers in turn.[60] Professor Robert Pitofsky argued in a widely cited 1979 law review article that Congress's 1950 amendments to section 7 of the Clayton Act "exhibited a clear concern that an economic order dominated by a few corporate giants . . . [could] facilitate the overthrow of democratic institutions and the installation of a

51. *See, e.g.*, 1 AREEDA & HOVENKAMP, *supra* note 3, ¶ 103b.

52. *See* 21 CONG. REC. 2599 (1890) (statement of Sen. Hoar).

53. 1 AREEDA & HOVENKAMP, *supra* note 3, ¶ 103d.

54. *See* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053 (1979); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 61–62 (2014).

55. THE FEDERALIST NO. 10 (James Madison).

56. *Id.*

57. *Id.*

58. *See* 21 CONG. REC. 2726 (1890) (statement of Sen. Edmunds).

59. *Id.*

60. *E.g.*, Pitofsky, *supra* note 54, at 1053; Teachout & Khan, *supra* note 54, at 61–62.

totalitarian regime."[61] Many Supreme Court decisions in the subsequent two decades reflected a similar concern.[62]

While many academics have questioned the consumer-welfare standard, others vigorously defend it.[63] Courts continue largely to adhere to it,[64] likely because of the limits on uncertainty it offers.[65] In an otherwise nebulous doctrine, the consumer-welfare standard at least provides a lighthouse in the fog.[66] This Note does not address the merits of the consumer-welfare standard directly. Rather, it points to these lesser known themes from the Sherman Act's legislative history as a potential source of direction in crafting new rules. The legislative history lends a certain theoretical coherency to the arguments made here in favor of refocusing antitrust scrutiny from statistics to behavior.

In sum, evidence suggests that the focus of Congress in enacting the Sherman Act and subsequent antitrust legislation was on protecting free competition among economic actors for its own sake as much as, and separate from, ensuring economic efficiency; and it perceived the law as a bulwark against political tyranny resulting from concentration of economic power.

B. The Rule of Reason

The rule of reason is the test courts most often use to determine whether a given defendant's conduct amounts to an anticompetitive restraint of trade.[67] Historically, two paths were available for plaintiffs to prove an antitrust violation—the rule of reason and the doctrine of per se illegality—but recently the boundaries have blurred and the per se doctrine is mostly limited to price-fixing and bid-rigging.[68] Developed and continually redeveloped by the courts since the enactment of the broadly worded Sherman Act in 1890, the rule of reason remains amorphous,[69] but lower courts have largely coalesced around a three-step, burden-shifting framework, which the Supreme Court has endorsed.[70] First, plaintiffs must prove that the restraint

61. Pitofsky, *supra* note 54, at 1053–54.

62. *Id.* at 1070 (first citing Brown Shoe Co. v. United States, 370 U.S. 294 (1962); then citing United States v. Von's Grocery, 384 U.S. 270 (1966); and then citing United States v. Pabst Brewing Co., 384 U.S. 546 (1966)).

63. *See, e.g.*, Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 348–53 (2010); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).

64. *See supra* note 44 and accompanying text.

65. *See, e.g.*, Douglas H. Ginsburg, *Bork's Legislative Intent and the Courts*, 79 ANTITRUST L.J. 941, 949–51 (2014).

66. *Id.*

67. *See* Markham, *supra* note 10, at 593.

68. *See* Gavil, *supra* note 8, at 759.

69. *See* Markham, *supra* note 10, at 596.

70. *See Amex*, 138 S. Ct. 2274, 2284 (2018) (citing Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993)); *see also* Gavil, *supra* note 8, at 760–66; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 103–04 (2018).

has or may impede competition.[71] If the plaintiffs satisfy step one, the burden then shifts to the defendants for step two.[72] Defendants must then demonstrate that the restraint has a procompetitive justification.[73] If the defendants are successful under step two, the burden shifts back to the plaintiffs who must show that the defendants could achieve the same procompetitive effects in a less harmful way.[74] In practice, the overwhelming majority of cases do not get past the first step in the rule of reason.[75] A 2009 empirical study found that in the preceding decade, 97 percent of cases under the rule of reason were resolved "on the grounds that the plaintiff [could not] show an anticompetitive effect."[76] By far the most important question, then, is what plaintiffs must do to make a prima facie case. Much of the Supreme Court precedent in the following analysis addresses that question, which has sparked major phase changes in how courts addressed antitrust cases over the past century.[77]

Section 1 of the Sherman Act provides, simply: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[78] Section 2 provides similar language regarding monopolies.[79] The interpretations of each section diverged significantly given the differences between the risks associated with monopolies and those resulting from anticompetitive agreements.[80] For that reason, the scope of the arguments made here is limited to section 1 cases.

One of the first things the Supreme Court did to grapple with the Sherman Act was to confront the fact that section 1 can easily be read to outlaw almost every contract or business agreement.[81] With 1911's *Standard Oil Co. of New Jersey v. United States*,[82] the Court established that only *unreasonable* restraints of trade are prohibited.[83] Discussing the interaction of the Sherman Act with the right to freely make and enforce contracts, the Court found that Congress did not intend the Sherman Act to restrain freedom to contract but rather to enhance it by punishing only those agreements that "unduly or

71. *See, e.g.*, 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1502 (3d ed. 2010).
72. *Id.*
73. *Id.*
74. *Id.*
75. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 837 (2009).
76. *Id.*
77. *See generally* Gavil, *supra* note 8 (tracing the major shifts in the application of the rule of reason).
78. 15 U.S.C. § 1 (2012).
79. *Id.* § 2.
80. *See, e.g.*, Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History*, 37 SAN DIEGO L. REV. 1, 9–10 (2000).
81. *See, e.g.*, United States v. Am. Express Co., 838 F.3d 179, 193 (2d Cir. 2016), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).
82. 221 U.S. 1 (1911).
83. *Id.* at 54–55; *see also The Antitrust Laws*, *supra* note 42.

improperly" harmed others' ability to compete.[84] The Court's emphasis on freedom to contract reflects a focus similar to that of the Sherman Act's drafters; the liberty of citizens to do business as they please was worth protecting in itself, apart from economic efficiency and consumer prices and perhaps more vital to maintaining healthy democracy.[85] The Court returned to the rule of reason a year later in *Chicago Board of Trade v. United States*,[86] where it clarified that section 1 outlaws only behavior that, on balance, impedes free competition.[87] Contracts that restrict the behavior of certain parties but serve to increase other competitive behavior do not, therefore, necessarily violate the Sherman Act.[88] Again the focus was on the behavior itself, independent of consumer prices.

In the decades following *Standard Oil* and *Chicago Board of Trade*, the Court moved away from a facts-driven, effects-centered analysis and turned with increasing regularity to the doctrine of per se illegality.[89] *United States v. Trenton Potteries Co.*,[90] handed down in 1927, categorically outlawed price-fixing agreements even if the agreed price was not necessarily "unreasonable."[91] In the ensuing four decades, the Court added division of markets, group boycotts, and tying arrangements to the pile of per se illegal behavior.[92] Under the per se doctrine, plaintiffs' burden is very low: all they must do to prove their case is show that defendants' conduct falls into a restricted category.[93] If it does, it is presumptively and irrebuttably illegal.[94]

During this period, the Court espoused an increasingly binary view of antitrust law: defendants whose behavior fell under the per se umbrella were swiftly condemned, but outside of those cases the plaintiffs' burden was extremely high and rarely met.[95] This categorical approach was, in one sense, a continuation of the prior focus on competitor behavior relative to consumer prices. The binary approach to antitrust law suffers from fatal weaknesses, however. First, where certain conduct is not easily categorized according to the lines already drawn, the administrative costs in attempting to parse it can be huge.[96] The per se doctrine is also ripe for manipulation, and both sides of a lawsuit will go to great lengths to label the restraint a

84. *Standard Oil*, 221 U.S. at 59–60, 62.
85. *See* Orbach, *supra* note 44, at 2269–75.
86. 246 U.S. 231 (1918).
87. *Id.* at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").
88. *See id.*
89. *See, e.g.*, Gavil, *supra* note 8, at 744.
90. 273 U.S. 392 (1927).
91. *Id.* at 397–98.
92. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).
93. *See* AREEDA & HOVENKAMP, *supra* note 71, ¶ 1509a.
94. *See id.*
95. Gavil, *supra* note 8, at 746.
96. *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1211 (2008).

certain way.[97] Finally, some of the per se categories simply made little or no sense and seemed to be the result of particular cases or happenstance.[98]

Starting in the mid-1970s, the Court began to back away from the per se doctrine. It refocused its attention on demonstrable competitive effects in individual cases and adopted a more economic approach in its reasoning, relying heavily on market definition and market share to make inferences about market power.[99] By the mid-1980s, a third category beyond per se and the rule of reason had emerged—a middle ground between the two—which enabled plaintiffs to establish a prima facie case without conducting an in-depth economic analysis but still offered defendants the opportunity to rebut a finding of anticompetitive effects.[100] Called the quick-look doctrine, it is suggestive of the Court's reluctance to delve into the numbers or seek testimony from economists where it can rely on other evidence.[101] It is a reassertion of antitrust law's purpose of protecting competitive behavior, not merely competitive prices.[102] By the turn of the millennium, the categories of per se, quick look, and the rule of reason were well established, and the plaintiff's burden in any given case depended on which category the alleged restraint fell into.[103]

But the evolution did not stop there. The Supreme Court unleashed an updated conception of the antitrust plaintiffs' burden in 1999's *California Dental Ass'n v. FTC.*[104] The opinion denounced all categorical boundaries such as quick look and per se.[105] Rather, the Court found that the weight of the plaintiffs' burden in showing anticompetitive effects is a continuum depending on how inherently suspicious the behavior at issue is:

