ANTITRUST — SHERMAN ACT, SECTION 2 — U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IMPOSES LIABILITY ON GOOGLE FOR ENGAGING IN ANTICOMPETITIVE CONDUCT AS A MONOPOLIST. — *United States v. Google, LLC*, No. 20-cv-3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024).

After decades out of the spotlight,[1] antitrust lawsuits appear to be back in vogue.[2] Though recent attempts to enjoin mergers have mostly failed,[3] some experts view ongoing DOJ and FTC efforts under section 2 of the Sherman Act to rein in allegedly anticompetitive conduct by large technology companies with more optimism.[4] Still, uncertainty over the agencies' ability to show that certain firms' activities caused anticompetitive harm persists,[5] and what threshold of proof suffices to establish causation remains unclear.[6] Recently, in *United States v. Google, LLC*,[7] the U.S. District Court for the District of Columbia held that Google illegally maintained monopoly power in two online markets by forming exclusive agreements that caused anticompetitive harm.[8] Ascertaining anticompetitive harm without using "but-for" evidence,[9] the court clarified ambiguity over the appropriate causation standard for establishing liability, selecting a lenient one on contestable grounds and applying it in an especially lenient fashion. As a result, the DOJ's and FTC's ability to constrain business activity effectively expanded.

Since the 2000s, Google has maintained a leading position in the market for general search services.[10] General search encompasses "the market for operating and offering a general search engine" that

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[1] *See* Filippo Lancieri et al., *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 487 (2023).

[2] *See* Brian C. Albrecht & Daniel J. Gilman, *Ranking the Big Tech Monopolization Cases: Some Economists' Perspectives*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 9, 2024), https://www.yalejreg.com/nc/ranking-the-big-tech-monopolization-cases-some-economists-perspectives-by-brian-c-albrecht-daniel-j-gilman [https://perma.cc/TW29-XVWQ]. *But cf.* Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* 1–2, 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32762, 2024) (questioning scope of empirical justifications for aggressive antitrust enforcement across various markets).

[3] *See, e.g.*, United States v. AT&T Inc., 310 F. Supp. 3d 161, 253–54 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019); FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1101 (N.D. Cal. 2023).

[4] *See* Albrecht & Gilman, *supra* note 2 (discussing relative strength of recent antitrust actions against Google, Apple, Amazon, and Meta); Daniel A. Crane, *Ranking the Big Tech Monopolization Cases*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 26, 2024), https://www.yalejreg.com/nc/ranking-the-big-tech-monopolization-cases-by-daniel-a-crane [https://perma.cc/W99F-ZW4X] (same).

[5] *See* Albrecht & Gilman, *supra* note 2; Crane, *supra* note 4.

[6] *See* Ankur Kapoor, *What Is the Standard of Causation of Monopoly?*, ANTITRUST, Summer 2009, at 38, 38.

[7] No. 20-cv-3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024).

[8] *Id.* at *3–4.

[9] *See id.* at *105–06.

[10] *See id.* at *2; Daisuke Wakabayashi, *Google Dominates Thanks to an Unrivaled View of the Web*, N.Y. TIMES (Dec. 14, 2020), https://www.nytimes.com/2020/12/14/technology/how-google-dominates.html [https://perma.cc/8EBD-XWUS].

"crawl[s] . . . the entire (general) internet," instead of a subset of webpages or topics, to return listed results.[11] For a long time, many attributed Google's dominance to talent and quality.[12] However, antitrust agencies eventually began to ponder additional, less innocuous explanations for the firm's success.[13] After investigating for over a year, on October 20, 2020, the DOJ, with attorneys general from eleven states, sued Google in the U.S. District Court for the District of Columbia.[14] According to the DOJ, Google "violated Section 2 of the Sherman Act" by forming "exclusive agreements to secure default distribution" of its search and advertising services to maintain monopolies in three online markets.[15] Soon after, on December 17, 2020, thirty-eight states sued Google in the same district.[16] This complaint raised additional claims of monopolization in a fourth online market, as well as of "exclusionary conduct . . . that targeted specialized vertical providers"[17] (SVPs) and users of Google's advertising management platform.[18] On January 7, 2021, the court granted a motion to "consolidate[] the two cases for pretrial purposes," before consolidating them for trial.[19]

After holding trial from September to November 2023,[20] the court ruled largely in the plaintiffs' favor.[21] Judge Mehta stated that "Google is a monopolist, and it has acted as one to maintain its monopoly."[22]

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[11] Christian Bergqvist, *The US Google Search Case Is Really About Monopolizing the Future*, PROMARKET (Aug. 20, 2024), https://www.promarket.org/2024/08/20/the-us-google-search-case-is-really-about-monopolizing-the-future [https://perma.cc/G97F-WGU4].

