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Does the Rule of Reason Violate the Rule of Law?

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In the past few years, the Supreme Court has been more active in deciding antitrust issues. The Court's choice of legal standards affects future market behavior and the incentives for individuals and organizations to engage in productive activity. Over the past thirty years, the Court has primarily relied upon the rule-of-reason standard — a fact-specific inquiry into whether a restraint of trade is "unreasonable." But despite its increased activity, the Court never assesses the deficiencies of this standard under rule-of-law principles. That assessment is critical. This Article analyzes the rule-of-reason standard's significant deficiencies, and how these deficiencies adversely affect antitrust enforcement and competition policy generally. Because perfect compliance with rule-of-law ideals, however, may be unobtainable and undesirable, this Article recommends several improvements to reorient the rule of reason closer to rule-of-law ideals.

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INTRODUCTION

A "key feature of all industrial market systems," according to the World Bank, "is a strong state that can support a formal legal system that complements existing norms and a state that itself respects the law and refrains from arbitrary actions."[1] This is especially true of antitrust law. With clear applicable standards, market participants can channel behavior in welfare-enhancing directions and better predict their rivals' behavior. Clear standards reduce transaction costs, rent-seeking behavior by market participants, and decision errors by the antitrust agencies and courts. The rule of law is part of our "ubiquitous drive to make [our] environment more predictable,"[2] it is a precondition for effective antitrust policy, and it remains integral to our democracy.[3]

[1] WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 4 (2002); *see also*, J.C. Dammann & Henry Hansmann, *A Global Market for Judicial Services* 11 n.18 (Univ. of Tex. Law, Law and Econ Research Paper No. 98, Yale Law & Econ. Research Paper No. 347, 2007), *available at* http://ssrn.com/abstract=976115 (collecting other studies that functioning judiciary is important precondition for, rather than simply consequence of, robust economic growth); William Easterly & Ross Levine, *Tropics, Germs and Crops: How Endowments Influence Economic Development* 17-18 (Nat'l Bureau of Econ. Research, Working Paper No. 9106, 2002).

[2] DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 14 (2005).

[3] *See generally* D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231 (2008) (explaining rule of law's supporting role in antitrust policy and economic growth). The rule of law, based on logical persuasion, displaced

There is, however, a disturbing trend: antitrust standards are straying from rule-of-law principles. Once hailed by President and Chief Justice Taft as among "the most important statutes ever passed in this country,"[4] the federal antitrust laws are now noteworthy for their "considerable disadvantages."[5] In the past few years, the Court has complained about the state of federal antitrust law. The Court decries antitrust's "interminable litigation"[6] and "inevitably costly and protracted discovery phase," as hopelessly beyond effective judicial supervision.[7] The Court also complains that antitrust's per se illegal standard might increase litigation costs by promoting "frivolous" suits.[8] It fears the "unusually" high risk of inconsistent results by antitrust courts.[9]

But who has created this predicament? The Supreme Court. Over the past ninety years, the Court has supplied the Sherman Antitrust Act's legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.[10] Under the Court's per se illegal rule, certain restraints of trade are deemed illegal without consideration of any defenses. These

the Furies, and a form of justice based on fear, anger and an orgy of reprisal life for life. But Athena warned of polluting the rule of law, "foul a clear well and you will suffer thirst . . . . The stronger your fear, your reverence for the just, the stronger your country's wall and city's safety." Aeschylus, *The Eumenides*, *in* THE ORESTEIA: AGAMEMNON, THE LIBATION BEARERS, THE EUMENIDES 262, 262 (Robert Fagles trans., 1984). As Aeschylus recognized, the response to fear is to reaffirm the rule of law. Torture, on the other hand, is one sign of a "political order that has rejected the standards and practices of democracy's revered institutions, notably in the realm of law." Karen J. Greenberg, *Scars and Stripes*, FIN. TIMES, May 31, 2008, at 19.

[4] WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 2 (1914).

[5] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

[6] *Id.* at 414.

[7] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966, 1967 n.6 (2007) (quoting Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)); *see also* CIVIL RULES ADVISORY COMMITTEE, MINUTES 32 (Nov. 8-9, 2007), http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf [hereinafter CIVIL RULES MINUTES] (demonstrating that court "spent some time decrying the enormous burdens that could be imposed by [antitrust] discovery, and in doubting the possibility that effective management of staged and focused discovery can be used to enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information exclusively available to the defendants can be used to supply a better preliminary fact showing that will justify full-scale discovery and litigation").

[8] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2718 (2007).

[9] Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2395 (2007).

[10] FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2, at 3-4 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [hereinafter COLLABORATION GUIDELINES].

restraints are so likely to harm competition and to lack significant procompetitive benefits that, in the Court's estimation, "they do not warrant the time and expense required for particularized inquiry into their effects."[11] Under the per se rule, once a plaintiff proves an agreement among competitors to engage in the prohibited conduct, the plaintiff wins.[12] But the Court evaluates all other restraints under the rule of reason. This standard involves a flexible factual inquiry into a restraint's overall competitive effect and "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[13] The rule of reason also "varies in focus and detail depending on the nature of the agreement and market circumstances."[14] "Under this rule the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[15] Despite its label, the rule of reason is not a directive defined ex ante (such as a speeding limit).[16] Instead, the term embraces antitrust's most vague and open-ended principles, making prospective compliance with its requirements exceedingly difficult.

Much to the dismay of those who must comply with these antitrust standards, the rule of reason has reemerged over the past thirty years at the expense of the per se standard. Since 1977, the Court has narrowed the scope of its per se rule. The Court overturned its per se rule for vertical, nonprice restraints in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[17] for vertical maximum resale price maintenance ("RPM")[18] in *State*

[11] *Id.* at 3.

[12] "The per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980). Besides horizontal price-fixing and allocation agreements, all other antitrust claims involve "rambl[ing] through the wilds of economic theory" under the rule of reason. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972). Group boycotts and tying claims, although subject to a per se standard, are more expansive on issues of market power and defenses. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293-94 (1985) (group boycotts); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13-18 (1984); WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK §§ 2:19, 2:21 (2006).

[13] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[14] COLLABORATION GUIDELINES, *supra* note 10, § 1.2, at 4. The rule of reason also governs most monopolization claims under section 2 of the Sherman Act. *See* United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001).

[15] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

[16] *See* Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1418 (2007).

[17] 433 U.S. at 57-59. Sylvania manufactured and sold television sets. But by 1962,

Oil Co. v. Khan,[19] and for vertical minimum RPM in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*[20] But in shedding its earlier per se rule,

its market share of all television sets sold in the United States was only between one and two percent. *Id.* at 38. Consequently, Sylvania reassessed its marketing strategy. It sold directly to a fewer number of authorized retailers. *Id.* Sylvania limited the number of franchises granted for a specific geographic location. *Id.* Moreover, it required each franchisee to sell Sylvania products only in its assigned geographic territory. By 1965 Sylvania's market share increased to five percent. *Id.* Continental T.V., a Sylvania retailer, complained about Sylvania allowing a new franchise one mile from Continental T.V. *Id.* at 39. Other disputes arose between Continental T.V. and Sylvania. Continental T.V. withheld payments to Sylvania. *Id.* at 40. Sylvania terminated Continental T.V. as a franchise dealer and sued to recover for the money owed. *Id.* Continental counterclaimed that Sylvania violated section 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from a specified location. *Id.* The Court overruled its earlier decision that such geographical sales restrictions imposed by a manufacturer on a retailer (a form of a vertical nonprice restraint) are per se illegal under the Sherman Act. *Id.* at 57. Instead, the Court held that these vertical, nonprice restraints should be evaluated under its rule of reason. *Id.* The Court found that the economic market impact of such vertical restraints is complex. A vertical nonprice restraint can potentially and simultaneously reduce *intrabrand* competition (e.g., competition among Sylvania dealers for the Sylvania brand of television sets) and stimulate *interbrand* competition (e.g., competition among different manufacturers of television sets, such as Zenith or RCA): "[W]hen interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Id.* at 52 n.19. Nonetheless, the Court in *Sylvania* was careful to distinguish its holding from another vertical restraint, namely resale price maintenance, the per se illegality of which was established firmly for many years, and which involves "significantly different questions of analysis and policy," reduces *interbrand* price competition, and if used industry-wide might facilitate cartelization. *Id.* at 51 n.18.

[18] Resale price maintenance ("RPM") refers to a manufacturer's or supplier's practice of "specif[ying] the minimum (or maximum) price at which the product must be re-sold to customers." OECD, GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW 75 (1993), http://www.oecd.org/dataoecd/8/61/2376087.pdf [hereinafter OECD GLOSSARY].

