

Antitrust Policy for Innovation

Richard Gilbert

Schumpeter v. Brandeis v. Chicago

June 15, 2021

What Is the Role of Innovation for Antitrust Enforcement?

- A standalone basis for antitrust liability in monopolization or merger enforcement?
- A defense against liability in monopolization or merger enforcement?
- A complement to conventional price-centric antitrust enforcement?

Antitrust Policy for Innovation

Monopolization:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

- No requirement to show an adverse effect on consumers; higher prices are presumed from monopoly
- Should there be a similar presumption that monopoly harms innovation?
 - **Probably yes** (Arrow replacement vs. preemption incentive & appropriation)
- Monopolization cases have not been decided based on presumed innovation effects
 - E.g., Plaintiffs alleged harm to innovation in *U.S. v. Microsoft*, but the Court did not address these allegations
 - Will *U.S. v. Google* or *F.T.C. v. Facebook* be different (for zero-price services)?

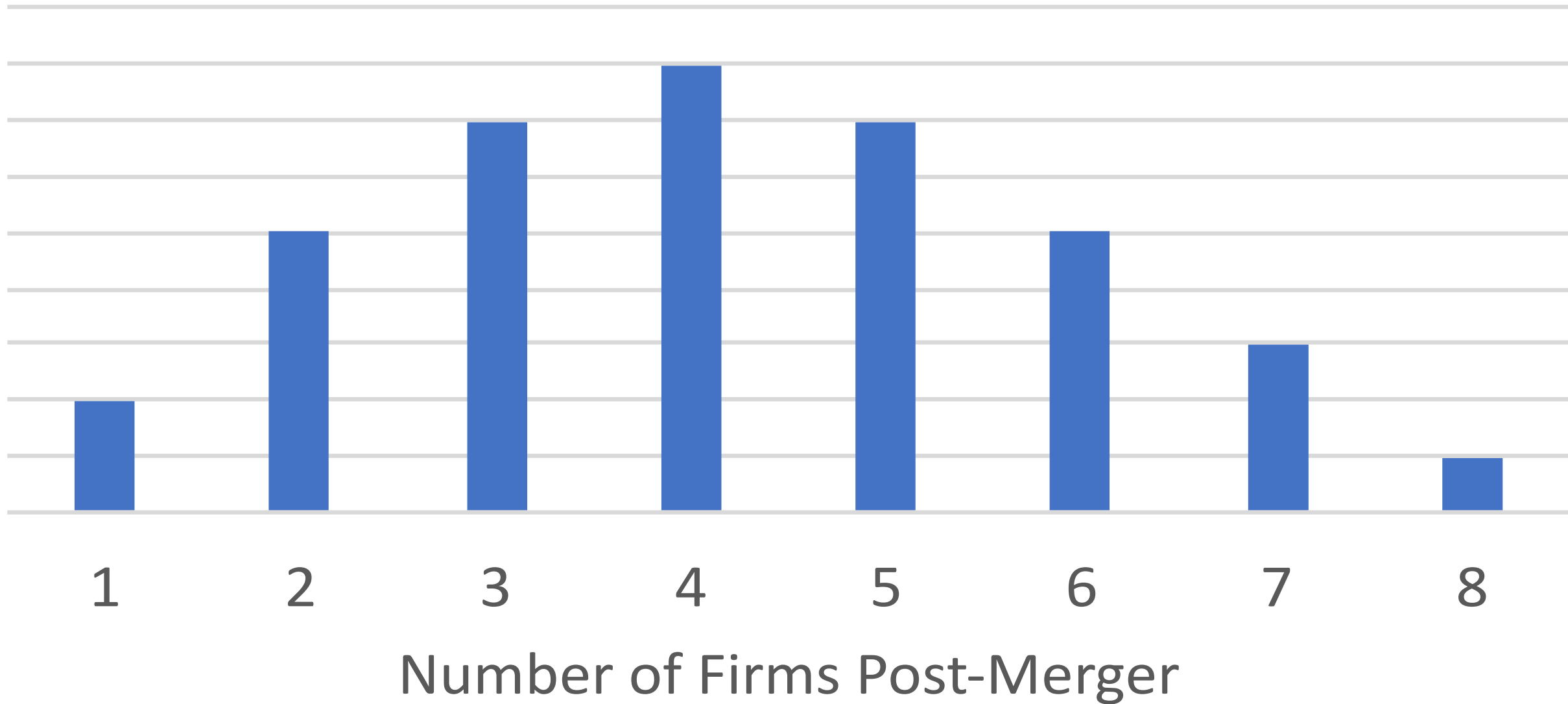
Antitrust Policy for Innovation

Mergers:

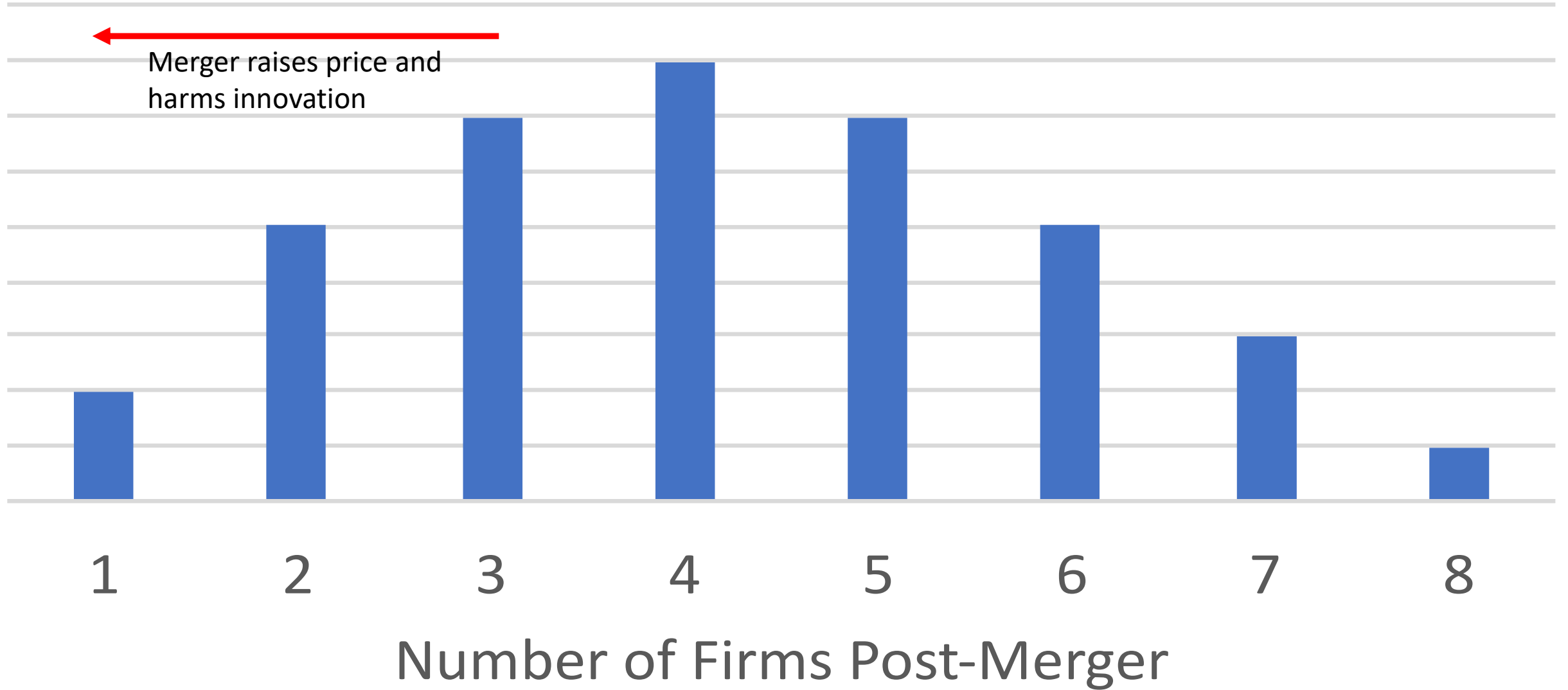
Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly.