[12] *See Google*, 2024 WL 3647498, at *2.

[13] *See* Tony Romm, *50 U.S. States and Territories Announce Broad Antitrust Investigation of Google*, WASH. POST (Sept. 9, 2019, 4:31 PM), https://www.washingtonpost.com/technology/2019/09/09/states-us-territories-announce-broad-antitrust-investigation-google [https://perma.cc/5SGC-BVJN].

[14] Brent Kendall & Rob Copeland, *Justice Department Hits Google with Antitrust Lawsuit*, WALL ST. J. (Oct. 20, 2020, 8:08 PM), https://www.wsj.com/articles/justice-department-to-file-long-awaited-antitrust-suit-against-google-11603195203 [https://perma.cc/2WEZ-WM39]; *Google*, 2024 WL 3647498, at *4.

[15] *Google*, 2024 WL 3647498, at *4. The markets consisted of "general search services, search advertising, and general search text advertising." *Id.* For a description of these markets, see *id.* at *68–73, *81. Plaintiffs accused Google of forming exclusive agreements with various technology companies, including Apple, Mozilla, and Samsung. *See* Complaint ¶ 4, *Google*, 2024 WL 3647498 (No. 20-cv-3010).

[16] *Google*, 2024 WL 3647498, at *4.

[17] SVPs offer results within a structured subset of the internet, rather than across its entirety. Examples include search engines on Amazon, Expedia, and Yelp. *See* Alexandre Marotel, *Vertical Search Engine*, TWAINO (May 6, 2022), https://www.twaino.com/en/definition/v/vertical-search-engine [https://perma.cc/W3YU-947Z].

[18] *See Google*, 2024 WL 3647498, at *4.

[19] *Id.* at *5.

[20] *Id.* Before trial, the court deferred plaintiffs' motion to sanction Google for failure to preserve evidence for trial, and it proceeded to partially grant Google's motion for summary judgment. *Id.* (citing United States v. Google LLC, 687 F. Supp. 3d 48, 78–84, 85–87 (D.D.C. 2023)). The partial grant of summary judgment dismissed claims that Google's targeting of SVPs and use of compatibility commitments violated section 2 of the Sherman Act. *Id.* (citing *Google*, 687 F. Supp. 3d at 78–83).

[21] *Id.* at *4.

[22] *Id.* at *3.

First, the court held that general search services and general search text advertising constituted "relevant product markets,"[23] applying the market definition factors[24] from *Brown Shoe Co. v. United States*.[25] Second, in light of "direct and indirect evidence," the court held that Google possessed monopoly power in these markets.[26] Third, the court analyzed whether Google's distribution contracts constituted exclusive agreements.[27] Applying the exclusive dealing framework from *United States v. Microsoft Corp.*,[28] the court held that Google's agreements with Apple, Mozilla, and Android distributors, among others, which "establish[ed] Google as the out-of-the-box default search engine,"[29] constituted exclusive dealing.[30] The agreements did not expressly exclude rivals such as Bing and DuckDuckGo[31] — however, they proved sufficiently exclusive in practice to the court.[32]

Fourth, the court held that Google's exclusive agreements caused anticompetitive effects in the general search services and general search text advertising markets.[33] In general search text advertising, Judge Mehta concluded that the agreements foreclosed 45% of the market and enabled Google to raise advertising prices, lower quality, and limit rivals' revenues.[34] In general search services, Judge Mehta also concluded that Google caused anticompetitive harm through market foreclosure, as "Google's exclusive distribution agreements foreclose[d] 50% of the general search services market by query volume."[35] For the figure, Judge Mehta cited plaintiffs' expert, Dr. Michael Whinston, who had found that "50% of all [general search engine] queries in the United States are run through the default search access points covered by the

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[23] *Id.* at *4, *95.

[24] *See id.* at *68–73, *81–95.