[19] 522 U.S. 3, 15 (1997). Khan entered into a contract with defendant State Oil to lease and operate a gas station. *Id.* at 7. Khan could charge any retail price for the gasoline but if the retail price exceeded State Oil's suggested retail price, then State Oil kept the excess. *Id.* Khan fell behind in its lease payments and was evicted. *Id.* Khan alleged that State Oil violated section 1 of the Sherman Act by preventing Khan from raising or lowering retail gas prices. *Id.* The Supreme Court overruled its earlier per se prohibition on vertical maximum resale price maintenance, and held that such vertical price-fixing should be analyzed under its rule of reason. *Id.* at 22. The Court noted that its holding in *Sylvania* substantially weakened the analytical underpinnings of its per se standard for such vertical restraints. *Id.* at 14. Because nonprice vertical restraints after *Sylvania* are subject to the rule of reason, franchised dealers might have a local monopoly in their region. *See id.* at 12-14. The manufacturer might set a maximum resale price to prevent franchised dealers from exploiting their monopoly

the Court has not offered clear objective rules. Instead, the Court retreated to its rule-of-reason standard.[21] This trend is fostered by "a growing tendency on the part of the Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision."[22] Not everyone is

position. *See id.* at 15-16. Moreover, if the manufacturer's maximum RPM restraint was masking an arrangement to fix minimum retail prices, the manufacturer's restraint could be challenged under the rule of reason. *Id.* at 17.

[20] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007). Defendant Leegin designed, manufactured, and distributed leather goods and accessories. Leegin sold to small retailers feeling they treat customers better, provide customers more services, and make the shopping experience more satisfactory than customers' experience in Sam's Club or Wal-Mart. Plaintiff operated Kay's Kloset, a women's apparel store in Texas. Plaintiff began carrying Leegin's Brighton products, which at one time accounted between 40 and 50 percent of plaintiff's profits. In 1997, Leegin instituted its Brighton Retail Pricing and Promotion Policy, and refused to sell its products to retailers that discounted Leegin's products below Leegin's suggested retail prices. Leegin adopted its minimum retail pricing policy to give retailers sufficient margins to provide customers the services it considered to be central to its distribution strategy. Leegin also expressed concern that such discounting harmed Brighton's brand image and reputation. In 2002, Leegin discovered that plaintiff was impermissibly discounting the Brighton line by 20%. Plaintiff justified its discounting as a response to other competing retailers' discounting Leegin's Brighton line. After Leegin asked plaintiff to stop discounting its Leegin products, plaintiff refused, was terminated, and then sued Leegin for violating the Sherman Act. At trial, Leegin wanted to introduce expert testimony describing the procompetitive effects of its minimum resale pricing policy. The district court excluded the expert testimony as irrelevant under the Court's per se rule against minimum resale price fixing. Plaintiff was awarded $3.975 million in trebled antitrust damages. The Supreme Court overruled its more than 90-year-old holding that resale price maintenance is per se illegal, and held that such vertical restraints on discounting should be judged by the rule of reason. The Court indicated that its earlier ruling rested on a formulistic common-law rule against restraints on alienation rather than a "demonstrable economic effect." The Court outlined the potential benefits of RPM, such as stimulating interbrand competition, giving customers more options of low-price/low-service brands and high-price/high-service brands, deterring discounting retailers from free riding on retailers who offer value-added services, and facilitating market entry for new firms and brands. The Court then noted RPM's potential anticompetitive effects, such as facilitating a price-fixing cartel or tacit collusion among manufacturers or retailers, protecting more dominant inefficient retailers with higher profits, and preventing more efficient retailers from sharing their lower costs with consumers through lower prices. Notwithstanding the risks of unlawful conduct, the Court could not state with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Id.* at 2717. The Court found that vertical agreements establishing minimum RPM could have procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. Thus, the rule of reason should govern.

[21] *Id.* at 2720; *Sylvania*, 433 U.S. at 49 n.15.

[22] Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007

complaining.[23] But the Court's totality-of-economic-circumstances standard has drawn heavy criticism over the past ninety-eight years,[24] including criticism from the Court itself.[25]

SUP. CT. REV. 205, 207 (2007).

[23] The Antitrust Modernization Commission said "advances in economic learning have persuaded courts to replace [their] per se rules with a more flexible analysis under the rule of reason." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATION 38 (2007) [hereinafter AMC REPORT]. Tethering antitrust law to the "goal of consumer welfare [,the definition of which remains disputed,] with an analysis based on economic learning . . . benefited consumers and [brought] more consistency and predictability in antitrust doctrine." *Id.* at 42.

[24] *See* John J. Flynn, *The Role of Rules in Antitrust Analysis*, 2006 UTAH L. REV. 605, 634; *see also*, AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 202 (2008), *available at* http://www.antitrustinstitute.org/archives/transitionreport.ashx [hereinafter AAI TRANSITION REPORT] (noting "surprising dearth of either judicial or agency guidance on how a rule of reason analysis should be conducted, particularly with respect to the actual balancing of procompetitive benefits against anticompetitive effects or risks"); ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 5 (1999) ("Commentators have long criticized the breadth of Brandeis' statement in *Board of Trade* [*of Chi. v. United States*, 246 U.S. 231 (1918)] as 'legitimiz[ing] the 'big case' in antitrust.'" (citation omitted)) [hereinafter ABA MONOGRAPH]; ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 44 (1993) (noting that Brandeis advocated "deviant rule of reason"); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 255 (3d ed. 2005) ("Brandeis' statement of the rule of reason . . . has been one of the most damaging in the annals of antitrust" as it "has suggested to many courts that . . . nearly everything is relevant."). *See generally,* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 346 (2000) (arguing that Brandeis's opinion "made things worse"); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 4 (1992) ("[O]pen-ended listing of possibly relevant factors is hardly illuminating as to their analytic inter-relationship, nor does it inform a decision maker of what weights to ascribe to different factual conclusions."); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (noting that content of rule of reason is largely unknown and, in practice, is little more than euphemism for nonliability). The rule of reason, with respect to section 2 monopolization claims, has also been attacked. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255, 257 (2003) (describing monopolizations standards as "not just vague but vacuous"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147-48 & n.4 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined."); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1624 (2005) (stating that rule of reason "has been a source of puzzlement to lawyers, judges and scholars").

[25] *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (stating that per se rule provides certainty and avoids lengthy and complex inquiries into history of

Over the past few years, the Court's approach to the federal antitrust laws has taken a perverse twist. The Court of late states that its rule of reason is the "prevailing,"[26] "usual,"[27] and "accepted standard"[28] for evaluating conduct under the Sherman Act. But then the Court uses the infirmities of its rule of reason — e.g., high discovery costs and inconsistent outcomes — to restrict, or increase the costs of, antitrust plaintiffs' access to the courts. For the same reasons, the Court justifies restricting governmental interference in the marketplace.

Lately, the Roberts Court has been active in deciding business law issues generally and antitrust issues specifically.[29] But while the Roberts Court has addressed the risk of false positives under its per se rule,[30] it has never assessed the deficiencies of its rule of reason under rule-of-law principles.[31] This assessment, however, is critical. The

particular industries to determine reasonableness of actions).

[26] *Sylvania*, 433 U.S. at 49.

[27] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[28] *Id.* at 2712.

[29] *See* Jeffrey Rosen, *Supreme Court Inc.: How the Nation's Highest Court Has Come to Side with Business*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, *available at* http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html.

[30] False positives here involve finding antitrust liability for restraints that are competitively neutral or procompetitive. In *Leegin*, for example, the Court recognized that its per se antitrust rules provide guidance to the business community and minimize the burdens on litigants and the judicial system. 127 S. Ct. at 2718. But the Court noted the risk of false positives from its per se rules in "prohibiting procompetitive conduct the antitrust laws should encourage." *Id.*; *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect." (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))).

[31] In *Leegin*, for example, the Court noted the risk of false positives under its per se rule against vertical price-fixing. 127 S. Ct. at 2718. The Court found that RPM may not always or almost always tend to restrict competition. *Id.* But the Court lacked any empirical basis as to the percentage of instances when RPM is pro- or anticompetitive or competitively neutral, and the magnitude of its benefits and harms. For example, if RPM were likely to be anticompetitive 65 percent of the time, and likely to cause over $100 billion in harm, while being procompetitive 20 percent of the time (with $10 billion in benefits), the Court could decide whether the incremental administrative costs of a more nuanced legal standard are worth its benefits. In addition, the Court never addressed the risks of false negatives (and positives) arising from its rule of reason or the increase in administrative costs under the rule of reason. For example, the Court opines that its per se rule "may increase litigation costs by promoting frivolous suits against legitimate practices." *Id.* at 2718. This is illogical. In determining that a certain restraint is per se illegal, the Court has concluded that the practice is generally illegitimate. As a result, one cannot fault antitrust plaintiffs for challenging such restraints. Indeed the Sherman Act (or any state statute prohibiting unfair and deceptive practices) could be faulted for promoting

rule of reason's deficiencies have significant implications for antitrust enforcement and competition policy generally. The current Court's choice of antitrust standards affects future market behavior and the incentives for market participants to engage in productive activity.

If any institution should be responsible for assessing the effects of the rule-of-reason standards, it is the Court. It is "hard to see how the judiciary can wash its hands of a problem it created."[32] Indeed, the rule of reason's acceptance did not arise independently from the Court; the Court created the rule of reason and determined the scope of its application. It could now create a new standard. When rule-of-reason analysis is equated with per se legality (for the antitrust plaintiff's bar)[33] or uncertainty (for the defense bar),[34] it signals the standard's deficiencies. These results suggest that antitrust's legal standards, rather than developing more definite elements and privileges, are perhaps regressing to the status of a prima facie tort.