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.[106]

This "enquiry meet for the case" approach has been roundly criticized by commentators as vague and bound to further complicate antitrust cases.[107] But it leaves room for lower courts to craft rules about what level of scrutiny should apply to what types of behavior. Here is an opportunity to rethink antitrust policy in an important way, and to perhaps be guided by the forgotten purposes of the Sherman Act's drafters: the complete freedom of

97. *See id.* at 1232–48.
98. *Id.* at 1248–55.
99. Gavil, *supra* note 8, at 744–51.
100. *See, e.g.*, *id.* at 751–53.
101. *See infra* Part II.C.
102. *See infra* Part II.C.
103. *See, e.g.*, Gavil, *supra* note 8, at 755–56.
104. 526 U.S. 756 (1999).
105. *Id.* at 780–81.
106. *Id.*
107. *See, e.g.*, Gavil, *supra* note 8, at 764–66; Hovenkamp, *supra* note 70, at 108; Markham, *supra* note 10, at 642–45; Stucke, *supra* note 24, at 1411–12.

economic actors to pursue competitive strategies and the protection of political liberty and democratic institutions from threats posed by concentration of economic power.[108]

To reduce uncertainty in litigation and in the market, courts should be clear on how they will decide where along the *California Dental* continuum the plaintiffs' burden will fall. One of the most important questions is whether and where to require an independent showing of market power.[109] Arguably, there could be some point on the spectrum of inherent anticompetitiveness beyond which no separate showing of market power is needed as a matter of law. This idea is developed further in Part III. The remainder of this Part discusses market power as an element of the antitrust plaintiff's burden, the goal being to clarify its usefulness and its pitfalls before considering the best role for market definition, which arises in the context of market power.

C. Market Power as a Separate Element

It is a common assumption that antitrust plaintiffs must prove two separate elements to prevail under the rule of reason: (1) market power and (2) anticompetitive conduct.[110] Under section 1, however, it is far from settled whether the plaintiffs' burden includes an independent demonstration or measurement of market power.[111] The idea of such a requirement in section 1 cases was an invention of then professor Richard Posner, tucked into a 1981 law review article[112] and then brought with him to the Seventh Circuit the following year.[113] While only the Seventh and Fourth Circuits have an explicit market-power requirement under section 1, its role as a dispositive issue is ubiquitous across the district and circuit courts.[114]

The principal advantage of this approach is the screen it provides: an opportunity to dispose of potentially complex and time-consuming cases quickly.[115] This is a legitimate purpose not to be taken lightly. Antitrust trials can last for months and involve in-depth testimony from economic experts.[116] Courts are right to be careful about wasting valuable time and

108. *See supra* Part I.A.
109. *See* Patterson, *supra* note 80, at 9–10.
110. *See, e.g.*, Kaplow, *supra* note 10, at 1371.
111. *See, e.g.*, Patterson, *supra* note 80, at 6–10.
112. Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 16 (1981).
113. *See* Patterson, *supra* note 80, at 15–24 (tracing the history of the market-power requirement back to Posner's article and through the Seventh Circuit); *see also* Markham, *supra* note 10, at 640.
114. *See* Hovenkamp, *supra* note 70, at 101–03.
115. *See, e.g.*, Crane, *supra* note 23, at 31–32; Markham, *supra* note 10, at 663.
116. *See, e.g.*, Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 AM. J. TRIAL ADVOC. 1, 22–24 (2016); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 365 (2013).

resources on potentially frivolous cases. Furthermore, the market-power screen provides some certainty and consistency in outcomes.[117]

On the other hand, the costs of dismissing meritorious cases cannot be ignored. How much anticompetitive behavior slips through the cracks in the name of efficiency and certainty? Whether a separate market power element provides an effective screen for antitrust cases under section 1 is an open question. The remainder of this section addresses that question, in other words, whether plaintiffs should be required to offer separate evidence—beyond the nature of the agreement and its effects—showing that the defendants' market power exceeds some predetermined level to meet their initial burden under the rule of reason.

It is of course true that a firm cannot commit an anticompetitive offense without the power to do so; market power is a factual predicate for the violation.[118] Furthermore, as the actual level of market power decreases, the likelihood of a procompetitive justification for the act in question increases.[119] Anticompetitive goals cannot explain agreements between firms with no market power if the firms are acting rationally in their own economic interest.[120] But the implication of using market power as a screen before evaluating the conduct in question is that there is some measure of market power that is a better predictor of anticompetitive effects than the nature of the conduct itself.[121] There is little evidence on which to base such an assumption.[122]

Additionally, there are significant costs to requiring separate proof of market power. These costs come not from the recognition of market power's factual significance to whether an agreement has anticompetitive effects but in separating its analysis from that of the conduct at issue. Scholars increasingly take the position that the two elements cannot be properly understood independently from one another and that setting out to measure market power in a silo is the wrong approach.[123] Professor Louis Kaplow has argued convincingly that market power affects antitrust liability through different "channels of relevance" and is almost never uniformly anticompetitive or procompetitive in its effects.[124] To start with, Kaplow argues that every antitrust case should be concerned with the probability of possible harm, the probable magnitude of that harm, the probability of benefits to competition, and the probable magnitude of such benefits.[125] That is a minimum of four channels of relevance on which market power operates. It may be a procompetitive force in one channel and anticompetitive in

117. *See, e.g.*, Gregory J. Werden, *Why (Ever) Define Markets?: An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 740–41, 746 (2013).
118. *See* Patterson, *supra* note 80, at 2.
119. Hovenkamp, *supra* note 70, at 107.
120. *Id.*
121. Patterson, *supra* note 80, at 39–40.
122. *See id.*; *see also* Kaplow, *supra* note 10, at 1375–77.
123. Crane, *supra* note 23, at 32–33; *see also* Kaplow, *supra* note 10, at 1406.
124. Kaplow, *supra* note 10, at 1322–54.
125. *Id.* at 1307–08.

another, and its effect in each case depends on the nature of the agreement.[126] While it is true that firms with more market power can generally do more harm with anticompetitive behavior, any procompetitive effects of their behavior may be magnified by the same degree.[127] If cases turn on measurements of market power, there is a risk of sacrificing procompetitive behavior by powerful firms, either from false positives or from risk-averse business decisions.[128] The current legal thinking mostly ignores this reality.[129]

Furthermore, market power is difficult to measure and the seemingly most straightforward ways to do so can be particularly unhelpful.[130] By far the most common method is market share, but antitrust scholars and practitioners are increasingly realizing that market share is often a poor indicator of the probability of anticompetitive effects.[131] The standard approach has been to (1) define the relevant market by including or excluding possible substitutes for the product, (2) determine defendants' market share, (3) use that information to infer whether defendants possess market power, and only then (4) decide whether defendants have used that power to cause anticompetitive effects.[132] As is discussed in Part II, the problems with this approach begin with the very first step. In searching for a better approach, one might consider other potential indicators of market power. Daniel Crane conducted an investigation into the use of entry barriers, profit margins, price discrimination, pricing discontinuity, exclusionary conduct, diversion ratios, and benchmarks as ways to infer market power.[133] Each proved to have significant weaknesses and none worked well across the board.[134]

Perhaps it is time to give up on a simple market-power indicator acting as an effective screen for lawsuits under section 1. Instead, courts should look more closely at the way market power operates and begin to craft rules about when a separate showing of market power is necessary and when it is not. Supreme Court precedent is clear that there is no blanket requirement for stand-alone proof of market power under the rule of reason.[135] At best, market power is one of several important factors to be considered.[136] Its complexity and variance as a competitive force, however, make its effects difficult to pin down.[137] Courts often use it as a reason to dismiss cases after market definition has revealed a low market share or has failed altogether.[138]

126. *Id.*
127. *Id.* at 1345–48.
128. *Id.*
129. *Id.* at 1405–07.
130. *See, e.g.*, Markham, *supra* note 10, at 638–39.
131. *See, e.g.*, *id.* at 640–45; *see also* Crane, *supra* note 23, at 38–42.
132. *See* Gregory J. Werden, *Assigning Market Shares*, 70 ANTITRUST L.J. 67, 71 (2002).
133. *Id.*
134. Crane, *supra* note 23, at 48–69.
135. Patterson, *supra* note 80, at 6.
136. *Id.*
137. *See, e.g.*, Stucke, *supra* note 24, at 1425–26.
138. *See* Carrier, *supra* note 75, at 830.

This makes market definition an important area of focus in clarifying the proper role of market power analysis in section 1 cases.

II. THE MARKET DEFINITION BEHEMOTH

It is perhaps not surprising that judges faced with an antitrust action where the effects of an agreement are not immediately evident would first seek to define the market. It is clear that market power must exist for anticompetitive effects to take place.[139] If defendants can show they lack market power, the court can dismiss the case without further thought.[140] This seems a proper and efficient approach at first glance; if an issue is going to be dispositive, better to decide it early before everyone wastes their time and money.[141] To evaluate market power in a silo like this, courts look for something to measure.[142] Typically, plaintiffs must prove that defendants possess market power by calculating their share of sales in a "properly defined relevant market."[143] The result is often a "battle between the 'we-win because it is a narrow market' plaintiffs and the 'you-lose because it is a broad market' defendants."[144] As this Part will show, that approach is fraught with uncertainty. Error costs are high for the courts and for businesses trying to make strategic decisions.[145] Furthermore, the guidance provided by the Supreme Court regarding market definition does not support such a large and decisive role in the process.[146] This Part first discusses the economics of market definition, how it is used to make inferences about market power, and the principal arguments regarding its role in section 1 cases. It then addresses what the Supreme Court has said about market definition and concludes that a scaled-back role is consistent with the case law.