[25] 370 U.S. 294 (1962). By applying the *Brown Shoe* factors, Judge Mehta eschewed the more quantitative market definition framework endorsed by the 2023 Horizontal Merger Guidelines. *See* U.S. DOJ & FTC, MERGER GUIDELINES 39–50 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/PGC9-L78T]. The court also held that "search advertising" was a relevant market in which Google was not a monopolist. *Google*, 2024 WL 3647498, at *81.

[26] *See Google*, 2024 WL 3647498, at *74–81, *91–92.

[27] *See id.* at *95.

[28] 253 F.3d 34 (D.C. Cir. 2001).

[29] *Google*, 2024 WL 3647498, at *98.

[30] *See id.* at *95–103.

[31] *See id.* at *96.

[32] *See id.* at *98 (citing ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270, 283 (3d Cir. 2012) (holding that de facto exclusivity may establish exclusive dealing under section 2 of the Sherman Act)).

[33] *Id.* at *103, *125.

[34] *See id.* at *125–26, *128.

[35] *Id.* at *107. Judge Mehta also concluded that the agreements impeded rivals' ability to scale and diminished rivals' incentives "to invest and innovate in general search." *Id.* at *104. Specifically, by entering default agreements, Google deprived rivals of additional "user queries" essential for establishing economies of scale. *See id.* at *109. Further, the default-induced "foreclosure of efficient channels of distribution" disincentivized capital investments into developing new, innovative general search engines. *See id.* at *114.

challenged distribution agreements."[36] As suggested by his citation to market shares, Judge Mehta relied on *Microsoft*'s lenient causation standard when determining the agreements' effects.[37] *Microsoft* allows courts to "infer 'causation'" when "a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'"[38]

In applying *Microsoft*, Judge Mehta declined to require evidence of but-for causation. He noted that a but-for causation standard would impose a substantial evidentiary burden on plaintiffs who cannot "confidently reconstruct . . . a world absent the defendant's exclusionary conduct."[39] Further, a stringent standard could encourage monopolists to take earlier anticompetitive action against potential entrants whose forecasted market impact may be less measurable.[40] Thus, inferring anticompetitive effects from exclusivity via *Microsoft* did not require "thought experiments" that compared actual outcomes to hypothetical outcomes in a "but-for world" sans Google's default agreements.[41] While Judge Mehta acknowledged that foreclosure, according to Dr. Whinston, would "ideally" be estimated against a counterfactual world without the default agreements, he concluded "the law does not require it."[42] Judge Mehta further rejected Google's argument that *Rambus Inc. v. FTC*[43] could be read "to support the need for a but-for world showing" when evaluating the anticompetitive effects of the default agreements.[44]

Fifth, the court rejected Google's procompetitive justifications for the default agreements.[45] As a result, the court concluded that Google violated section 2 of the Sherman Act.[46] Judge Mehta ruled in Google's

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[36] *Id.* at *104.

[37] *See id.* ("[C]ausation does not require but-for proof."). But-for analysis would provide more econometrically robust estimates of how rival search engines' market performance would have changed in a counterfactual world without Google's exclusive agreements. *See id.* at *105.

[38] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (alterations in original) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996)).

[39] *Google*, 2024 WL 3647498, at *104 (quoting *Microsoft*, 253 F.3d at 79); *see also* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 309–10 (1949) ("[T]o demand that bare inference be supported by [but-for] evidence . . . would be a standard of proof . . . most ill-suited for ascertainment by courts.").

[40] *See Microsoft*, 253 F.3d at 79 (noting that plaintiffs' "inability to reconstruct the hypothetical marketplace" would incentivize "earlier anticompetitive action" by large incumbents); *cf.* Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 125 (Wayne D. Collins et al. eds., 2008) (detailing how complexity of antitrust burdens of proof have made antitrust litigation complicated and expensive).

[41] *See Google*, 2024 WL 3647498, at *106.

[42] *Id.* at *105. Dr. Whinston provided two counterfactual analyses: One analyzed the extent to which Google's market position would deteriorate in a hypothetical world "in which users are offered a [general search engine] 'choice screen' out of the box." *Id.* at *106. The other was labeled "Super Duck." *Id.*

[43] 522 F.3d 456 (D.C. Cir. 2008).

[44] *Google*, 2024 WL 3647498, at *105.

[45] *Id.* at *125.