Above all other problems, the current "flexible" rule of reason provides little predictability to market participants. It subjects litigants and trial courts to the purgatory of "sprawling, costly, and hugely time-consuming" discovery.[35] For example, a per se price-fixing claim under section 1 of the Sherman Act requires proof of an agreement.[36] But even under some lower courts' more "structured" rule of reason, antitrust

frivolous suits against legitimate practices. The proper response is providing a better legal standard that effectively spares specific legitimate practices (such as providing a legal exception to the per se rule in cases of new entry). *Id.* at 2731 (Breyer, J., dissenting). Moreover, the Court's rule of reason would only exacerbate the litigation costs, and thereby increase the risk of promoting frivolous suits against legitimate practices. As discussed *infra* at Part II.C.7, the rule of reason, given its far broader scope of factual issues and defenses, increases litigation costs. Thus while defendants face the same amount of antitrust damages under either a rule-of-reason or per se standard, defendants under the rule of reason face higher litigation costs and unpredictable results.

[32] Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2630 (2008) (discussing punitive damages).

[33] *See* Arthur, *supra* note 24, at 337 ("The traditional rule of reason was uniformly viewed as 'a euphemism for an endless economic inquiry resulting in a defense verdict.") (quoting Maxwell M. Blecher, *The* Schwinn *Case — An Example of a Genuine Commitment to Antitrust Law*, 44 ANTITRUST L.J. 550, 553 (1975))).

[34] *See* ABA MONOGRAPH, *supra* note 24, at 102 (stating "rule of reason — and its application in particular cases — has remained imprecise and unpredictable").

[35] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 n.6 (2007). This also assumes that uncertainty provides no advantage to either private plaintiffs or defendants. In reality, uncertainty may favor the players with greater resources or alternative means to resolve their disputes.

[36] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

plaintiffs (including the federal antitrust agencies) and defendants must engage in an elaborate four-part minuet.

As under the per se rule, plaintiffs must also prove an agreement under the rule of reason. But they must then, first, establish that the challenged restraint has had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. In the absence of direct evidence of these anticompetitive effects, plaintiffs can demonstrate the likely anticompetitive effects of a restraint by showing the defendants' "market power" as inferred from their high market share within a properly defined product and geographic market.[37] Such a market definition, in turn, entails issues of cross-elasticity of demand,[38] as well as supply substitutability into those markets, and ease of entry.[39]

But that is just the opening of a four-step routine. After plaintiffs meet their initial burden, the second step shifts the burden of production to defendants to provide a procompetitive justification for the challenged restraint (including the extent to which the restraint increased productive efficiencies, lowered marginal costs, and yielded procompetitive benefits to consumers).[40] If the defendants offer procompetitive business justifications, plaintiffs can, in the third stage, respond by showing the defendants' procompetitive justifications as pretextual, that lesser restrictive alternatives exist for the challenged

[37] The burden is on the antitrust plaintiff to first define the relevant market within which the alleged significant anticompetitive effects of the defendant's actions occur. Worldwide Basketball & Sport Tours v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 962 (6th Cir. 2004); United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003); Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003). An antitrust market consists of a relevant product and geographic market. Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998).

[38] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961) (defining relevant geographic market as area in which potential buyer may rationally look for goods or services he or she seeks); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (defining relevant product market as those "commodities reasonably interchangeable by consumers for the same purposes"); *see also* FED. TRADE COMM'N & DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 1.1 (1992 & rev. 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11 (outlining product market definition for horizontal mergers).

[39] Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998); United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001).

[40] Only after the antitrust plaintiff has met its initial burden does the burden of production shift to the defendant, who then must provide a procompetitive justification for the challenged restraint. *Worldwide Basketball & Sport Tours*, 388 F.3d at 959; *Visa*, 344 F.3d at 238; *Plymouth Whalers Hockey Club*, 325 F.3d at 718.

restraint, or that the restraint is not reasonably necessary to achieve the procompetitive objectives.[41] If plaintiffs' rule of reason claims survive to this point, plaintiffs must, in a fourth step, show that the restraint's anticompetitive effects outweigh its procompetitive benefits.[42] The fact-finder then engages in a "careful weighing of the competitive effects of the agreement — both pro and con — to determine if the effects of the challenged restraint tend to promote or destroy competition."[43]

To address the above four stages, antitrust litigants generally offer competing economic expert testimony. To confound matters further, the experts' neo-classical economic theories are often premised on "rational" profit-maximizing behavior. These theories, as the burgeoning behavioral economics literature reflects, may be divorced from marketplace realities.[44] Over the next decade, the rule of reason's infirmities likely will worsen. The courts will weigh not only conflicting testimony by Industrial Organization economists but conflicting economic theories, with the rise of behavioral, evolutionary, and New Institutional Economics. Because a rule-of-reason case is so costly to try, it is likely that fewer antitrust violations will be challenged. This is disturbing under an evolutionary economic perspective, when unchallenged anticompetitive conduct forecloses entrants with innovative technologies from markets.[45] An independent judiciary and the rule of law may be the only protections left for consumers and smaller competitors.

Part I of this Article examines the conventional wisdom that the Court saved the unworkable Sherman Act "from stifling literalness [i.e., condemning all restraints of trade] by 'the rule of reason.'"[46] In reality, the Court's rule of reason was highly contentious, and its

[41] *Visa*, 344 F.3d at 238; *see also Worldwide Basketball & Sport Tours*, 388 F.3d at 959; *Plymouth Whalers Hockey Club*, 325 F.3d at 718; Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001); COLLABORATION GUIDELINES, *supra* note 10, § 3.36(b), at 24.

[42] Geneva Pharm. Tech. Corp. v. Barr Lab., Inc., 386 F.3d 485, 507 (2d Cir. 2004); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998).

[43] *Id.* at 507; *see also Visa*, 344 F.3d at 238; *Worldwide Basketball & Sport Tours*, 388 F.3d at 959; *Plymouth Whalers Hockey Club*, 325 F.3d at 718; *Tanaka*, 252 F.3d at 1063; *Law*, 134 F.3d at 1019.

[44] *See* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 534-35 (2007).

[45] Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 514-17.

[46] Associated Press v. United States, 326 U.S. 1, 27 (1945).

critics accurately predicted its many shortcomings.[47] The Court later sought to bring its Sherman Act standards closer to rule-of-law principles. But after *Sylvania*, the Court dismantled many of its per se rules. Part II identifies seven deficiencies of the Court's rule of reason under rule-of-law principles. But as Part III addresses, conformity with a rigid rule of law may be suboptimal with respect to competition policy. Because perfect compliance with rule-of-law ideals may be unobtainable and undesirable, Part IV recommends several improvements to harmonize the rule of reason with rule-of-law ideals.

I. DEVELOPMENT OF THE RULE-OF-REASON STANDARD

A. The Sherman Act

The operative words of the Sherman Act are few in number. Section 1 of the Sherman Act states that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[48] Section 2 makes it unlawful for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty."[49] Unlike most traditional criminal statutes, the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct [that] it proscribes."[50] Senator Sherman admitted that defining in legal language the precise line between lawful and unlawful combinations was difficult, and must be left for the courts: "All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will

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[47] *See infra* Part II.C.

[48] 15 U.S.C. § 1 (2006).

[49] 15 U.S.C. § 2 (2006).

[50] United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978). Nor does the Sherman Act delineate which conduct should be criminally or civilly prosecuted; this is left to the DOJ's discretion. Over the past 50 years, Congress increased the maximum criminal fines and term of incarceration for Sherman Act violations. Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 460-69. From a misdemeanor, the criminal penalties now stand as a felony with up to 10 years imprisonment and a fine up to $100 million for corporations and $1 million for individuals. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (codified as amended at 15 U.S.C. §§ 1-3 (2006)). For statistics on criminal enforcement, see Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 95-96 (2000). For DOJ's policies on antitrust cases it prosecutes criminally, see U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, at III-20 to 21 (4th ed. 2008), *available at* http://www.usdoj.gov/atr/public/divisionmanual/chapter3.pdf.

apply them so as to carry out the meaning of the law . . . ."[51] Thus, the Sherman Act provides the courts some discretion as to the means for furthering the Act's objectives.[52] But contrary to the Court's current position,[53] this discretion is not unfettered. For example, when the Court opined that monopolies are important to our free-market economy,[54] its belief was inconsistent with the Sherman Act's general principles.[55] Ultimately, the antitrust standard must be grounded in the statute's general principles.

[51] 21 CONG. REC. 2460 (1890); *see also* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 228 (1954) (citing references in legislative debates to courts as instrumentalities for Sherman Act's clarification).

[52] *See* TAFT, *supra* note 4, at 3 (1914) (explaining that "great lawyers" drafted Sherman Act; they presumably used terms such as restraint of trade, monopoly, combination and conspiracy "with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our federal Constitution are to be so construed."); THORELLI, *supra* note 51, at 181-83; *see also* 36 CONG. REC. 522 (1903) (statement of Sen. Hoar) ("We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law."); 21 CONG. REC. 3146 (1890) (statement of Sen. Vest) ("We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States Courts with authority to enforce that doctrine by injunction."); 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman) ("It does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."). The cohesiveness of the common law in 1890 is unclear. ABA MONOGRAPH, *supra* note 24, at 16-17; THORELLI, *supra* note 51, at 50-53, 228; Herbert Pope, *The Reason for the Continued Uncertainty of the Sherman Act*, 7 U. ILL. L. REV. 201, 203 (1912).

[53] *See generally* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2724 (2007) (explaining Court's antitrust doctrines evolve with new circumstances and new wisdom).