139. *See supra* Part I.C.

140. *See supra* Part I.C.

141. *See* Kaplow, *supra* note 10, at 1356.

142. *See, e.g.*, *id.* at 1371–72.

143. Crane, *supra* note 23, at 32; Posner & Landes, *supra* note 8, at 938 ("The standard method of proving market power in antitrust cases involves first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough to support an inference of the required degree of market power.").

144. Evans, *supra* note 23, at 53.

145. For an explanation of the error-cost framework, see *id.* at 76–79.

> The error-cost framework has become the backbone of American antitrust analysis. It recognizes that when imperfect human beings base decisions on imperfect information they make mistakes and that those mistakes have costs. There is no way to avoid errors. But we can devise rules that help us make the decisions that maximize our wellbeing net of the costs of making mistakes. In developing these rules we need to take the likelihood and cost of errors into account. False positives result when a rule, or test, finds that the subject has the condition when in fact they do not. False negatives result when a test finds that the subject does not have the condition when in fact they do. Both errors lead to costs.

Id. at 76.

146. *See infra* Part II.C.

A. Economics of Market Definition

Market definition emerges most often as a step towards making inferences about the defendants' level of market power. According to the authors of antitrust law's most authoritative treatise, market power exists "when the defendant (1) can profitably set prices well above its costs and (2) enjoys some protection against rivals' entry or expansion that would erode such supracompetitive prices and profits."[147] In other words, it is the ability to raise prices "well above" costs and keep them there without losing business to rivals.[148] Since market power is a factual predicate for an antitrust violation, it is a natural pillar for defendants to attack and measurements of market power can be powerful tools.[149] There are more direct measures of market power than market share, however, and it is worth exploring why those are not used more often in antirust cases.

One possibility is the Lerner index, which measures the degree to which a given price exceeds the marginal costs to the firm to produce the product.[150] Theoretically, in a perfectly competitive market, all firms produce at the level where price equals marginal cost.[151] The Lerner index is an indication of how far the actual price deviates from the perfectly competitive price, a textbook measure of market power.[152] It presents practical difficulties, however. First, the marginal cost of a particular product can be hard to measure, and second, prices will almost always exceed marginal costs to a certain degree, so the firm can cover its fixed costs and recover its initial investment.[153] It is often difficult to surmise how much of a difference between price and marginal costs is legitimate given these considerations.[154] Put another way, it is difficult to figure out exactly what the competitive price is or should be.

Another basic economic indicator of market power is the price elasticity of demand, or "the percentage change of the quantity demanded of some good in response to a given price change."[155] Where a firm can raise the price of its product and suffer little or no reduction in sales, it has a low price elasticity of demand.[156] If a raise in price causes consumers to turn somewhere else, resulting in a loss in sales of the product, that product has a higher price elasticity of demand.[157] If market power is defined as the ability to raise prices beyond competitive levels without suffering a decrease in demand, it follows logically that the lower a product's price elasticity of

147. AREEDA & HOVENKAMP, *supra* note 3, ¶ 501.
148. *Id.*
149. *See id.* ¶ 531.
150. *See, e.g.*, *id.* ¶ 503b.
151. Evans, *supra* note 23, at 65.
152. *See, e.g.*, E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 28 (6th ed. 2014) ("The higher the [Lerner] index the greater the firm's market power.").
153. Evans, *supra* note 23, at 66.
154. *Id.*
155. AREEDA & HOVENKAMP, *supra* note 3, ¶ 507.
156. *See, e.g.*, SULLIVAN & HARRISON, *supra* note 152, at 13–14.
157. *Id.*

demand, the higher the market power of the firm producing it.[158] In the context of section 1, if a defendant can show their product has a high price elasticity of demand, it can argue its lack of market power precludes it from exerting anticompetitive effects on the market.[159]

Both the Lerner index and price elasticity of demand are ways to represent market power in the language of economics, but they are not numbers practitioners can easily and reliably calculate with commonly available data and use to accurately measure it.[160] As a result, courts have turned to numbers they can calculate in order to make inferences about market power, namely market share, which can only be measured if a market is defined.[161]

The way most courts go about defining the market is to allow defendants to argue that certain other products should be considered substitutes and thus included in the market for the market share calculation.[162] To decide whether a given substitute should be included in the relevant market, courts look to measure or estimate the cross elasticity of demand of the product and the possible substitute.[163] Cross elasticity of demand is the measure of the change in demand for one product caused by a change in the price for a different product.[164] Where this measure is high, the products are deemed substitutes.[165] If defendants can establish that substitutes for its products are available, they can argue that the inquiry must focus on competition in the broader market consisting of the defendants' product plus those substitutes, thus lowering the defendants' relative market share.[166] Cross elasticity of demand has become the subject of extensive expert testimony from economists in antitrust cases.[167]

This process is vulnerable to errors at every step. The next section seeks to identify these errors and consider their general likelihood and cost. It concludes that the current market definition process is costlier than it is worth and courts should, at the very least, scale back their use of it.

B. Error and Efficiency Costs of Market Definition

The exercise of including or excluding certain products in the relevant market presents the risk of two types of errors.[168] Either products that do provide significant competitive constraints are excluded or products that do not do so are included.[169] Any errors of either type will lead to mistaken inferences about market power, which can be dispositive and are likely to

158. AREEDA & HOVENKAMP, *supra* note 3, ¶ 507.
159. *See, e.g.*, SULLIVAN & HARRISON, *supra* note 152, at 29.
160. *See* Evans, *supra* note 23, at 65–66.
161. SULLIVAN & HARRISON, *supra* note 152, at 28.
162. Evans, *supra* note 23, at 60–63.
163. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 507.
164. *See, e.g.*, SULLIVAN & HARRISON, *supra* note 152, at 30.
165. *Id.*
166. *See, e.g.*, Evans, *supra* note 23, at 53.
167. *See, e.g.*, Kaplow, *supra* note 1, at 480.
168. Evans, *supra* note 23, at 76–79.
169. *Id.*

disrupt the whole ensuing analysis.[170] Hard data about how often these errors occur or their cost is not available, but inconsistency in how courts decide what products to include and extreme variance in outcomes suggests they are frequent.[171] In many cases, the opposing sides will present opinions from highly credentialed experts at the opposite extremes of the relevant market spectrum.[172] This makes the result more arbitrary and heavily dependent on the persuasiveness of the lawyers and experts for each side.[173] If there was consensus on a clear and reliable way to determine which products should be included in the market, one would expect arguments to take place more at the margins.[174]

Additionally, the binary nature of this market definition approach does not reflect the reality of economic competition.[175] Products are labeled either inside or outside the relevant market, and once they are found to be inside it, the level of competition each product provides to the defendant's product is inferred from its market share.[176] This fails to recognize that products can have different levels of substitutability, i.e., a product with a smaller market share can exert more pressure if it is a closer substitute than one with a larger market share but a lower cross elasticity of demand.[177] Product differentiation—where products that serve the exact same function are different enough, or marketed as such, to affect consumer decisions[178]—further complicates the issue, making it even more difficult to determine how consumers will react to price changes.[179]

This inflexibility and extreme divergence in opposing positions on market definition create uncertainty for both plaintiffs and defendants.[180] It falls harder on plaintiffs, however, since they bear the burden of proving that defendants have market power in the relevant market.[181] As discussed above, the most common result in rule of reason cases is dismissal because plaintiffs fail to make a prima facie case for anticompetitive effects.[182] While it is impossible to gather definitive statistics about how often courts get the wrong answer in these cases, i.e., dismiss a case where anticompetitive effects are present (false negative) or allow one to proceed where they are clearly not

170. *Id.*

171. *Id.*; Kaplow, *supra* note 1, at 442.

172. *See* Evans, *supra* note 23, at 79; Markham, *supra* note 10, at 639. For a discussion of the extensive role of experts in antitrust cases, see generally Andrew I. Gavil, *After* Daubert*: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663 (1997).

173. Evans, *supra* note 23, at 78–79.

174. *See id.*

175. *Id.* at 79–81.

176. *Id.* at 78.

177. *Id.*

178. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 563a.

179. *See* Evans, *supra* note 23, at 56; Kaplow, *supra* note 1, at 504; Stucke, *supra* note 24, at 1427.

180. *See* Stucke, *supra* note 24, at 1425–26.

181. *See* Markham, *supra* note 10, at 638–39.

182. *See, e.g.*, Carrier, *supra* note 75, at 830.

(false positive), there are strong indications that the error rate in antitrust cases is particularly high.[183]

The cost of these errors is vast. A false positive will lead to millions of dollars in unnecessary litigation costs, and the fear of false positives may lead businesses to abstain from procompetitive behavior that would benefit its competitors and consumers.[184] False negatives allow businesses to continue impeding competition, which can result in competitors' failure and billions of dollars in overcharges to consumers.[185] Given that market definition is often decisive and occupies much of courts' time in antitrust cases, it is a natural area to focus on in any attempt to reduce error costs under the rule of reason. The uncertainty surrounding market definition, and its potential to end cases, leads defense attorneys to devote vast resources to arguing the issue.[186] If courts continue allowing this, expenditures in time and money are potentially limitless, as is the complexity of the testimony. Antitrust trials can drag on for months, with testimony from dozens of expert witnesses.[187] Courts' valuable time is wasted where market definition could be dispensed with quickly.