- Mergers can reduce innovation incentives under some, but not all, circumstances
 - “Downward Innovation Pressure” versus “Upward Pricing Pressure”
- But it is difficult to find examples in which the innovation benefit from a merger more than compensates for likely higher prices
 - E.g. Goettler & Gordon for microprocessors
 - Perhaps accelerate innovation of patented drugs or winner-take-all technology
- Market definition is an unnecessary burden for innovation-centric merger enforcement

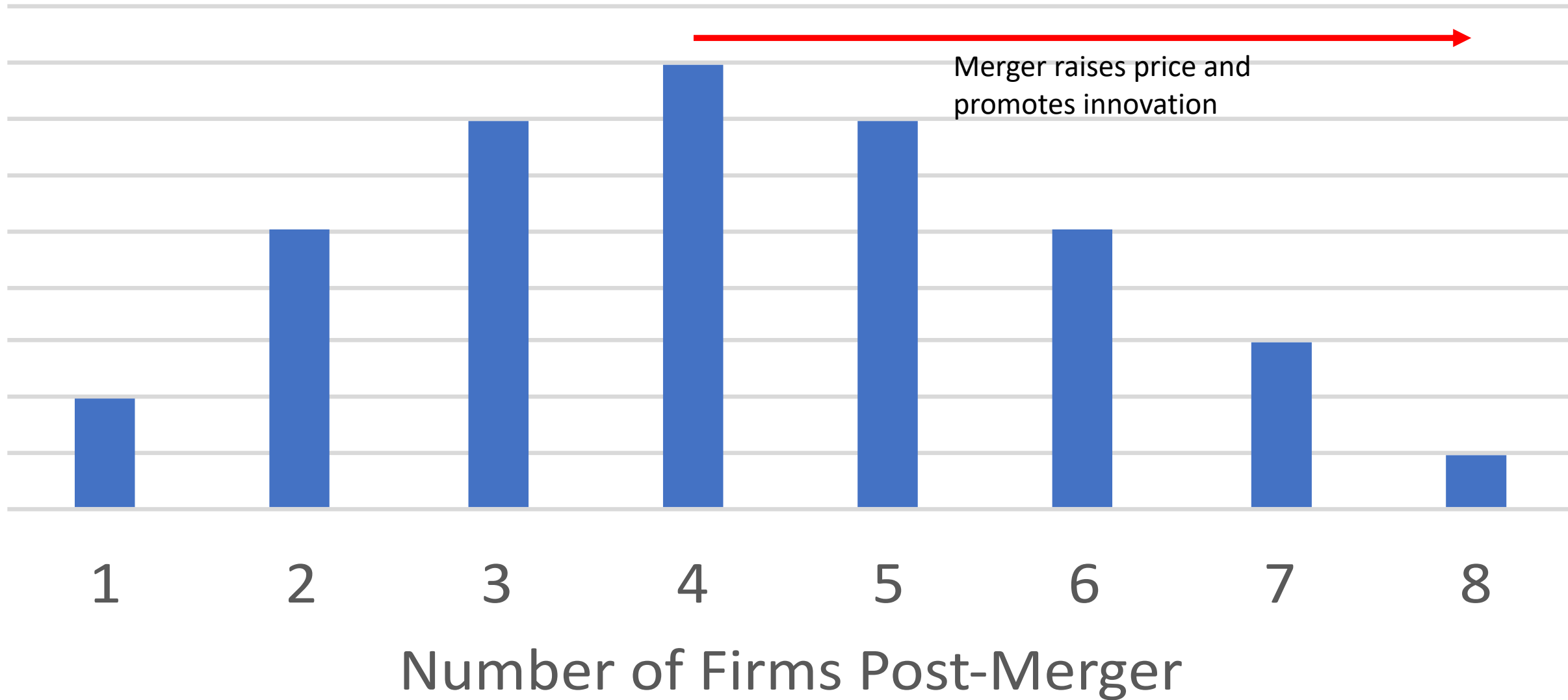
Innovation Rate



Innovation Rate



Innovation Rate



What Is the Role of Innovation for Antitrust Enforcement?

- A standalone basis for antitrust liability in monopolization or merger enforcement
 - Difficult to find examples of cases in price or related non-price (quality) effects are absent and liability depends on innovation effects
- A defense against liability in monopolization or merger enforcement
 - Schumpeterian arguments that monopoly or large increases in concentration are often alleged by defendants and sometimes accepted by courts – probably too much
- A complement to conventional price-centric antitrust enforcement