[54] Although the Sherman Act's text and legislative history reject the *Trinko* hierarchy, the *Trinko* Court surmised that cartels are the "supreme evil" and charging monopoly prices is "an important element of the free-market system." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004). The *Trinko* Court opined, contrary to the empirical evidence, that monopoly prices attract "'business acumen' in the first place" and "risk taking that produces innovation and economic growth." *Id.* at 407; Stucke, *supra* note 45, at 498.

[55] *See, e.g.*, John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987) (noting that traditional antitrust jurisprudence has seldom addressed underlying values Congress intended to maintain through legislation); Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981) (explaining that Act's four major historical goals are "(1) dispersion of economic power, (2) freedom and opportunity to compete on merits, (3) satisfaction of consumers, and (4) protection of

B. The Introduction and Criticism of the Rule of Reason

Recently, the Court said it "has never taken a literal approach to [the Sherman Act's] language."[56] But contrary to this assertion, the Court did originally interpret the Sherman Act literally. In *United States v. Trans-Missouri Freight Ass'n*, the Court held that "every" contract, combination or conspiracy that restrains trade is unlawful.[57] The Court rejected the defendant railroads'[58] and dissenting Justice (later Chief Justice) White's rule-of-reason approach[59] that, despite its terms, the Sherman Act prohibited only "unreasonable" restraints of trade. As the majority noted, the "plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such

competition process as market governor"); R. Hofstadter, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS 188, 199-200 (1965) (stating that antitrust goals were economic (competition maximizes "economic efficiency"); political (antitrust principles "intended to block private accumulations of power and protect democratic government"); and social and moral (competitive process was "disciplinary machinery" for character development)).

[56] *Leegin*, 127 S. Ct. at 2712 (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)); *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 (1978) (stating that "problem presented by the language of [section] 1 of the Sherman Act is that it cannot mean what it says").

[57] 166 U.S. 290, 312, 345 (1897). Still rejecting the rule-of-reason approach, the Court distinguished between restraints with a direct, immediate, and necessary effect and those with an indirect or incidental effect upon trade or commerce. *See, e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234 (1899) (stating that contracts that affect trade "only incidentally, and not directly" are valid); Hopkins v. United States, 171 U.S. 578, 600 (1898) (arguing that Sherman Act "must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it"); United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898) (stating that "the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce," and is inapplicable where effect upon interstate commerce is indirect or incidental); Milton Handler, *The Judicial Architects of the Rule of Reason*, 10 A.B.A. ANTITRUST SEC. 21, 21-28 (1957). Arguably the Court loosely followed a version of then-Judge Taft's ancillary restraint analysis in *United States v. Addyston Pipe & Steel*, 85 F. 271, 280-83 (6th Cir. 1898). A restraint entered into for the purpose of promoting legitimate business was lawful, even though the agreement may indirectly affect commerce. *Joint Traffic*, 171 U.S. at 568. Thus, the direct/indirect distinction represents a retreat from condemning every restraint on commerce; whether it confers the courts with greater discretion than rule-of-reason analysis is less clear.

[58] *Trans-Mo. Freight*, 166 U.S. at 329.

[59] *Id.* at 351-52.

language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."[60]

Justice White's rule of reason fared no better under the administration of then-President Taft. In 1910, President Taft rejected amending the Sherman Act to prohibit only "unreasonable" restraints of trade.[61] He felt that allowing courts to decide what constituted reasonable restraints, suppression of competition, or monopolistic acts would run contrary to rule-of-law principles. In a special message to Congress, President Taft revealed the basis for his discomfort:

> I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.[62]

Whereas a more general rule of reason was unworkable and unwise, President Taft believed that the Court could continue to distinguish between "incidental" and "direct" restraints of trade.[63]

Reflecting President Taft's views, Congress never amended the Sherman Act to prohibit only "unreasonable" restraints of trade. It refused to give to the courts what would amount to a legislative power — "the power to say what are the good trusts and what are the bad trusts, according to . . . [their] economic and political views."[64]

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[60] 166 U.S. at 328.

[61] William Howard Taft, U.S. President, Special Message to Congress (Jan. 7, 1910), *available at* http://www.presidency.ucsb.edu/ws/?pid=68486 (last visited Apr. 19, 2009) ("It has been proposed, however, that the word 'reasonable' should be made a part of the statute, and then that it should be left to the court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly.").

[62] *Id.*

[63] *Id.* ("A mere incidental restraint of trade and competition is not within the inhibition of the act, but it is where the combination or conspiracy or contract is inevitably and directly a substantial restraint of competition, and so a restraint of trade, that the statute is violated."). President Taft noted that the term "restraint of trade" came from the common law, which permitted certain covenants incidental or ancillary to the carrying out of a main or principal contract. *Id.* Taft previously explained how the common law permitted noncompete agreements when one party sold its business to another. These noncompete provisions enable the seller to dispose of all the fruits of its industry (including the business's good-will) to another. *Addyston Pipe & Steel*, 85 F. at 280 (Taft, J.).

[64] TAFT, *supra* note 4, at 114 ("It would be un-wise to intrust this power to the

Speaking on behalf of the Senate Judiciary Committee, one Senator said that leaving it to the courts to decide what anticompetitive restraints are reasonable or unreasonable would "lead to the greatest variableness and uncertainty in the enforcement of the law. . . . [T]here would be as many different rules of reasonableness as cases, courts, and juries."[65] Any statute premised on a restraint's reasonableness would "entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute."[66]

Although Congress never amended the Sherman Act to condemn only *unreasonable* restraints of trade, the Supreme Court did so with a simple change to the composition of its members.[67] Chief Justice White's rule of reason ultimately prevailed in 1911. In *Standard Oil Co. of New Jersey v. United States*, now-Chief Justice White addressed the landmark antitrust challenge to John D. Rockefeller's monopoly of the oil industry.[68] The Chief Justice stated that the Sherman Act's operative terms "restraint of trade" and "monopolize" had a "well-known meaning" at common law.[69] The common law courts had applied a "standard of reason" in dealing with these issues.[70] But by incorporating those broad terms in the Sherman Act, Congress, according to the Court, did not intend to constrain liability to only those restraints illegal under the common law. Congress also sought to prohibit "the many new forms of contracts and combinations which were being evolved from existing economic condition."[71] Thus, because the classes of restraint were sufficiently broad to cover every conceivable contract or combination affecting interstate commerce, it

courts. It would be legislative power, not judicial power.").

[65] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 96-97 (1911) (Harlan, J., concurring and dissenting in part) (quoting Senator Nelson's comments in 1909 regarding bill which proposed to amend antitrust act in various particulars).

[66] *Id.* at 97-98.

[67] Herbert H. Naujoks, *Monopoly and Restraint of Trade Under the Sherman Act*, 5 WIS. L. REV. 129, 133 (1929).

[68] 221 U.S. at 30. The United States alleged that Rockefeller's Standard Oil had controlled 90 percent of the business of producing, shipping, refining and selling petroleum and its products, and thus could fix the price of crude and refined petroleum. *Id.* at 33. Among the challenged practices were the railroads' discriminatory rebates and preferences in favor of the defendants, defendants' control of the pipe lines for transporting oil from the oil fields to refineries in six areas, unfair practices against competing pipe lines, contracts with competitors in restraint of trade, "unfair methods of competition, such as local price cutting at points where necessary to suppress competition," and espionage of other competitors. *Id.* at 42-43.

[69] *Id.* at 59-60.

[70] *Id.* at 60.

[71] *Id.* at 59.

necessarily followed that not every restraint was illegal. It was the courts' function to strike down only the unreasonable restraints, while sparing the reasonable restraints of trade. Thus, courts must apply a "standard of reason" to determine "whether in a given case a particular act had or had not brought about the wrong against which the statute provided."[72]

The Chief Justice discounted the United States' (and Court's prior) construction of the statute, which deemed "every" contract in restraint of trade or commerce illegal. The Sherman Act does not enumerate those particular restraints that are illegal; because Congress, under the majority's view, never intended to make *all* restraints illegal (despite the statute's terms), "it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act."[73] Perhaps in response to President Taft's and others' concerns about a rule of reason, Chief Justice White noted that the courts' discretion was circumscribed by the public policy embodied in the statute: the courts could not reason a restraint of trade "plainly within the statute" as legal.[74]

Despite Chief Justice White's assertion that the holding in *Standard Oil* did not depart from any previous decision of the Court,[75] the Court's rule of reason engendered strong disapproval.[76] Justice Harlan's *Standard Oil* dissent attacked the majority's "judicial legislation"[77] as an "invasion by the judiciary of the constitutional

[72] *Id*. at 60.

[73] *Id*. at 63.

[74] *Id*. at 67. Several weeks later, in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), Chief Justice White again applied the rule of reason. The defendant tobacco companies (i) spent millions of dollars to purchase competitors' facilities, not with the purpose of using them, but to close them down and render them useless for the purposes of trade, and bound the facilities' employees to long-term noncompete agreements; (ii) colluded with foreign competitors to divide among themselves geographic markets; (iii) engaged in predatory pricing (lowering prices below cost) to drive competitors out of business or compel them to become part of defendant's combination; (iv) controlled key ingredients essential to manufacture tobacco products, which served "as perpetual barriers to the entry of others into the tobacco trade." *Id*. at 182-83.