The complexity of antitrust cases and the resources required to prosecute them under the current approach contribute to a severe dearth of trials in the field.[188] Heightened pleading requirements, higher standards for expert witnesses, and higher burdens for class certification have also contributed to the vanishing of the antitrust trial in recent years, especially those before a jury.[189] This dearth of jury trials is particularly problematic in antitrust enforcement because antitrust cases have implications beyond the individual litigants and may affect the broad structure of economic relations in significant ways.[190]

Juries provide a significant check on judicial power.[191] In antitrust cases, where judges tend to incorporate their own opinions about economic policy into their decisions, this check is arguably more important than usual.[192] Jury trials force attorneys to simplify their arguments and present them as clearly and efficiently as possible.[193] A larger sample of jury trials would allow the general public to weigh in on important antitrust issues using common sense gleaned from their everyday experience.[194] This could be a refreshing

183. Evans, *supra* note 23, at 76–79; *see also* Markham, *supra* note 10, at 612; Stucke, *supra* note 24, at 1377, 1446–49.

184. *See, e.g.*, Evans, *supra* note 23, at 78.

185. *See id.* at 77–78.

186. *See, e.g.*, Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2196–97 (2014).

187. *Id.*

188. *See* Cavanagh, *supra* note 116, at 3, 17–28; Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 37 (2008).

189. *See, e.g.*, Miller, *supra* note 116, at 357–65.

190. *See* Pitofksy, *supra* note 54, at 1064, 1075.

191. *See* First & Waller, *supra* note 40, at 2572–73.

192. *Id.*; *see also* Cavanagh, *supra* note 116, at 6, 38.

193. First & Waller, *supra* note 40, at 2552.

194. *See id.* at 2552–55.

injection into a field bogged down in complex economic theory. More verdicts would make settlement negotiations more reflective of possible judgment amounts and the probability of success in certain types of cases.[195] Without enough data to look at, antitrust lawyers operate largely in the dark when they negotiate settlements, so it is very difficult to tell whether these adequately address defendants' wrongdoing.[196] The private deterrent operates best where settlement amounts accurately reflect the harm caused.[197]

The likelihood that market definition results in substantial error costs and inefficiency is enough that courts should look hard at finding a better way to proceed under the rule of reason. In particular, the presumption that plaintiffs must prove a relevant market to bear their initial burden under section 1 rule of reason cases should be eliminated. Fortunately, under Supreme Court precedent, courts have room to adjust how they approach market definition. The next section discusses what the Court has said about market definition and concludes that a lesser role is consistent with the relevant case law.

C. Market Definition in the Supreme Court

The Supreme Court recognized and addressed the potential for confusion around market definition in *Standard Oil*, the rule of reason's foundational case.[198] The Court explicitly stated that the Sherman Act applied to *any* part of interstate commerce that is affected:

> The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.[199]

The Court acknowledged that certain behavior might be anticompetitive even if it does not negatively affect the widest relevant market, so long as it affects some class of market participants.[200]

For several decades following *Standard Oil*, the Court returned to the issue mainly to narrow the focus of its inquiry. In *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*,[201] for example, the Court asserted that "sections 1 and 2 . . . apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."[202] In both *Lorain Journal Co. v. United States*[203] and *Times-Picayune Publishing Co. v. United States*,[204] the Court

195. *See* Miller, *supra* note 116, at 358.
196. *See id.* at 358–59.
197. *See, e.g.*, *id.*
198. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61–62 (1911).
199. *Id.* at 61.
200. *See id.* at 61–62.
201. 293 U.S. 268 (1934).
202. *Id.* at 279.
203. 342 U.S. 143 (1951).
204. 345 U.S. 594 (1953).

addressed two-sided markets for newspaper advertising. In both cases, it defined the market for advertisers and for readers as separate and addressed anticompetitive effects on the advertiser side without considering the effects on readers.[205]

The seed of the modern market definition paradigm seems to be 1956's *United States v. E. I. du Pont de Nemours & Co.*,[206] a monopoly case under section 2 of the Sherman Act.[207] In a notorious argument which has become known to many commentators as the "cellophane fallacy,"[208] the Court found a lack of monopoly power for a manufacturer of cellophane because consumers could easily switch to wax paper, aluminum foil, or some other type of food wrapping in response to a price increase for cellophane.[209] To calculate the cross elasticity of demand between cellophane and those products, however, the Court used the actual current price of cellophane as a baseline, failing to account for the possibility that the price was already supracompetitive.[210] In deciding whether the defendants possessed market power, the Court ignored any market power that the firm already exercised, evaluating only its potential unused market power.[211] This case represents early and strong evidence that the market definition process is highly prone to errors. Even as commentators largely agreed that *du Pont* rested on faulty reasoning, defendants began putting increasing weight on similar arguments, introducing measures of cross elasticity of demand to prove that additional products should be included in the relevant market, and lower courts proved willing to entertain them.[212]

The Court confirmed the importance of cross elasticity of demand in market definition with *Brown Shoe Co. v. United States*,[213] handed down in 1962.[214] It qualified that endorsement, however, with a recognition that within properly defined markets "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."[215] When using cross elasticity to define a market, then, one cannot ignore evidence of competitive forces operating on some narrower submarket, even when a broader market seems proper at first glance. Here, the Court recognized the danger of separating the market definition inquiry from the conduct itself.

205. *Id.* at 610; *Lorain Journal*, 342 U.S. at 152–53.
206. 351 U.S. 377 (1956).
207. *Id.* at 380–81.
208. *See, e.g.*, Gene C. Schaerr, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L.J. 670, 677 (1985).
209. *See du Pont*, 351 U.S. at 404.
210. *See* Schaerr, *supra* note 208, at 677 n.49.
211. *Id.* at 676–77.
212. *See generally* Werden, *supra* note 2 (reviewing the history of market definition in antitrust cases).
213. 370 U.S. 294 (1962).
214. *Id.* at 325 ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.").
215. *Id.*

United States v. Grinnell Corp.,[216] handed down in 1966, presented a novel challenge for the Court in defining the product market. The case concerned monopolization of the market for certain home security services. The defendant provided centralized comprehensive home security systems, i.e., fire alarm, sprinkler, and burglar alarm systems linked to a central command center with employees who responded to the alarms.[217] Defendants argued the services they offered were so diverse that they could not be grouped together into one relevant market.[218] In other words, firms offering only one of the services should be considered substitutes because consumers could buy the services separately if the price for the central service got too high. While acknowledging that there was a certain level of cross elasticity between the defendant's product and more differentiated services and devices, the Court found that the submarket for centralized comprehensive services was a relevant market on which competitive forces could operate and ruled in favor of the plaintiffs on the issue.[219]

Next came *NCAA v. Board of Regents of the University of Oklahoma*,[220] where the Court stated explicitly that under the rule of reason, neither proof of market power nor elaborate market definition analysis is necessary where there is evidence a restraint causes price or output to be decoupled from consumer demand.[221] Two years after *NCAA*, the Supreme Court handed down *FTC v. Indiana Federation of Dentists*[222] ("*IFD*"), where it expanded the rule to include cases beyond naked restrictions on price or output.[223] In that case, a group of dentists agreed not to provide x-rays to insurance companies, who had a policy of reviewing them to evaluate the cost-effectiveness of dental treatment.[224] In concluding that these agreements were anticompetitive, the Court relied on the FTC's factual finding that in the absence of the agreements, many dentists would have complied with the requests for x-rays.[225] Without a demonstration of procompetitive effects by the defendants, this was enough.[226] The Court required neither a definition of the relevant market nor evidence that the costs of dental treatment actually increased.[227] Discussed further below, the reasoning of this case provides a

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216. 384 U.S. 563 (1966).
217. *Id.* at 574.
218. *Id.*
219. *Id.*
220. 468 U.S. 85 (1984).
221. *Id.* at 109–10.
222. 476 U.S. 447 (1986).
223. *Id.* at 460–61.
224. *Id.* at 448–49.
225. *Id.* at 461–62.
226. *Id.* at 461 ("In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.").
227. *Id.* at 461–62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting

good foundation for a modern rule regarding market definition under section 1.

The Supreme Court has not altered course since *IFD*. *California Dental* acknowledged that case,[228] as did *Amex*.[229] So with the knowledge that market definition is not a requirement under section 1 and that the level of the plaintiffs' initial burden is a continuum dependent on the nature of the agreement, the task then is to surmise where on the continuum plaintiffs start to be required to define the market explicitly and what characteristics of an agreement warrant a place higher or lower on that continuum.

III. When to Avoid Market Definition: The Proposed Rule

The first step any court must take under the rule of reason is to decide how heavy the plaintiffs' initial burden is; where on the *California Dental* continuum[230] does the type of behavior at issue fall? To answer the question, one must consider on what characteristics the burden continuum depends. What makes one agreement inherently more suspect than another? There are a few ways to go about answering that question. One is the categorical approach, where certain categories of agreement are tagged as anticompetitive and the question becomes whether the agreement in question falls into one of those categories. But the Supreme Court has clearly disavowed the categorical approach in antitrust, favoring more flexibility.[231] A potential alternative is an effects-centered approach, not in terms of the final price for consumers but based on the effects the agreement has on the freedom of other economic actors to pursue particular competitive strategies.

If an ideal world is one where competing firms can attempt any and all strategies, with consumers picking the winners according to some calculation of price, quality, branding, availability, etc.—the result being a constant evolution of better-quality products and more efficient production and marketing of those products—then any agreement that prevents firms from employing certain competitive strategies should be highly suspicious. Applying this premise in the market definition context, one can imagine a rule worded something like this: under section 1 of the Sherman Act, where plaintiffs present evidence that an agreement more likely than not prevents a class of economic actors, beyond the willing parties to the agreement, from engaging in some competitive strategy that they otherwise would have pursued, the result should be a prima facie finding of unreasonable anticompetitive effects. At that point, defendants must defend their behavior before the court considers arguments on market definition or market power.