[46] *Id.* at *134.

favor on some matters, including sanctions,[47] as well as the absence of a duty to deal with rivals on its own platforms.[48] Still, commentators saw the ruling as a setback for Google,[49] which announced its intention to appeal.[50] In anticipation of the imminent remedies trial, debate over what form remedies should take has begun.[51]

In holding that Google's exclusive agreements caused anticompetitive harm without requiring but-for proof, the court clarified a previously unclear standard for establishing a "causal link"[52] to grant injunctive relief. Preferring *Microsoft*'s framework over *Rambus*'s stringent but-for standard,[53] Judge Mehta adopted a lenient threshold requirement for establishing causation of anticompetitive harm. Still, by overlooking theoretical reasons for favoring this lenient causation standard, Judge Mehta justified dismissing the *Rambus* standard on rather superficial grounds. Further, by interpreting *Microsoft*'s causation standard leniently in *Google*'s distinct factual setting, Judge Mehta effectively loosened an already lenient evidentiary burden for entities that are better positioned to meet stringent standards. In all, extending an especially lenient causation standard expands antitrust agencies' ability to enjoin business activity under section 2 of the Sherman Act.

In following *Microsoft* rather than *Rambus*, Judge Mehta installed a lenient causation framework for inferring exclusive agreements' anticompetitive effects in a wide array of activities. Before *Google*, courts and experts long struggled to determine what standard of proof sufficed to establish when monopolistic conduct caused anticompetitive harm that "r[a]n afoul of Section 2 of the Sherman Act."[54] Disagreements over evidentiary standards manifested in the *Microsoft* and *Rambus* courts' respective reasonings. In *Microsoft*, the D.C. Circuit was concerned that stringent causation standards would unfairly "allow monopolists free reign to squash nascent, albeit unproven, competitors" who could not reliably "reconstruct the hypothetical marketplace absent a defendant's

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[47] *Id.* at *4.

[48] *Id.* at *132.

[49] *See, e.g.*, Andrew Orlowski, *Google Antitrust Ruling Is a Blow to Big Business*, UNHERD (Aug. 6, 2024, 11:55 AM), https://unherd.com/us/newsroom/google-antitrust-ruling-is-a-setback-to-big-business [https://perma.cc/9TYV-6UQC].

[50] *See* David McCabe, *"Google Is a Monopolist," Judge Rules in Landmark Antitrust Case*, N.Y. TIMES (Aug. 5, 2024), https://www.nytimes.com/2024/08/05/technology/google-antitrust-ruling.html [https://perma.cc/9HUH-R4UZ].

[51] *Compare, e.g.*, Tim Wu, Opinion, *What Should We Do About Google?*, N.Y. TIMES (Aug. 13, 2024), https://www.nytimes.com/2024/08/13/opinion/google-antitrust-remedy.html [https://perma.cc/EZ25-H2U9] (advocating for breakup of Google), *with, e.g.*, Joseph V. Coniglio, *DOJ v. Google: Six Weak Spots in Judge Mehta's Decision*, INFO. TECH. & INNOVATION FOUND. (Aug. 23, 2024), https://itif.org/publications/2024/08/23/six-weak-spots-judge-mehta-google-decision [https://perma.cc/YS86-C3Y7] (favoring a narrower remedy for Google).

[52] *Google*, 2024 WL 3647498, at *104 (quoting United States v. Microsoft Corp., 253 F.3d 34, 78 (D.C. Cir. 2001)).

[53] *See id.* at *105–06; *see also supra* note 37 (discussing what a but-for standard would entail).

[54] *See* Kapoor, *supra* note 6, at 38.

anticompetitive conduct."[55] That led the court to allow the inference that exclusive "conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power" caused anticompetitive harm.[56] This lenient standard would sometimes require the defendant "to suffer the uncertain consequences of its own undesirable conduct."[57] In *Rambus*, the D.C. Circuit reversed an FTC determination that Rambus's misrepresentation of its patent interests to a standards-setting body violated section 2 of the Sherman Act, even though the body conferred an exclusionary advantage on Rambus by incorporating its patents into industry-wide technological standards.[58] Unfazed by *Microsoft*, the D.C. Circuit explained that if the FTC did not show that the standards-setting body "would have standardized the very same technologies" in "the world that would have existed but for Rambus's deception,"[59] then it did not establish an anticompetitive effect from Rambus's actions.[60] Thus, before *Google*, some insisted that *Microsoft*'s "reasonably capable" standard covered most government suits under section 2.[61] Others promoted *Rambus*'s more stringent "but-for" requirement as a default, with an exception for "nascent" competitive threats.[62] By citing to market shares without requiring a more rigorous empirical inquiry into whether rivals could have grown but for Google's default contracts,[63] Judge Mehta sided with the former group.