[75] *Am. Tobacco Co.*, 221 U.S. at 178-79. As Justice Harlan responded in his separate opinion, "[t]his statement surprises me quite as much as would a statement that black was white or white was black." *Id.* at 191 (Harlan, J. concurring and dissenting in part).

[76] *See Standard Oil*, 221 U.S. at 83.

[77] *Id.* at 99 (Harlan, J., concurring and dissenting in part).

domain of Congress."[78] The Court "has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department."[79] Justice Harlan predicted the later criticisms of the rule of reason:

> I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry — difficult to solve by proof — whether the particular contract, combination, or trust involved in each case is or is not an 'unreasonable' or 'undue' restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraint of interstate commerce as are shown not to be unreasonable or undue.[80]

Thus, for Justice Harlan, the majority's rule of reason was the "perversion" of the Sherman Act's plain words, all done in a way to defeat the will of Congress.[81] By inserting the term "unreasonable" into the Sherman Act, the Court "makes Congress say what it did not say; what, as I think, it plainly did not intend to say; and what, since the passage of the act, it has explicitly refused to say."[82] The dissenting Justice did not necessarily agree with the soundness of this legislative policy. Instead, if a literal interpretation proved embarrassing, Justice Harlan believed Congress should fix the Sherman Act.

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[78] *Id.* at 104.
[79] *Id.* at 104-05.
[80] *Id.* at 103.
[81] *Am. Tobacco*, 221 U.S. at 192.
[82] *Id.*

In response to Justice Harlan's and others' criticism, early defenders of the rule of reason noted that its purpose was to broaden and enlarge the force of the Sherman Act.[83] The defenders feared that businesses would escape prosecution by engaging in conduct not specifically anticompetitive under the common law.[84] Interestingly, President Taft began his Third Annual Message to Congress in 1911 defending the Court's rule-of-reason analysis.[85] President Taft argued that a rule-of-reason standard, if narrowly construed, would not emasculate the Sherman Act.[86] Even under the rule of reason, courts lacked the power to say that certain restraints might be lawful if the parties moderated their use of market power and did not exact from the public too great and exorbitant a price. President Taft assured Congress that nothing in *Standard Oil* and *United States v. American Tobacco Co*.[87] suggested "such a dangerous theory of judicial discretion."[88] Nor did the rule of reason commit to the courts "undefined and unlimited discretion" as to when restraints violated the statute.[89] Instead, a reasonable restraint of trade at common law "is well understood and is clearly defined" under President Taft's ancillary restraint analysis, which he previously applied as an appellate judge in an antitrust case.[90] Thus, in President Taft's view, the Court's *Standard Oil* and *American Tobacco* decisions had not usurped legislative power to formulate the Court's own social or economic policies.[91]

Nonetheless, President Taft recognized the "need and wisdom of additional or supplemental legislation" to provide the entire business community better guidance and to foster competition "without loss of

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[83] *See id.* at 179; Felix H. Levy, *The Federal Anti-trust Law and the "Rule of Reason,"* 1 VA. L. REV. 188, 202 (1913); *Tobacco Decision Meets with Favor*, N.Y. TIMES, May 31, 1911, at 1.

[84] Levy, *supra* note 83, at 203 ("[I]n view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason renders it impossible to escape by any indirection the prohibition of the statute.").

[85] William Howard Taft, U.S. President, Third Annual State of the Union Address (Dec. 5, 1911), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29552 (last visited Apr. 19, 2009).

[86] *Id.*

[87] *See supra* note 74.

[88] Taft, *supra* note 85.

[89] *Id.*

[90] *Id.* "It must be limited to accomplish the purpose of a lawful main contract to which, in order that it shall be enforceable at all, it must be incidental. If it exceed the needs of that contract, it is void." *Id.* This is more fully explored in then-Judge Taft's *Addyston Pipe* decision. United States v. Addyston Pipe & Steel Co., 85 F. 271, 280-83 (6th Cir. 1898).

[91] Taft, *supra* note 85.

real efficiency or progress."[92] Taft believed that such specificity orients the rule of reason toward rule-of-law ideals:

> I see no objection — and indeed I can see decided advantages — in the enactment of a law which shall describe and denounce methods of competition which are unfair and are badges of the unlawful purpose denounced in the anti-trust law. The attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business, or the making of exclusive contracts with customers under which they are required to give up association with other manufacturers, and numerous kindred methods for stifling competition and effecting monopoly, should be described with sufficient accuracy in a criminal statute on the one hand to enable the Government to shorten its task by prosecuting single misdemeanors instead of an entire conspiracy, and, on the other hand, to serve the purpose of pointing out more in detail to the business community what must be avoided.[93]

Thus, despite his defense of the Court's rule of reason, President Taft advocated for legislation to repair the standard. The legal standards, under his proposed legislation, should make it be easier for prosecutors to swiftly punish anticompetitive restraints, while providing the needed transparency for businesses to avoid potential criminal liability.

Debate over the state of antitrust enforcement generally, and the Court's rule of reason specifically, continued into the 1912 presidential election. The Democratic Party's national platform criticized the Court's rule of reason, which deprived the Sherman Act "much of its efficiency"[94] and favored "legislation which will restore to the statute the strength of which it has been deprived by such interpretation."[95] In contrast, the Republicans defended the Court's

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[92] *Id.*

[93] *Id.*

[94] The 1912 Democratic Party platform included a 217-word section favoring "the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand[ing] the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States." John T. Woolley & Gerhard Peters, The American Presidency Project, Democratic Party Platforms: Democratic Party Platform of 1912, http://www.presidency.ucsb.edu/ws/index.php?pid=29590 (last visited Apr. 1, 2009).

[95] *Id.*

rule of reason and the Taft administration's antitrust enforcement. But they supported supplemental antitrust legislation to specify as criminal offences those acts that uniformly violate the antitrust laws. This clarity would orient the Sherman Act toward the rule of law: those businesses who "honestly intend to obey the law" would have a guide for their action; those businesses "who aim to violate the law may the more surely be punished."[96] And the Republicans supported the creation of an administrative board to replace many of the functions handled by the courts.[97] In their view, creating a federal trade commission would "promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure."[98]

The Democrats got the better of the argument, or at least the election. After defeating Taft and Roosevelt, Woodrow Wilson, in addressing a Joint Session of Congress on Trusts and Monopolies, sought to conform the rule of reason with rule-of-law principles:

> The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. . . . And the business men of the country desire something more than that the menace of legal process in these

[96] The Republican Party platform had a 246-word section committed to antitrust enforcement and supplemental legislation that provides "same certainty should be given to the law prohibiting combinations and monopolies that characterize other provisions of commercial law; in order that no part of the field of business opportunity may be restricted by monopoly or combination, that business success honorably achieved may not be converted into crime, and that the right of every man to acquire commodities, and particularly the necessaries of life, in an open market uninfluenced by the manipulation of trust or combination, may be preserved." John T. Woolley & Gerhard Peters, The American Presidency Project, Republican Party Platforms: Republican Party Platform of 1912, http://www.presidency.ucsb.edu/ws/index.php?pid=29633 (last visited Apr. 1, 2009). Independent candidate Theodore Roosevelt attacked both Wilson (noting that 80 percent of trusts were incorporated in New Jersey, where the Democratic candidate was governor) and the Republicans (under the control of special interests), and promised a commission to better effectuate antitrust policy. Theodore Roosevelt, U.S. President, The Leader and the Cause, Address at Milwaukee, Wis. (Oct. 14, 1912) (http://www.theodore-roosevelt.com/trmilwspeech.html).

[97] Woolley & Peters, *supra* note 96.

[98] *Id.*

> matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.[99]

To provide such guidance, President Wilson proposed that the actual processes and methods of monopoly and the many hurtful restraints of trade, which he felt were sufficiently known by that time, should be "explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain."[100] That same year, with criticism from President Wilson and others mounting, Congress passed the Clayton Act and Federal Trade Commission Act ("FTC Act").[101] Both acts promoted the Federal Trade Commission as the means for setting and enforcing clearer standards of liability.[102]

This endeavor to promote clarity, however, suffered a setback in 1918. Justice Brandeis explained in *Board of Trade of Chicago v. United States* (*CBOT*)[103] that not every restraint of trade was unlawful, only the unreasonable restraints, determined under the following rule-of-reason factors:

> 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after

[99] Woodrow Wilson, U.S. President, Address to a Joint Session of Congress on Trusts & Monopolies (Jan. 20, 1914) (http://www.presidency.ucsb.edu/ws/?pid=65374).

[100] *Id.*

[101] ROBERT PITOFSKY ET AL., TRADE REGULATION: CASES AND MATERIALS 73-74 (5th ed. 2003) (explaining that 1914 statutes constituted response to rule of reason: "Advocates of a vigorous antitrust policy felt that this flexible approach gave undesirable and unreviewable power over the nation's economic development to the judiciary. On the other hand, businessmen worried about how to stay within the confines of this vague standard.").

[102] *See* FTC v. Gratz, 253 U.S. 421, 433-34 (1920) (Brandeis, J., dissenting); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 48 (1924). After the FTC Act, the Chamber of Commerce members overwhelmingly recommended to Congress to reconsider the antitrust laws and formulate standards of general business conduct to be administered by a supervisory body. Special to The N.Y. Times, *Seeks Revision of Anti-Trust Laws: Referendum by Commerce Chamber of United States Shows Overwhelming Majority for It*, N.Y. TIMES, Apr. 5, 1919, at 22, *available at* http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9405E4DC1E3BEE3ABC4D53DFB2668382609EDE.