Importantly, the rule does not cover agreements that merely restrict the behavior of the parties, only those that would prevent a wider class of actors

mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.").

228. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

229. *Amex*, 138 S. Ct. 2274, 2285 n.7 (2018).

230. *See supra* notes 104–07 and accompanying text.

231. *Cal. Dental*, 526 U.S. at 780–81.

from engaging in some competitive strategy or where parties are effectively forced to participate in the agreement. Therefore, it does not infringe on the right of businesses to freely contract. Plaintiffs bear the burden of proving that, absent the agreement, those actors more likely than not would have engaged in the competitive strategy.

Another way to interpret the rule is as a presumption: agreements that eliminate entire competitive strategies are anticompetitive, absent a procompetitive justification, regardless of any separate market-power measurement. It can also be phrased like this: where entire competitive strategies are blocked by an agreement, the parties necessarily have market power. Whatever conception makes the most sense, the reader is encouraged to keep that in mind when this Note refers to "the proposed rule." The remainder of this Part examines that rule, its consistency or lack thereof with Supreme Court precedent and economic theory, how it would apply in practice, some potential criticisms, and its likely effect on the consistency and efficiency of antitrust prosecutions. It concludes with a case study of how the rule would apply in pharmaceutical pay-for-delay lawsuits.

A. Origins in the Supreme Court

The foundation of the rule comes from *IFD*, which confirmed that market definition is not required under section 1.[232] Unfortunately, the opinion did not clarify much beyond the fact that direct evidence of anticompetitive effects obviated the need for market definition, and lower courts have produced varying interpretations of what constitutes such direct evidence.[233] A deeper look into the *IFD* opinion, however, reveals the Supreme Court's concern with the elimination of a particular competitive strategy.[234] The evidence in that case showed that the Indiana Federation of Dentists was able to prevent all dentists in certain geographic areas from submitting x-rays to insurance companies, who had a policy of reviewing them to ensure dentists were using cost-effective treatments.[235] The anticompetitive effect that obviated the need for a market definition was that "insurers in [certain] areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays."[236] The very next sentence in the opinion, often quoted, declares the rule that "'proof of actual detrimental effects' . . . can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[237] Proof of an increased price for dental services was not a requirement, just the fact that the practice of obtaining x-rays was blocked.[238]

232. *See IFD*, 476 U.S. 447, 461 (1986).
233. *See* Crane, *supra* note 23, at 43–45.
234. *IFD*, 476 U.S. at 460–61.
235. *See id.*
236. *Id.*
237. *Id.* (quoting PHILLIP AREEDA, ANTITRUST LAW ¶ 1511 (1986)).
238. *Id.* at 459.

Lower courts have responded to *IFD* with a hodgepodge of attempts to categorize behavior that constitutes direct evidence of anticompetitive effects.[239] One common interpretation is that proof of increased price and decreased output obviates the need for an inquiry into market definition or market power,[240] but the *IFD* Court clearly imagined a lower bar than that;[241] in fact it explicitly stated that proof of increased price was not necessary.[242] Others argue that *IFD* makes sense only as a quick-look case and that it turned less on any direct evidence than on the inherently suspect nature of the agreement, which immediately shifted the burden to the defendants.[243] Whether it is considered direct evidence of anticompetitive effects or inherently suspect behavior, the key was that the insurers were blocked as a group from undertaking a competitive strategy.

The other case requiring attention is *California Dental*. Here, the proposed rule is best understood as a marker somewhere along the inherently suspect spectrum.[244] Evidence that the rule is satisfied should mean that the burden is somewhere on the lower end of the spectrum. Additionally, if the burden is on the lower end of the spectrum, courts should avoid market definition. This conception is entirely in line with *California Dental*'s reasoning; in fact, it adds value to that decision by providing some guidance on how to determine the "enquiry meet for the case."[245]

Recently, the Court has shown further signs that it recognizes the limits of market power as a separate element. In *FTC v. Actavis, Inc.*,[246] for example, it found that where certain settlement agreements in patent litigation surrounding branded and generic pharmaceuticals contained evidence of a payment from the brand manufacturer to the generic in exchange for a promise to stay off the market for a certain time, a large enough payment eliminates the need for a separate inquiry into market power.[247] The size of the payment reflects its value to the brand manufacturer, which can only come from charging prices above what they would charge in the presence of generic competition. The ability to do just that is often pointed to as the definition of market power, so a high payment is evidence enough of the likelihood of anticompetitive harm.[248] While the rule in *Actavis* is narrow, it shows that plaintiffs can meet their burden under the rule of reason without

239. *See* Crane, *supra* note 23, at 45–46.
240. *Id.* at 45.
241. *IFD*, 476 U.S. at 461–62; *see also* Crane, *supra* note 23, at 45 (Among courts interpreting *IFD*, "[t]he most commonly repeated maxim—that proof of restricted output and supracompetitive prices establishes market power—is not an analytical criterion at all but merely repeats the definition of market power. It amounts to saying that a plaintiff directly proves market power when she directly proves market power.").
242. *IFD*, 476 U.S. at 461–62.
243. *See, e.g.*, Crane, *supra* note 23, at 44–45.
244. *See supra* notes 106–07 and accompanying text.
245. *See supra* notes 106–07 and accompanying text.
246. 570 U.S. 136 (2013).
247. *Id.* at 158; *see infra* Part III.E (providing an in-depth discussion of market power and market definition in the context of reverse payment cases).
248. *Actavis*, 570 U.S. at 158.

a separate showing of market power and without direct evidence of increased price or decreased output. Where and when they should be able to do that is the focus of the proposed rule and of the rest of this Note.

B. Application of the Rule

The goal of this section is to test the proposed rule against common types of antitrust cases. It is not meant to advocate in favor of a categorical view of antitrust law, and the rule applies the same to all categories of cases. That said, there are similar fact patterns that emerge again and again in antitrust, and it is useful to apply the proposed rule to those patterns and identify where results would differ from the status quo. The chosen fact patterns are resale price maintenance, exclusive dealing, group boycotts, and price-fixing.[249] These provide a diverse enough sample to make some meaningful inferences.

1. Resale Price Maintenance

Resale price maintenance—where a manufacturer establishes a minimum retail price dealers may charge for its product[250]—was per se illegal until 2007's *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[251] in which the Court overturned precedent and ruled that the practice be dealt with under the rule of reason.[252] In its opinion, the Court pointed to the possibilities for both anticompetitive and procompetitive effects of such policies.[253] Sometimes, resale price maintenance can give consumers more options and promote market entry by new firms or brands.[254] Other times, the policies can facilitate horizontal cartels among manufacturers or retailers.[255] They can also be abused by powerful firms to, for example, "forestall innovation in distribution that decreases costs."[256]

To remain consistent with this interpretation of resale price maintenance, the proposed rule should be satisfied only under certain conditions, and that turns out to be the case. Where resale price agreements merely restrict the sellers of the manufacturer's product and do not block other manufacturers from competing with lower-priced products, the rule is not satisfied because the low-price strategy is still viable. Where it can be shown that resale price maintenance either facilitates reseller cartels which prevent price competition

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249. This choice was guided in part by the categories identified in the guide to antitrust laws on the FTC's website. *See Dealings in the Supply Chain*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain [https://perma.cc/B8GK-J2SQ] (last visited Nov. 12, 2019); *Dealings with Competitors*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors [https://perma.cc/2XWW-HJY5] (last visited Nov. 12, 2019).

250. *See, e.g.*, Hovenkamp, *supra* note 70, at 99.

251. 551 U.S. 877 (2007).

252. *Id.* at 882.

253. *Id.* at 890–92.

254. *Id.* at 892–93.

255. *Id.*

256. *Id.* at 893.

or where single firms abuse the practice to stifle innovation in efficiency and cost savings, the rule would dictate that the defendants must demonstrate procompetitive effects; otherwise, the plaintiffs should prevail.

After the *Leegin* decision, the case was reheard on remand under the rule of reason. The Eastern District of Texas found that the plaintiff "ha[d] not pleaded a tenable product market for a rule of reason analysis" and granted Leegin's motion to dismiss.[257] The Fifth Circuit affirmed, and the Supreme Court denied certiorari.[258] The district court's opinion focused entirely on market definition and never analyzed the nature of the agreements or their effects.[259] In a rehearing of the case under the proposed rule, the first question would be different. Not what is the relevant market but is there evidence that a class of actors was prevented from undertaking a competitive strategy?

The facts alleged in *Leegin* did not include evidence that the policy affected any economic actors beyond the parties to the agreement.[260] The products at issue were leather fashion accessories.[261] Leegin's resale price policies were intended to maintain a reputation for the brand as high-end.[262] No evidence was presented indicating that other manufacturers were prevented from pursuing a low-cost strategy, that the policy had facilitated cartel behavior among retailers, or that retailers were forced to agree in the face of possible destruction.[263] Assuming that no evidence of this existed, the facts would not have been enough to satisfy the rule. The district court's decision on remand is thus consistent with the proposed rule. Since the rule was not satisfied, the plaintiffs would need to take another route to meet their initial burden. Whether the market definition analysis conducted by the district court was coherent or correct is beyond the scope of this Note, but to use such an analysis with this fact pattern is consistent with the proposed rule.

An example of where resale price maintenance may fall afoul of the proposed rule is *Babyage.com, Inc. v. Toys "R" Us, Inc.*[264] In that case, several manufacturers of baby products instituted minimum resale prices. Evidence suggested that Babies "R" Us, the largest retailer for baby products, orchestrated an arrangement among the manufacturers to set the policies.[265] Competitor retailers alleged that while they had been able to compete with Babies "R" Us by undercutting its prices before the resale price minimums, that strategy was no longer viable. The new price minimums were too high for these retailers to draw customers away from Babies "R" Us nor could

257. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., No. CV 2:03CV107 (TJW), 2009 WL 938561, at *8 (E.D. Tex. Apr. 6, 2009), *aff'd*, 615 F.3d 412 (5th Cir. 2010).

258. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2010), *cert. denied*, 562 U.S. 1217 (Feb. 22, 2011) (No. 10-653) (mem.).

259. *Leegin*, 2009 WL 938561, at *8.

260. *Leegin*, 551 U.S. at 884.

261. *Id.* at 882.

262. *Id.* at 883.

263. *See Leegin*, 615 F.3d at 420–21.

264. 558 F. Supp. 2d 575 (E.D. Pa. 2008).

265. *Id.* at 579.

they offer enough selection without access the manufacturers' products.[266] Furthermore, there was evidence that the resale price maintenance policies were not in the economic interest of each manufacturer, but were the result of threats from Babies "R" Us to drop the manufacturers' products if they did not comply.[267]

This evidence presents a great example of where market definition is unnecessary. Without market power, Babies "R" Us could not have coerced the manufacturers into the resale price minimums; it was only because each of them depended on Babies "R" Us for so much of their sales that they could not afford to refuse.[268] Furthermore, the only way these policies stood to benefit Babies "R" Us was by eliminating price competition.[269] It is also a great example of how the proposed rule would function. Plaintiffs explicitly alleged that their strategy of undercutting Babies "R" Us on price was thwarted by the policies and that Babies "R" Us coercively orchestrated the policies, which were not in the manufacturers' own economic interests.[270] This type of allegation, if plausible, should be enough to take a case past a motion to dismiss.

While the court considered the evidence described above in its opinion denying the defendants' motion to dismiss, it turned first to whether the plaintiffs had met their burden on the "relevant-market element."[271] To do so, it stated, the plaintiffs must define the relevant market "with reference to cross elasticity of demand" and must not "clearly fail to encompass all 'interchangeable substitute products.'"[272] Only by alleging with "enough heft" that "a hypothetical monopolist could profitably raise prices [in the relevant market]" had the plaintiffs passed this test.[273] The decision thus sets up market definition as an issue for trial and, by pointing to the need for "heft" in the allegations at the motion to dismiss stage, it arguably suggests the need for similarly hefty proof at trial.

Under the proposed rule, the evidence regarding coercion by Babies "R" Us would be enough to clear a motion to dismiss. If Babies "R" Us was able to force manufacturers to agree against their own economic interests, it necessarily possesses market power. If plaintiffs can prove those facts, then, there should be no need to prove a relevant market using cross elasticity of demand. The case can be tried on the issues of whether Babies "R" Us coerced the manufacturers into the resale price maintenance policies and whether these policies affected the viability of the competing retailers' low-cost strategies.

266. *Id.*
267. *Id.* at 582.
268. *Id.*
269. *Id.* at 583.
270. *Id.* at 584.
271. *Id.* at 580.
272. *Id.* (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)).
273. *Id.* at 582.

In sum, where resale price maintenance takes the form of agreements between willing parties and does not effectively block firms from pursuing low-price strategies outside the agreement, the rule would not be satisfied. Where such strategies are blocked, or if firms are forced to agree, it would be satisfied.

2. Exclusive Dealing

Exclusive dealing agreements generally prevent distributors or retailers from selling products other than those manufactured by the other party to the agreement.[274] A large food and beverage producer, for example, may want to have dedicated distributors in certain areas who carry only its products, to insure quality and efficiency standards. These may also take the form of requirements contracts, where a manufacturer agrees to only buy inputs from one supplier.[275] Courts deal with exclusive dealing under the rule of reason,[276] and the cases turn largely on the percentage of the market foreclosed to the firms outside the agreement.[277] Starting in the 1960s, courts began to recognize more efficiencies resulting from exclusive dealing agreements, and the foreclosure percentage needed to show anticompetitive effects rose significantly.[278] By the 1990s, most courts would not find anticompetitive effects unless more than 40 percent of the market was foreclosed.[279] Since that time, the focus has shifted somewhat to market power, i.e., market share, but foreclosure rates remain an important factor.[280]

Analysis under the proposed rule would also focus on foreclosure but would differ in looking first at whether any previously viable competitive strategies were precluded as a result of the foreclosure. A 2005 case in the Third Circuit, *United States v. Dentsply International, Inc.*,[281] provides a good example of exclusive dealing. Dentsply manufactured artificial teeth and sold them to dental supply dealers, who in turn sold them to dental laboratories, along with a variety of other products.[282] When Dentsply began requiring dealers to agree not to carry any of its competitors' products, the Department of Justice challenged the policies under sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act.[283] After a bench trial, the court found that although Dentsply possessed market power, the restraints did not restrict competition because they only applied to dealers, and it was

274. *See Exclusive Dealing or Requirements Contracts*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or [https://perma.cc/T8MQ-G367] (last visited Nov. 12, 2019).

275. *Id.*

276. Hovenkamp, *supra* note 70, at 87.

277. *See* Jonathan M. Jacobson, *Exclusive Dealing, Foreclosure, and Consumer Harm*, 70 ANTITRUST L.J. 311, 311–12 (2002).

278. *Id.*

279. *Id.* at 324.

280. 11 AREEDA & HOVENKAMP, *supra* note 71, ¶ 1821d.

281. 399 F.3d 181 (3d Cir. 2005).

282. *Id.* at 184.

283. *See* United States v. Dentsply Int'l, Inc., 277 F. Supp. 2d 387, 390 (D. Del. 2003), *rev'd*, 399 F.3d 181 (3d Cir. 2005).

still possible for competing manufacturers to sell directly to the dental laboratories.[284] The government appealed only the ruling on its section 2 claims, and the Third Circuit reversed, finding that exclusion of competitors from the dealer channels allowed Dentsply to preserve its monopoly power and was therefore anticompetitive.[285]

Applying the proposed rule in this case would have gotten a different result in the district court, not because of market definition but because the rule recognizes that preclusion of a competitive strategy is an anticompetitive effect, even if other strategies remain available. The district court addressed Dentsply's procompetitive justifications in its opinion, finding them "pretextual."[286] Had the court applied the rule to its findings of fact, the government would have prevailed on its section 1 claim. Because the Third Circuit never weighed in on that claim it is impossible to say whether that too would have been reversed, but the proposed rule would have reached a similar finding of anticompetitive effects in a more direct and efficient way. This case demonstrates that the proposed rule can provide value even outside of the market definition context by focusing courts' attention immediately on the competitive strategies at issue.

3. Group Boycotts and Price-Fixing

Group boycotts, or agreements among competitors not to do business with a certain firm or group of firms, were long considered per se illegal.[287] Swept up in the trend away from per se classification, most group boycott cases are now subject to the rule of reason, though most are still found to be unlawful.[288] Courts have drawn a distinction between naked horizontal agreements among competitors to shut out other competitors, which are almost always, if not always, anticompetitive and ancillary boycotts, where the agreement is motivated by some other, potentially procompetitive goal.[289] Ancillary boycotts often occur as part of joint ventures between smaller firms to coordinate production or distribution with the goal of lowering costs for all involved.[290] Conversely, a naked boycott's only benefit is the isolation of firms using a particular competitive strategy and success inherently depends on the parties possessing sufficient market power to cut the strategy off.[291] Rational actors would not make the agreements if they did not at least believe there was enough market power among them to effectuate it. Most courts recognize that this fact obviates the need for any

284. *Id.* at 449.
285. *Dentsply*, 399 F.3d at 191.
286. *Dentsply*, 277 F. Supp. 2d at 453.
287. *See* 13 AREEDA & HOVENKAMP, *supra* note 71, ¶ 2203a.
288. *Id.*
289. *Id.* ¶ 2201a.
290. *Id.*
291. *Id.*

separate market-power inquiry.[292] While perhaps not quite per se illegal, naked group boycotts are as close as it gets besides price-fixing.[293]

Faced with a more ancillary type of restraint, courts will often turn to market power, which is not illogical given the above analysis.[294] If there is no market power, there is no anticompetitive group boycott. But all the pitfalls of siloing the market-power analysis described above apply. The proposed rule would likely achieve similar results as market definition and market share in these ancillary cases but more efficiently and with fewer errors. The analysis should focus on the nature of the agreement and whether its success is dependent on exclusion of competitive strategies, not just competitors. Where that is the case, market power can be inferred and the court can skip the separate market definition analysis.

A similar analysis applies to naked horizontal price-fixing, although that practice seems likely to remain the one truly per se illegal group of cases. Wherever competitors successfully inflate the price they can charge, other competitors will be denied the opportunity to capture customers from the guilty firms by offering a lower-cost alternative, so the rule is satisfied.[295] Such a result is only possible where the parties to a price-fixing agreement have market power.

The above analysis suggests a few tentative conclusions regarding the proposed rule. First, the results of its application would mirror those of the status quo in a sizable chunk of cases, but the evidence used to reach those conclusions would be different in many of them. Second, the proposed rule appears to apply well across these categories, suggesting that categorical analysis in antitrust cases is unnecessary. The rule should thus be applied without a category in mind and before the court places the case in any such. Finally, the rule would refocus analysis in some cases on the freedom of action of the accused party's competitors and away from the exact parameters of the relevant market and defendants' share thereof. The next section responds preemptively to a few potential criticisms of the proposed rule and hopefully reinforces its viability while adding to the argument for its implementation.