Although rejecting *Rambus* clarified conflicting precedent, Judge Mehta's reasoning for preferring *Microsoft*'s lenient causation standard rested on superficial factual grounds. Judge Mehta distinguished *Rambus*[64] and noted its failure to explicitly overturn *Microsoft*.[65] His reasoning underweighted a key theoretical rationale for relaxing causation standards: the infeasibility of producing but-for evidence.[66] Both

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55 *Microsoft*, 253 F.3d at 79.

56 *Id.*; *see also* AREEDA & HOVENKAMP, *supra* note 38, ¶ 650c, at 69.

57 *Microsoft*, 253 F.3d at 79 (quoting AREEDA & HOVENKAMP, *supra* note 38, ¶ 651c, at 78).

58 *See* Rambus Inc. v. FTC, 522 F.3d 456, 459, 461–62 (D.C. Cir. 2008).

59 *Id.* at 466.

60 *Id.* at 466–67; *see also* GEOFFREY A. MANNE, A CRITICAL ANALYSIS OF THE GOOGLE SEARCH ANTITRUST DECISION 5–8 (2024), https://laweconcenter.org/wp-content/uploads/2024/08/Manne-Google-Search-Decision-Analysis-2024-08-14.pdf [https://perma.cc/NZ2W-FRKZ].

61 *See, e.g.*, Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 840 (2021); *see also* AREEDA & HOVENKAMP, *supra* note 38, ¶651c, at 78.

62 *See, e.g.*, Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, COMPETITION POL'Y INT'L: N. AM. COLUMN (May 25, 2020), https://www.pymnts.com/cpi-posts/challenging-consummated-mergers-under-section-2-2 [https://perma.cc/M33Y-Z2HQ]; MANNE, *supra* note 60, at 4.

63 *See Google*, 2024 WL 3647498, at *105–06.

64 *See id.* at *105 ("[*Rambus*] involved deception[,] . . . a form of exclusionary conduct particularly susceptible to a finding of materiality." (citing *Rambus*, 522 F.3d at 466)).

65 *See id.*

66 *See* United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001). Some, such as Judge Ginsburg and Professor Geoffrey Manne, justify their interpretation of *Microsoft* by invoking the inability of nascent competitors to credibly produce but-for estimates of their market positioning in the absence of exclusive conduct. *See, e.g.*, MANNE, *supra* note 60, at 3–4.

Supreme Court and D.C. Circuit precedent opined that requiring but-for proof to infer anticompetitive harm from exclusive conduct may sometimes create an insurmountable burden of proof on plaintiffs.[67] Though Judge Mehta cited to these concerns when deciding to apply a "reasonably capable" standard,[68] he failed to demonstrate that insurmountable evidentiary barriers justified forgoing a but-for requirement. In fact, he refused to consider the plaintiff expert's *actually produced* but-for analysis on the anticompetitive effects of Google's default agreements.[69] This omission overlooked the key theoretical rationale for choosing a lenient causation requirement to infer anticompetitive harm.[70]

Beyond disfavoring *Rambus*'s stringent causation standard, Judge Mehta further relaxed causation requirements for established competitors by leniently interpreting *Microsoft* in *Google*'s distinct factual setting. In *Google*, Judge Mehta faithfully applied *Microsoft*'s first requirement that a monopolist's conduct must not be "reasonably capable of contributing significantly to a defendant's continued monopoly power."[71] However, he was silent on how *Microsoft*'s second requirement that competitors "reasonably constituted nascent threats"[72] applied to *Google*'s facts. In *Microsoft*, the D.C. Circuit noted that "the District Court made ample findings" of fact before concluding that certain startups "showed potential" as viable "threats" to Microsoft's Internet Explorer.[73] How this second component maps to *Google*, where rivals like Bing and DuckDuckGo constitute established substitutes, not nascent threats, is unclear. One might infer a requirement that established competitors demonstrate some degree of viable capability to threaten an incumbent's position in the absence of exclusive agreements.[74] On the other hand, perhaps established substitutes are a threat simply by remaining on the market. This latter interpretation would de facto remove the second prong of the *Microsoft* standard for established

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[67] *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 309–10 (1949); *Microsoft*, 253 F.3d at 79.