[103] Bd. of Trade of Chi. v. United States (*CBOT*), 246 U.S. 231, 238 (1918).

> the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[104]

Under Chief Justice White's logic in *Standard Oil*, Congress implicitly endorsed the common law's rule of reason in enacting the Sherman Act. Now *CBOT*'s open-ended rule of reason significantly differed from its common law counterpart.[105] *CBOT*'s rule of reason neither identified categories of conduct that were presumptively anticompetitive or socially undesirable nor contained any other presumption of illegality.[106] The Court's rule of reason instead resembled a cause of action at its infancy, namely the prima facie intentional tort. An antitrust defendant, like a tortfeasor, would be liable if its conduct caused injury to another, were generally culpable (anticompetitive), and were not justifiable under the circumstances.[107] Even if another court found a similar practice in a different industry anticompetitive, *CBOT*'s rule-of-reason factors would treat each challenged restraint as novel. Liability would turn on facts peculiar to the industry to which, and during the period when, the defendant applied the restraint.

As a commentator at the time noted, President Wilson never accomplished his ambitious program to "give a 'further and more explicit legislative definition of the policy and meaning' of the Sherman Antitrust so as to 'practically eliminate uncertainty.'"[108]

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[104] *Id.*

[105] The Court generally identifies *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347, 347 (K.B.) as outlining the rule of reason standard. Snepp v. United States, 444 U.S. 507, 519 (1980) (Stevens, J., dissenting); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689 (1978) ("Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business.").

[106] *Mitchel*, 24 Eng. Rep. at 347 ("All contracts, where there is a bare restraint of trade and no more, must be void"; "where the special matter appears so as to make it a reasonable and useful contract the presumption is excluded").

[107] *See* Flynn, *supra* note 24, at 635 ("[The] essence of a rule of reason violation is proof that joint conduct has been used to displace the competitive process without justification or excuse.").

[108] Naujoks, *supra* note 67, at 134.

Insofar as the proponents of the supplemental 1914 antitrust legislation "had hoped to clarify" the Sherman Act "by substituting specific rules of conduct for general principles, they largely failed."[109] Despite its many infirmities, *CBOT* remains the "classic articulation" of how courts should undertake the rule-of-reason analysis.[110]

C. Rise of the Per Se Rule

While the White Court's rule of reason in *Standard Oil* drew criticism, the Court in a different 1911 decision created another far-reaching legal standard — per se illegality. The per se rule did not arise through a Sherman Act claim. Instead, a defendant in a tortious interference of contract action challenged the validity of a price restraint imposed by contract.[111] In addition, before and after *CBOT*, the Court bounded its discretion under the Sherman Act by rejecting certain defenses.[112] For example, in *United States v. Trenton Potteries*

[109] HENDERSON, *supra* note 102, at 48.

[110] United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), *modified*,183 F. Supp. 2d 613 (S.D.N.Y. 2001) (quoting Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)); *see also* 1 RUDOLFF CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:37 (4th ed. 2009) ("Modern attempts to refine or further develop the rule of reason, as announced by Justice Brandeis in 1918, are virtually nonexistent.").

[111] Dr. Miles Med. Co. v. John D. Parke & Sons Co., 220 U.S. 373, 381-82 (1911). The plaintiff, which manufactured proprietary medicines prepared in accordance with secret formulae, sought to maintain prices for its medicines at both the wholesale and retail level. *Id.* at 394. Defendant, a wholesaler, did not agree to plaintiff's prices, but sold plaintiff's medicines at a discount to retail druggists. *Id.* Defendant procured plaintiff's medicines from other wholesalers under contract with plaintiff and induced those wholesalers to breach their contract by agreeing to sell plaintiff's medicines at "cut prices." *Id.* Plaintiff sued defendant for tortious interference of contract. *Id.* at 394-95. Defendant countered that there could be no tortious interference of contract claim because plaintiff's contracts with other wholesalers were void. The Court held that it was clear and obvious that plaintiff's agreements restrained trade. *Id.* at 407-09. In the wake of *Leegin*, it will be interesting to watch whether manufacturers, no longer facing the threat of per se liability, pursue more tortious interference claims against discounters and seek to prevent unlicensed distribution of their authentic branded products over the Internet. *See EU Competition Authorities Ponder Case Barring Sales of LVMH Products on eBay*, ANTITRUST & TRADE REG. DAILY, July 18, 2008 (describing Paris Commercial Court ordering eBay to prevent users on any of its sites worldwide from selling or buying counterfeit or *authentic* LMVH perfumes and cosmetics).

[112] "In the first price-fixing case arising under the Sherman Act, the Court . . . rejected the defense as a matter of law." Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 350 n.22 (1982) (citing United States v. Trans-Mo. Freight Ass'n., 166 U.S. 290, 339 (1897)); *see also* Gilbert H. Montague, *"Per Se Illegality" and the Rule of Reason*, 12 A.B.A. ANTITRUST SEC. 69, 76 (1958).

Co., the Court recognized its own limitations and rejected the defense that prices were reasonable: "in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable — a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."[113]

Nonetheless, in the height of the Great Depression, the Court did not apply its per se rule to an agreement among competitors to fix price. Instead the Court realized the critics' concerns that under the rule of reason the Court could decide what good or bad cartels are according to its economic and political views. Chief Justice White had previously assured the public that its discretion under the rule of reason was circumscribed by the public policy embodied in the Sherman Act. But twenty-two years later, in 1933, the Court reasoned that an anticompetitive restraint of trade, which was plainly within the statute's prohibitions, was legal.[114] In *Appalachian Coals, Inc. v. United States*,[115] coal producers were confronted with the oversupply of coal, exacerbated in part by certain "destructive" trade practices, such as buyers dumping "distressed" coal (due in part to lack of storage facilities) onto the market. In response to industry conditions, 137 coal producers formed Appalachian Coals, Inc., as its exclusive selling agent, enabling the former competing producers to fix the coal prices. Before commencing operations, Appalachian Coals approached the U.S. Department of Justice (DOJ) for approval. Instead of approving the combination, the United States challenged its horizontal price restraint in court. Using the *CBOT* rule-of-reason factors, the Court held that the competitors' proposed price-fixing did not violate the Sherman Act. Some of the Court's findings, if valid, are uncontroversial.[116] In one controversial aspect, however, the Court injected its beliefs under the rule of reason — namely that the

[113] 273 U.S. 392, 398 (1927).

[114] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377-78 (1933).

[115] *Id.*

[116] *Id.* at 371-72 (finding there were "virtually inexhaustible sources of supply" by alternative producers in affected market, "organized buying power of large consumers," and industry's low-entry barriers and excess capacity; although customers testified in favor of defendant, several defense witnesses admitted "that there would be some tendency to raise the price but that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes").

Sherman Act permits horizontal restraints that stabilize prices if they are not detrimental to the Court's conception of "fair competition."[117] The Court's holding legitimized the criticism of the rule of the reason: the Court, under its vague standard, *could* permit anticompetitive restraints it viewed as fostering "fair competitive opportunities" in distressed industries.

In 1940, faced with another distressed industry, the petroleum industry, the Court imposed greater restraint on its discretion (and that of the lower courts) and sought to discipline itself from further adventures under the rule of reason. The Court turned to its alternative standard, the per se rule, to prevent an analysis that legalizes competitors' price fixing arrangements: "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into . . . [their] reasonableness."[118] In more fully articulating its per se prohibition on horizontal price-fixing, the Court expanded the scope of liability.[119] The Court also rejected many justifications for price-fixing, including lack of market power, "ruinous competition," "fairer competitive prices," "financial disaster," "evils of price cutting," reasonableness of price, defendants' good intentions, evidence of government approval of the scheme, or the financial distress of the particular industry.[120]

Over the next thirty-seven years, the Court did not embrace the per se rule in every instance.[121] But the Court, in recognizing its rule of

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[117] *Id.* at 373.

[118] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). Ironically, the *Socony* Court departed from the rule of reason announced in *Standard Oil*. Socony was part of the Standard Oil monopoly that after the 1911 Supreme Court decision was broken into different operating units and principal petroleum marketers. Daniel A. Crane, *The Story of* United States v. Socony-Vacuum*: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES 91, 92-93 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

[119] Combinations that "tamper" with price structure are per se illegal. *Socony-Vacuum*, 310 U.S. at 221. Thus, the Sherman Act reaches combinations formed for the purpose, and with the effect, of raising, depressing, fixing, pegging, or stabilizing prices. Antitrust plaintiffs need not prove that defendants fixed prices directly or controlled a substantial part of the commodity, no competition remained, or prices as a result were uniform, inflexible, or unreasonable. *Id.* at 222, 224 n.59.

[120] *Socony-Vacuum*, 310 U.S. at 221-22, 226-27, 229. In response to *Socony*, the National Association of Manufacturers advocated legislation that would subject all Sherman Act claims to the rule of reason. *N.A.M. Group Seeks Curbs on Bureaus*, N.Y. TIMES, Dec. 6, 1940, at 20.