C. Potential Criticisms

The first potential criticism of the proposed rule is that, at its core, it provides nothing new. It can be argued that the rule is simply a restatement of the established notion that direct evidence of anticompetitive effects obviates the need for a separate market-power analysis.[296] The direct-evidence doctrine is muddled, however, and courts often require direct

292. *Id.*
293. *Id.*
294. *Id.*
295. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.").
296. *IFD*, 476 U.S. 447, 460–61 (1986).

evidence of increased price.[297] The practical effect of this interpretation is that plaintiffs must establish what the competitive price is and then establish that the agreement caused the actual price to exceed it.[298] Identifying a competitive price is very difficult and injects more ambiguity and uncertainty into the process.[299] The proposed rule focuses on the change in economic behavior resulting from the agreement, abstracted from the numbers. It punishes behavior that entirely precludes any potential competitive strategies. In one sense, the proposed rule can be understood as a change in focus from numbers to behavior. It is meant to apply far more broadly than the current direct-evidence doctrine and is a more efficient way to separate the wheat from the chaff than either the market-definition/market-share analysis or the direct-evidence analysis.

Second, one might argue that the proposed rule suffers from the same flaw as direct evidence; namely, it will be difficult to show that certain behavior would have taken place absent the agreement. But that issue is inherent in antitrust law.[300] Liability can only be established by some showing of what competition was supposed to look like and how it differed in actuality.[301] In shifting the focus from establishing a but-for price to a but-for competitive strategy, the proposed rule elicits different evidence that is in some cases a clearer indicator of anticompetitive effects. Furthermore, the rule is not meant to be easily satisfied. To prove that a certain strategy more likely than not would have been used in a but-for world is a high evidentiary burden, but it is often the most telling and most efficient factor on which to rest liability.

Third, by reducing the role of market definition and market share significantly, the rule is open to criticism that it is too pro-plaintiff. The idea that screening through market definition and market share helps avoid wrongful punishment of behavior that is actually procompetitive is widespread.[302] It is part and parcel of the Chicago school of antitrust,[303] and businesses rely heavily on market-power arguments in defending their behavior.[304] The aim of this Note is not to discount the market-power screen entirely but to point out how completely the issue dominates modern antitrust jurisprudence, to question the logical foundations of using it in all rule of reason cases, and to point out a subset of cases where it unnecessary and inefficient.

The question of whether the proposed rule is friendlier to plaintiffs than the current regime is difficult to answer. It is probably friendlier to defendants who wield significant market power but avoid blocking competitors' strategies and harder on less powerful firms who are

297. *See, e.g.*, *Amex*, 138 S. Ct. 2274, 2284 (2018).
298. *See* Crane, *supra* note 23, at 45.
299. *Id.*
300. *Id.* at 33.
301. *Id.*
302. *See, e.g.*, *Amex*, 138 S. Ct. at 2284; Evans, *supra* note 23, at 89; Hovenkamp, *supra* note 70, at 98.
303. *See, e.g.*, Patterson, *supra* note 80, at 10.
304. *See supra* note 1 and accompanying text.

nonetheless able to snuff them out. That seems a desirable outcome on its face. The most significant implication of the proposed rule is not that more or fewer plaintiffs will prevail but how those that do will get there.

D. *Implications of the Rule*

Perhaps the most persuasive arguments for implementing the proposed rule are the effects it would have on the process of prosecuting antitrust cases. The best way to examine those potential results is to go step-by-step through the stages of an antitrust lawsuit and consider what the proposed rule's effects might be at each major hurdle plaintiffs must clear.

Broadly, the proposed rule would likely lead courts to place more emphasis on causation and less on market definition in a certain set of cases. Under the current regime, plaintiffs' lawyers have an incentive to seek cases where they can define a market very narrowly. Assuming it is more beneficial for lawyers to investigate instances where entire competitive strategies are cut off than to investigate where markets can be construed narrowly, this effect is desirable. In any event, the implications will hopefully become clearer with a step-by-step investigation.

The first hurdle any plaintiff must clear is the motion to dismiss. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[305] Following the proposed rule, if plaintiffs plead sufficient facts that, accepted as true, make it plausible that the agreement blocks at least one competitive strategy entirely, the hurdle is cleared. Practically, it means that where such a showing is made, plaintiffs need not prove a relevant market or make a separate showing of market power to clear a motion to dismiss.

If the case clears a motion to dismiss, the parties will proceed to discovery. Here is the phase where the rule does most of its work. In today's typical antitrust case, a large portion of discovery is devoted to market definition.[306] Both sides generally offer experts who prepare lengthy reports, often containing the most complex economic analysis found in the whole process.[307] Each of them then responds to the other side in a rebuttal report and then there is a final round of replies.[308] Every expert is then deposed.[309] Where the proposed rule is satisfied, courts should grant motions by plaintiffs to restrict or eliminate market definition discovery. Of course, plaintiffs who choose that path would not be able to fall back on proving market power separately if their case under the proposed rule fails.

The next landmark is the summary judgment motion. Where the rule is satisfied, summary judgment on market power should be granted in favor of the plaintiffs. The effect of such a ruling is that the issue of market definition

305. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
306. *See supra* note 172 and accompanying text.
307. *Id.*
308. *See* MANUAL FOR COMPLEX LITIGATION § 11.481 (4th ed. 2004).
309. *See id.*

does not appear in any way, shape, or form before the factfinder. It is entirely possible to grasp antitrust cases and the arguments made therein without hearing of such a thing as a relevant market and is likely a better way to understand the issues in many cases. Introducing expert testimony regarding cross elasticity merely to define the market runs the risk that jurors will be immediately overwhelmed and check out.[310]

The proposed rule is derived not from complex economic theory but from a close examination of what economic competition means at its most basic foundation, guided by the statements of the Sherman Act's drafters and the opinions of the Supreme Court.[311] Simplifying antitrust cases to this level is not only advantageous in reducing error and efficiency costs but necessary to maintain the jury's vital check on judicial power.[312] There are ripe issues that need to be decided by juries.[313] Getting them decided is in everyone's interest, but if cases remain overwhelmingly complex, the incentive will remain for early dismissal or quick settlements and cases will never reach juries.[314] The proposed role is meant in part to help them get there.

E. Pay-for-Delay Agreements: A Case Study

The purpose of this section is to expand upon and clarify what the proposed rule might look like in practice by way of a case study of pharmaceutical pay-for-delay lawsuits. These cases provide a good example because there is often enough evidence to satisfy the rule, and some courts have begun to recognize that market definition is unnecessary while others continue to require it.[315] A brief description of the unique underlying legislation at issue in pay-for-delay cases is provided below, followed by an exploration of what the results of the proposed rule might look like when applied to them.

Congress passed the Drug Price Competition and Patent Term Restoration (Hatch-Waxman) Act of 1984[316] with the goal of increasing the use of generic drugs to bring down overall drug costs.[317] Among the problems the law addressed were the cumbersome Food and Drug Administration approval process[318] and the excessive costs for generic firms to challenge weak patents covering branded drugs.[319] The Act made it easier for generic manufacturers to get approval for drugs that are bioequivalent to existing branded drugs by filing an "Abbreviated New Drug Application" (ANDA), a far simpler

310. *See* Crane, *supra* note 188, at 33–35.
311. *See supra* Part I.A.
312. Cavanagh, *supra* note 116, at 38.
313. *See id.* at 6.
314. *See* Miller, *supra* note 116, at 365–66.
315. *See infra* notes 338–40 and accompanying text.
316. Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of the U.S.C.).
317. *See* H.R. REP. NO. 98-857, at 14, 17 (1984).
318. *See, e.g.*, Ann K. Wooster, Annotation, *Construction and Application of Hatch-Waxman Act, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (Codified as Amended at 21 U.S.C.A. § 355 and 35 U.S.C.A. § 271(e) (1994))*, 180 A.L.R. Fed. Art. 487, § 2(a) (2002).
319. *See, e.g.*, Margaret K. Kyle, *Competition Law, Intellectual Property, and the Pharmaceutical Sector*, 81 ANTITRUST L.J. 1 (2016).

process than the standard "New Drug Application."[320] It also provided an incentive for these companies to challenge patents covering brand drugs: the first company to file an ANDA for a new generic and include a certification that a patent covering the brand drug is invalid or unenforceable (the "first-filer") gets a six-month exclusivity period during which no other companies can market a generic.[321] Brand manufacturers, who are loath to give up their lucrative monopolies on patented drugs, often employ various tactics to extend the life of their patent protection beyond its initial term.[322] The patent office lacks the resources for thorough investigations, so the result is that many drugs are covered by patents long after the initial patent term has expired, but many of those patents would not hold up if challenged in court.[323] The Hatch-Waxman Act's drafters recognized this and provided this incentive to force brand manufacturers to defend their patents in court.[324] Once an ANDA is filed on a drug with nominal patent protection, the patent owners have forty-five days to bring an infringement suit before the generic can enter.[325] Once the suit is filed, generic entry is postponed for an additional thirty months or until the patent is judged invalid or enforceable, whichever comes first.[326]

Pay-for-delay agreements arise when brand manufacturers settle these patent suits with a payment to the generic manufacturer in exchange for a delay in the launch of the generic until the expiration of the patent or some other specified date.[327] These agreements are sometimes called reverse payments because the company that brought the lawsuit pays the initial target to settle the case, the opposite of what normally happens in a civil settlement.[328] The size of these payments is an indicator of both the power of the branded firm to maintain a supracompetitive price (market power) and the weakness of the patent at issue. Where a brand drug is protected by a legitimate patent, no payment is needed to keep generics off the market, and where a branded company lacks market power, a payment to one firm would be useless since other market forces would bring the price to a competitive level.[329]

Pay-for-delay agreements started to become common in the early 2000s, and when antitrust enforcers, drug wholesalers, consumers, and retailers

320. Wooster, *supra* note 318, § 2(a).

321. *Id.*

322. *See, e.g.,* Eric L. Cramer & Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. REV. 81, 81–82 (2004).