[68] *See Google*, 2024 WL 3647498, at *105 (quoting, inter alia, *Standard Oil*, 337 U.S. at 309–10; *Microsoft*, 253 F.3d at 79).

[69] *See id.* at *106 (declining to consider Dr. Whinston's "Super Duck" counterfactual).

[70] Accuracy and empirical feasibility tradeoffs can inform causation standards for showing violations of section 2 of the Sherman Act. *Cf.* Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331, 332 (2020) ("Merger enforcement is usually directed at proposed combinations of large, established firms. . . . But startups are new and comparatively small, leaving little data with which to estimate competitive effects.").

[71] *Microsoft*, 253 F.3d at 79; *see Google*, 2024 WL 3647498, at *115.

[72] *Microsoft*, 253 F.3d at 79. The *Microsoft* court noted, arguably in dicta, that one "may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes." *Id.*

[73] *Id.*; *see also* Ginsburg & Wong-Ervin, *supra* note 62; MANNE, *supra* note 60, at 21 (suggesting that evaluation of competitors' viability constituted a vital component of finding a causal link between exclusive agreements and anticompetitive effects under *Microsoft*).

[74] *See* MANNE, *supra* note 60, at 4–5.

competitors. As a result, antitrust agencies would effectively face lower evidentiary burdens when evaluating established competitors rather than nascent potential entrants, even though higher evidentiary burdens would probably be more difficult to overcome when evaluating nascent entrants.[75] Thus, by favoring the latter approach, Judge Mehta further loosened an "edentulous"[76] standard for inferring causation when evaluating entities that are already better positioned to satisfy more stringent standards of causal inference.

In all, the causation standard implemented in *Google* empowers antitrust agencies to enjoin a wider range of business activity via section 2 of the Sherman Act. Potential for error in distinguishing anticompetitive from procompetitive conduct likely explains why disagreements over the stringency of evidentiary requirements for causation have persisted.[77] Requiring a stricter "but-for" evidentiary standard to infer causation would more likely ensure nonintervention in firms' legitimate procompetitive conduct at the expense of allowing some anticompetitive conduct.[78] Implementing a more lenient evidentiary standard for causation à la *Microsoft* would produce the inverse tradeoff: More anticompetitive conduct would be caught at the expense of chilling some permissible actions.[79] *Google* moves antitrust doctrine toward the latter approach, yet in doing so, it arguably misallocates deferential evidentiary standards to less needy entities. Some may welcome *Google*'s widening of regulatory oversight over business activity as a check against anticompetitive practices.[80] For others, the ruling primarily hinders procompetitive diffusion of high-quality technology.[81] Either way, as more disputes between tech companies and antitrust agencies loom,[82] vigorous debate over the optimal causal standard for inferring anticompetitive harm from exclusive actions will almost surely persist.

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[75] *Cf.* Bryan & Hovenkamp, *supra* note 70, at 332.

[76] *Microsoft*, 253 F.3d at 79.

[77] *Cf.* Bryan & Hovenkamp, *supra* note 70, at 332 (noting that heightened "uncertainty about a startup's future impact on the market[]" could explain the lack of antitrust action against startup acquisitions by incumbents).

[78] *See* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 85 (2005) (suggesting that stricter evidentiary burdens could deter certain legitimate and arguably procompetitive activities).

[79] *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 27 (2015) (summarizing and critiquing lenient approach).

[80] *Cf.* Paul Heidhues et al., *More Competitive Search Through Regulation*, 40 YALE J. ON REG. 915, 918 (2023) (arguing that new regulations should be introduced to "ameliorate the harms flowing from Google's current monopoly position").

[81] *See, e.g.*, Mark Jamison, *Everyone Loses in Google's Antitrust Ruling*, AEI: AEIDEAS (Aug. 15, 2024), https://www.aei.org/technology-and-innovation/everyone-loses-in-googles-antitrust-ruling [https://perma.cc/G4HE-WNVH].

[82] *See* Crane, *supra* note 4.