[121] For example, in 1963, the Court needed to know more about vertical nonprice restraints' actual impact to decide whether they have a pernicious effect on competition and lack any redeeming virtue. *See* White Motor Co. v. United States, 372 U.S. 253, 261 (1963). Four years later, the Court condemned certain vertical

reason's shortcomings, increasingly opted for more administrable rules. In 1956, for example, the Court admitted, "it is fair to say that the Rule [of Reason] is imprecise," but adhered to Chief Justice White's belief that the rule's "application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation."[122] Two years later, the Court was more critical of its rule of reason: "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken."[123]

Thus, the Court sought four objectives as it developed the per se rule. First, the Court generally (but not always[124]) sought a rule that was administrable for generalist judges. With some notable exceptions,[125] the Court turned to the Sherman Act's legislative history or common law precedent as a basis for its rules.[126] Its philosophy was

nonprice restraints. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372-73 (1967). Given the opaqueness of the *Schwinn* decision, whether the Court's learning improved in the intervening years is questionable. In *United States v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 918-19 (E.D. La. 1957), *aff'd per curiam*, 355 U.S. 22 (1957), a district court rejected the government's contention that the challenged group boycott was per se illegal, but found it illegal under the rule of reason. On appeal by the defendant, the Supreme Court summarily affirmed per curiam the judgment without elaborating whether the lower court applied the right standard. *Id.*

[122] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 386-87 (1956).

[123] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[124] *See, e.g.*, *Arnold, Schwinn & Co.*, 388 U.S. at 382 (Stewart, J., dissenting) (saying "I cannot understand how that marketing system becomes per se unreasonable and illegal in those instances where it is effectuated through sales to wholesalers and dealers").

[125] Albrecht v. Herald Co., 390 U.S. 145, 168-69 (1968) (Stewart, J., dissenting) (pointing out that contrary to Court's holding, protecting households from monopoly overcharges furthered antitrust principles). *Arnold, Schwinn & Co.*, 388 U.S. at 388 (stating that no "previous antitrust decision of this Court justifies" adoption of a per se rule and government requested only presumption of illegality).

[126] For example, to bring some transparency and predictability in merger review, the Court aimed for a presumption consistent with the Congressional concerns in the 1950 Clayton Act amendments to deal with the rising tide of economic concentration in the American economy. United States v. Phila. Nat'l Bank, 374 U.S. 321, 365 (1963). The tests of illegality under amended section 7 "'are intended to be similar to those which

that "in any case in which it is possible, without doing violence to the congressional objective embodied in . . . [the statute], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration."[127] The Court, for example, did not condemn all mergers with high market shares. Instead, it created a presumption of illegality when the merging parties' share exceeded thirty percent.[128] By creating an administrable rule, the Court also restricted the lower courts' ramblings under the rule of reason.[129]

Second, the Court sought rules to enhance predictability. For example, in devising the thirty percent presumption for mergers, the Court sought to foster business autonomy: unless business executives "can assess the legal consequences of a merger with some confidence, sound business planning is retarded."[130] The Court's role was to provide clearer rules on what was civilly (and criminally) illegal under the Sherman Act.[131] "Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory . . . to maintain a flexible approach."[132]

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the courts have applied in interpreting the same language as used in other sections of the Clayton Act.'" *Id.* (quoting H.R. REP. NO. 1191, at 8 (1949)). The Court sought a presumptively anticompetitive postmerger market share based on the market share and market concentration figures in its earlier Clayton Act contract-integration cases, and which was consistent with prevailing scholarly opinion. *Id.* at 365-66.

[127] *Phila. Nat'l Bank*, 374 U.S. at 362.

[128] *See id.* at 363 ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.").

[129] *See id.* at 362 ("We must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation.").

[130] *Id.*

[131] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972) ("Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.").

[132] *Id.* The Court repeated this argument in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982):

> Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering

Third, the Court sought to avoid having to bog down the courts with examinations of difficult economic problems. This was demonstrated in *United States v. Topco Associates, Inc.*, where the Court recognized its judicial limitations.[133] Neither the Court nor the

> to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute.

Id. at 354-55 (citation omitted).

[133] *See* 405 U.S. 596 (1972). Topco at the time was a cooperative association of 25 small and medium-sized regional supermarket chains operating in 33 states. *Id.* There was limited integration of assets among its members: no pooling of earnings, profits, capital, management, or advertising resources. *Id.* Topco purchased goods and resold them to its members under a private label. *Id.* Thus, the smaller supermarket chains could compete with the major supermarket chains by also offering a private label. *Id.* at 599. The United States did not challenge the competitors' formation of Topco itself. *See id.* at 603. Indeed, the Court recognized the benefits of the competitors jointly creating and producing private label products, including (i) exploiting economies of scale in purchasing, transporting, warehousing, promoting, and advertising, (ii) offering supermarket consumers lower priced products besides branded products and a greater mix of differently priced and quality goods; and (iii) giving the smaller supermarkets some bargaining leverage in dealing with national manufacturers of branded products. *Id.* at 600 n.3. Approximately 20 years after Topco was formed, its members agreed to two restraints that the United States challenged. First, each member could sell Topco brands only in its designated marketing territory. *Id.* at 601. If a member sold Topco private-label products outside of its exclusive territorial area, it could be excluded from Topco and no longer offer Topco private-label goods. *Id.* at 602-03. Second, members could not freely sell Topco private-label products at the wholesale level. *Id.* at 603. To do so, the member must first get permission from Topco; even if the member received permission for such wholesaling, its sales of the Topco private-label product were limited to "a specific geographic area" and "under any conditions imposed by the association." *Id.* at 603-04. Topco's justification for the restraints was that its members needed private-label products to compete with the larger supermarket chains. *Id.* at 604-05. And the members needed territorial restraints to sell private-label products. *Id.* at 605. By restricting intrabrand competition among retailers selling Topco private-label products, Topco's members promoted greater competition between its products and those of the major supermarket chains like Kroger and A&P. *Id.* The United States, under the direction of Donald Turner, decided to present its case as a per se illegal territorial restraint. Peter C. Carstensen & Harry First, *Rambling Through Economic Theory:* Topco*'s Closer Look*, *in* ANTITRUST STORIES, *supra* note 118 at 171, 186. Its case-in-chief took only a few minutes. *Id.* at 190-91. The district court, however, applied the rule of reason and found that the challenged restraints' procompetitive effects (promoting interbrand competition with the major supermarket chains) outweighed their anticompetitive effects (minimizing intrabrand competition). *Topco*, 405 U.S. at 605-06, 608. The Court reversed, holding that agreements among rivals to allocate territories are per se illegal. *Id.* at 607-08. The majority and dissenting Chief

defendant could weigh the reduction of competition in one area (such as intrabrand competition for Topco private-label products among Topco member retailers) versus greater competition in another area (such as interbrand competition between Topco members' private-label products and the major retailers' private-label goods).[134] The Court did not share dissenting Chief Justice Burger's confidence in the judiciary's ability to examine "'difficult economic problems.'"[135]

Fourth, not only was this weighing beyond its competence, but the Court recognized that the legislature, while subject to rent-seeking,[136] is more politically accountable than the judiciary; thus, Congress must make these normative trade-offs:

> There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to

Justice Burger had two fundamental differences. *Id.* at 622-23. First, the majority emphasized the administrability of antitrust rules and the court's limited capacity in examining difficult economic problems. Chief Justice Burger, on the other hand, felt that a court under the Sherman Act must examine these "'difficult economic problems.'" *Id.* at 622. Second, the majority felt that neither the courts nor the Topco members had any authority to tradeoff the reduction of intrabrand competition for greater interbrand competition. *Id.* at 612. The dissent, however, argued that no price fixing was involved and Topco was not a "near-monopoly" as its members on average had a six percent share in their markets. *Id.* at 622-23.

[134] *Id.* at 609-10 ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.").

[135] *Id.* at 622 (Burger, C.J., dissenting).

[136] Rent seeking involves "[s]pending time and money not on the production of real goods and services, but rather on trying to get the government to change the rules so as to make one's business more profitable. This can take various forms, including seeking subsidies on the outputs or the inputs of a business, or persuading the government to change the rules so as to keep out competitors, tolerate or promote collusion between those already engaged in an activity, or make legally compulsory the use of professional services." OXFORD DICTIONARY OF ECONOMICS 399 (John Black ed., 2d ed. 2002).

> bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.[137]

As the Court's concerns reflect, the rule of reason was not only hard to administer, it also left the courts vulnerable to rent-seekers. Keenly aware of their own interests, rent-seekers will seek results that benefit themselves, but not necessarily consumers.

But by the 1950s, some called for a return to the rule of reason.[138] Many of the Court's antitrust decisions between the 1950s and early 1970s became a popular piñata for the Chicago School adherents, whose view of law and economics clashed with the simplification embodied in the per se rules. Some criticism is deserved. But the hyperbole at times is empirically deficient. For example, some Chicago School adherents criticized *Topco*, which they saw as a procompetitive joint venture to foster interbrand competition.[139] Chief Justice Burger predicted that unless Congress intervened, "grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains."[140] Congress never intervened. Today one still

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[137] *Topco*, 405 U.S. at 611-12. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71 (1963), the defendant banks after merging would control at least 30 percent of the commercial banking business in the four-county Philadelphia metropolitan area. The defendants sought to justify the potential loss of competition in the local commercial market with greater competition in other markets, namely: (i) increasing the resulting bank's lending limit will enable it to compete with large out-of-state banks (particularly New York banks) for very large loans, and (ii) Philadelphia needs a larger bank to bring business into the area and stimulate economic development. The Court rejected as a policy matter these two trade-offs, which would require a court to offset anticompetitive effects in one market for procompetitive benefits in another:

> A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended [section] 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

Id. at 371.