323. *See, e.g.*, *How Pay-for-Delay Settlements Make Consumers and the Federal Government Pay More for Much Needed Drugs: Hearing Before the H. Subcomm. on Commerce, Trade & Consumer Prot.*, 111th Cong. 13–15 (2009) [hereinafter *Pay-for-Delay Hearing*] (statement of the Federal Trade Commission).

324. *Id.*

325. Wooster, *supra* note 318, § 7.

326. *Id.* § 2(a).

327. *See, e.g.*, *Pay-for-Delay Hearing*, *supra* note 323, at 13–15.

328. FTC v. Actavis, Inc., 570 U.S. 136, 141 (2013).

329. *See, e.g.*, Aaron Edlin et al., *Activating* Actavis, ANTITRUST, Fall 2013, at 16, 16–18.

caught on, they began to bring antitrust lawsuits claiming the reverse payments were anticompetitive.[330] One of these cases, *Actavis*, made it to the Supreme Court, which found in 2013 that the agreements were potentially anticompetitive and that the size of a reverse payment is itself a strong indicator of market power.[331] Therefore, the larger the payment, the more profit the branded firm stood to lose from price competition and the more market power the firm necessarily has.[332] Despite this decision, lower courts still give significant attention to market definition in many pay-for-delay cases.[333] Defendants frequently argue that the product market for a given drug extends to other drugs which treat the same condition, despite strong evidence that neither doctors nor patients usually consider cost when choosing a drug, meaning price competition is very limited.[334] Calling different drugs that treat the same condition substitutes is often inaccurate due to this lack of price sensitivity,[335] and as the Supreme Court recognized, the existence of the payment itself demonstrates that the brand manufacturer had the power to maintain a supracompetitive price; the payment does not make economic sense otherwise.[336]

Reverse payments are especially suspect due to the exclusivity period baked into the Hatch-Waxman Act. Where a brand manufacturer pays the first-filer to delay its launch, the entire market is held hostage because no other generic can enter until the expiration of the exclusivity.[337] This fact is key in applying the proposed rule. Where there is evidence that a pay-for-delay agreement blocked all generic entry for a certain amount of time, courts should avoid market definition discovery and should grant summary judgment on market power for the plaintiffs.

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330. *See Actavis*, 570 U.S. at 145–47.

331. *See id.* at 157 ("[W]here a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. At least, 'the size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power'—namely, the power to charge prices higher than the competitive level." (internal citations omitted) (quoting 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2046 (3d ed. 2012))).

332. *Id.*

333. *See, e.g.*, Michael Toomey, *The Use of Merger Analysis Techniques to Assess the Competitive Effects of Reverse Payment Settlements*, 92 WASH. U. L. REV. 193, 214–16 (2014).

334. Cramer & Berger, *supra* note 322, at 123–24.

335. *Id.* at 129.

336. *Actavis*, 570 U.S. at 157.

337. *See, e.g.*, Cramer & Berger, *supra* note 322, at 96–97.

While most courts still consider market definition a separate required element in these cases,[338] some have begun to step away from it.[339] Judge Stefan R. Underhill in the District of Connecticut, for example, took the affirmative step of issuing an order to show cause to the defendants that requested a briefing on why he should allow discovery on market definition.[340] Specifically, the order asked the defendants to address (1) whether proof of overcharges necessarily proves market power, (2) whether sales and pricing data regarding only the drug and its generic could prove directly that the price was supracompetitive, and (3) whether market definition was "necessary or material."[341] During oral argument, Judge Underhill articulated a view that market definition adds confusion to many antitrust cases, that avoiding it is often in the interest of judicial economy, and that the Sherman Act covers anticompetitive effects on *any* relevant market.[342] In response to the judge's question at oral argument, defense counsel argued that "[t]here's a lot of competition going on here, we think. . . . The economists need to review this material, tell us what the answer is."[343] Judge Underhill ruled that "the relevant market in this case is determined by the nature of the challenged agreement, that the only relevant market in this litigation is therefore the market of Aggrenox and its generic equivalents, and that no discovery or evidence relating to other drugs as potential substitutes is relevant."[344]

The alignment of the reasoning in this decision with the proposed rule is evidence of the rule's potential viability and of the plausibility of courts experimenting with it or something like it. There is one step Judge Underhill did not take (he did not need to in that case), which the rule does: direct proof of supracompetitive price or decreased output should not be required; proof of a blocked competitive strategy should be enough. That tweak serves to solidify the move away from hypothetical price numbers, cross elasticities of demand, and the like. *In re Aggrenox Antitrust Litigation* ended up settling before trial, like almost all antitrust cases do.[345]

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338. *See, e.g.*, *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. CV 14-md-02503, 2018 WL 563144, at *12 (D. Mass. Jan. 25, 2018) (denying plaintiffs' motion for summary judgment on market power and granting defendant's motion for summary judgment on direct evidence of market power); *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 388 (D. Mass. 2013) (finding that "the reasonable interchangeability of brand Nexium with other drugs . . . is better left for resolution by a jury").

339. *See, e.g.*, United Food & Commercial Workers Local 1776 v. Teikoku Pharma USA, 296 F. Supp. 3d 1142, 1166–74 (N.D. Cal. 2017) (granting summary judgment in favor of the plaintiffs on market power).

340. Order to Show Cause, *In re* Aggrenox Antitrust Litig., No. 3:14-md-02516 (SRU) (D. Conn. Jan. 8, 2016), ECF No. 432.

341. *Id.* at 2.

342. Transcript of Oral Argument on Order to Show Cause at 24–25, 30, *Aggrenox*, No. 3:14-md-2516 (SRU) (D. Conn. Mar. 31, 2016), ECF No. 469.

343. *Id.* at 35.

344. *In re* Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 663 (D. Conn. 2016).

345. Order Granting Final Judgment and Order of Dismissal Approving Indirect Purchaser Class Settlement and Dismissing Indirect Purchaser Class Claims Against Boehringer and Teva, *Aggrenox*, No. 3:14-md-2516 (SRU) (D. Conn. July 19, 2018), ECF No. 821.

As of this writing, only three pay-for-delay cases have gone to trial, with two of them settling before a verdict.[346] That leaves a sample of one: a jury trial in the District of Massachusetts regarding Nexium, a blockbuster drug used to treat indigestion.[347] The results of special questions to the jury in that case revealed a finding for the plaintiffs on the market-power element and a finding for defendants on causation, leading to no liability.[348]

Of course, no firm conclusions can be drawn from one case, but the only available evidence of its kind suggests that the jury found its way through the weeds to the heart of the issue. In the end, they were unconvinced that absent the agreement, any generic companies would have launched.[349] Certain case-specific facts significantly increased doubt in that area, doubt which is not present in many other pay-for-delay cases.[350] The plaintiffs simply could not prove that the generic more likely than not would have launched earlier without the agreement.[351] This is exactly the analysis that would have been called for under the proposed rule—the only differences being that the market definition questions would not go to the jury and all those hours of testimony and pages of exhibits and expert reports would vanish.

CONCLUSION

The role of market definition in antitrust cases is in flux. Both courts and commentators have begun to question its usefulness in achieving the goals of the antitrust laws. In exploring other strategies, courts need to know where they can confidently dispense with market definition. Practitioners on both sides of the antitrust bar, potential plaintiffs, and all those who make strategic business decisions stand to benefit from a rule clarifying when plaintiffs can make a prima facie case without defining a relevant market. This Note has endeavored to design such a rule for cases falling under section 1 of the Sherman Act. In many of these cases, a look at the strategies available to the defendant's competitors is the best place for courts to start their inquiries. By

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346. Order Approving Settlement End-Payor Class Plaintiffs' Settlements with Medicis Pharmaceutical Corp. and Impax Laboratories, Inc.; Entering Final Judgment; and Dismissing End-Payor Class's Claims Against Medicis Pharmaceutical Corp. and Impax Laboratories Inc., *In re* Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-02503 (D. Mass. July 18, 2018), ECF No. 1175; Order, Apotex, Inc. v. Cephalon, Inc., No. 2:06-cv-2768 (E.D. Pa. July 7, 2017), ECF No. 1265.

347. *In re* Nexium (Esomeprazole) Antitrust Litig., No. 12-md-02409-WGY (D. Mass. filed Dec. 7, 2012). Another pay-for-delay case is set for trial in January 2020 in the District of Rhode Island. *See* Case Management Order No. 16, *In re* Loestrin 24 Fe Antitrust Litig., No. 13-md-2472 (D.R.I. Oct. 23, 2019), ECF No. 1277. In that case, the court requested extra briefing and oral argument on specific questions regarding market definition and market power. *See* Questions for Further Market Power Briefing, *Loestrin*, No. 13-md-02472 (D.R.I. Sept. 20, 2019), ECF No. 1232. A decision regarding summary judgment on market power was still pending as of this writing.

348. *See* Jury Verdict at 1, *Nexium*, No. 12-md-02409-WGY (D. Mass. Dec. 5, 2014), ECF No. 1383.

349. *Id.*

350. *See* Transcript of Jury Charge at 48–50, *Nexium*, No. 12-md-02409-WGY (D. Mass. Dec. 11, 2014), ECF No. 1441.

351. *See id.*; *see also* Jury Verdict, *supra* note 348, at 1 (question 4).

simplifying the issues, this approach can streamline cases, improving efficiency, accuracy, and consistency. It can also help get more antitrust cases in front of juries, strengthening that vital check on judicial power in cases that may alter the structure of economic relations in this country.