[138] *See, e.g.*, Luther A. Huston, *Patman Attacks Antitrust Study*, N.Y. TIMES, May 11, 1955, at 20 (noting recommendation of infusion of rule of reason into antitrust enforcement structures).

[139] BORK, *supra* note 24, at 274-78.

[140] United States v. Topco Assocs., Inc., 405 U.S. 596, 624 (1972) (Burger, C.J., dissenting).

can buy private-label Topco products at local supermarkets. Closer analysis of *Topco* revealed that the majority got it right.[141] The deficiency was its incomplete analysis, not its outcome. In applying the per se doctrine, the majority never addressed the key issue: whether the challenged restraint — geographic exclusivity of the trademark — was necessary.[142]

D. The Rule of Reason Strikes Back

Since its 1977 *Sylvania* decision, the Court, following its "common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."[143] Expressing concern over the risk of false positives under its per se rule,[144] the *Leegin* Court further

[141] For an excellent retrospective, see Carstensen & First, *supra* note 133, 199-201.

[142] Justice Burger and later critics adopted this view reflexively, arguing that "by definition" labels must be exclusive to attract other small firms. *Id.* But whatever the risk of free riding, lesser restrictive alternatives than vertical price fixing existed. As Carstensen and First recount, during oral arguments before the Supreme Court, Topco conceded that to give each supermarket member its own private-label cost only $350,000. Carstensen & First, *supra* note 133, at 174. This amount was small relative to the minimum amount of annual sales (about $250 million by the 1960s) to support an effective private-label program. *Id.* at 177. Given this modest cost, instead of one Topco brand, inquired the Court, "the private Seven-Eleven label would be competing with the private Giant label." *Id.* at 174. Little free-riding occurred before or after the decree, as supermarkets did not invest in promoting their private-label brands. *Id.* at 176. Instead, *Topco*'s underdeveloped record suggested that the restraints were intended to hinder efficient mid-sized retailers from expanding into another member's territory. *Id.* at 182-85. Because these lesser restrictive alternatives eliminated any free-riding problem (and the need for territorial restraints), the Court concluded in oral argument, as Topco's expert previously testified, that "the effect of exclusivity in this arrangement is simply to limit competition in private label territories." *Id.* at 174-75. On remand, the district court permitted "primary responsibility" clauses defeating exclusivity but providing incentives for firms to concentrate in assigned areas. *Id.* at 197-98. Topco survived and prospered. Absent the horizontal restraints, its members freely entered each other's territories. Topco increased the number of available brands so that members could have their unique private label (like Food City brand). Today Topco has more than 50 members and combined sales second only to Wal-Mart. *Id.* at 201.

[143] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2721 (2007); *see also* AMC REPORT, *supra* note 23, at 36 ("The Court's decision in *Sylvania* marked a major turning point in antitrust law. After this decision, 'the Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.'") (quoting ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002)).

[144] *Leegin*, 127 S. Ct. at 2718. The Court has also expressed concern over false positives under its rule of reason with respect to section 2 claims. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (explaining

limited the rule's application.[145] As a result, formerly per se illegal conduct is now subject to the rule of reason.[146]

The Court's shift from per se rules would be an unsurprising reflection of the Court's increased confidence in its[147] or the lower courts' capacity to adjudicate complex economic issues, like antitrust. But the Court's skepticism of, rather than its confidence in, the judiciary's competency has increased over the past few years as reflected in its decisions in *Credit Suisse Securities (USA) LLC v. Billing*,[148] *Bell Atlantic Corp. v. Twombly*,[149] and *Trinko*.[150] Moreover,

that "cost of false positives counsels against an undue expansion of [section] 2 liability"). The Court's concern over false positives itself may be a false positive and ignores the risk of false negatives under the rule of reason. Stucke, *supra* note 45, at 531. As several FTC employees noted after surveying the 344 private enforcement antitrust actions decided under section 2 between 2000 and July 1, 2007, only nine of those cases were decided for plaintiffs: "The paucity of judgments for plaintiffs suggests that false positives in the sense of incorrect final rulings of liability likely are relatively infrequent. Taken in isolation, this could suggest that any undue influence of private section 2 enforcement on the conduct of dominant firms is limited." William F. Adkinson, Jr., et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* app. 5, 14-15 (Working Paper, FTC, 2008), *available at* http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf.

[145] *Leegin*, 127 S. Ct. at 2713 (explaining that to justify per se prohibition, antitrust plaintiff must show alleged restraints have "'manifestly anticompetitive'" effects and "'lack . . . any redeeming virtue'") (internal citations omitted).

[146] *See id.* at 2710-13 (discussing minimum RPM); State Oil Co. v. Khan, 522 U.S. 3, 17-19 (1997) (examining maximum RPM); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57-59 (1977) (reviewing vertical, nonprice restraints).

[147] Antitrust issues rarely arose during the recent confirmation hearings, so it is difficult to assess the recent Justices' familiarity with antitrust. When asked to explain his thoughts on *LePage's Inc. v. 3M*, 277 F.3d 365, 369 (3d Cir. 2002) (joining majority) and *LePage's Inc. v. 3M* , 324 F.3d 141, 182 (3d Cir. 2003) (en banc) (dissenting), Justice Alito prefaced his comments by saying, "I'm not an antitrust expert, and so I plod my way through these antitrust issues when they come up." *Confirmation Hearing of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 525 (2006) (testimony of then-Judge Alito).

[148] 127 S. Ct. 2383, 2395 (2007). In holding that the federal securities laws implicitly preclude the application of the federal antitrust laws to the alleged laddering and tying conduct in that case, the Court feared that under its antitrust standards, many different courts would reach inconsistent results and likely to make unusually serious mistakes.

[149] 550 U.S. 544 (2007). The Court's concern over false positives and the high discovery and litigation costs arising from its antitrust standards explained its unilateral creation of a new pleading standard for civil antitrust claims. To mitigate its concerns, an antitrust plaintiff stating a section 1 claim must allege enough factual matter (taken as true) to suggest that an agreement was made, *id.* at 1295; "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.* at 556; "enough facts to state a claim to relief that is plausible on its

the majorities in *Sylvania* and *Leegin* never considered an intermediary standard consistent with rule-of-law ideals and its experience with antitrust issues.[151] Instead, without assessing the standard's costs or deficiencies under rule-of-law principles, the Court resurrected its abused *CBOT* rule-of-reason factors as the prevailing, usual and accepted standard for testing whether a practice restrains trade in violation of section 1 of the Sherman Act.[152]

Even the staunchest critics of *Leegin* recognize that resale price maintenance occasionally is competitively neutral or procompetitive. Ideally, in those circumstances, a workable legal standard efficiently spares RPM from condemnation. Critics are not, however, dissatisfied with *Leegin* because the Court departed from per se liability. Instead, their dissatisfaction is with the Court's rule of reason. If the alternative standard efficiently condemned anticompetitive instances of RPM, spared its procompetitive instances,[153] and enabled the parties

face," *id.* at 570; or enough facts to convert plaintiff's claims from being "conceivable" to "plausible." *Id.*

[150] 540 U.S. at 414-15. In assessing whether antitrust liability should apply to the monopolist's failure to comply with the 1996 Telecommunications Act, the Court noted the high costs of antitrust "intervention," including the high risk of false positives and the "interminable litigation." *Cf.* J. Thomas Rosch, Commissioner, FTC, The State of Antitrust in 2008, Prepared Remarks Before the Antitrust Section of the North Carolina State Bar Association (May 9, 2008) ("[T]he Court's recent decisions reflect some concern with the private enforcement of the antitrust laws and the ability of the courts to reach the right answer in private cases."); INT'L COMPETITION NETWORK, COMPETITION AND THE JUDICIARY 8-9 & tbl. 3 (2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/CompetitionandtheJudiciary.pdf (highlighting two principal findings from survey of 18 competition authorities in 17 countries (both developing and developed nations) were their perception that their countries' judiciaries interpreted competition rules differently and were not sufficiently familiar with economic concepts to assess competition claims).

[151] One interviewee in Finsbury International Policy & Regulatory Advisers' (FIPRA) recent study commented:

> If you read [*Leegin*] you are struck by two things: First, the list of potential benefits of RPM as well as a list of potential theories of harm, [. . .] which reads like a textbook without much [judgment]. I expected the Supreme Court to clearly express its priorities. Secondly, what was most striking was the statement that increases in price following RPM may not matter all that much. If prices go up, so be it, we don't care; what really matters are the efficiency benefits from the use of RPM. This is a significant departure and indicates what you care about at end of day.

PHIL EVANS, IN SEARCH OF THE MARGINAL CONSUMER: THE FIPRA STUDY 53 (2008).

[152] *Leegin*, 127 S. Ct. at 2710, 2712-13.

[153] For example, a manufacturer entering a market may use RPM to provide the

to adjudicate their claims quickly and cheaply, then the shift from per se liability would be welcomed, rather than criticized.

E. Quick-Look Rule of Reason

Although the Court's 1977 decision in *Sylvania* represents its retreat from per se rules to the rule of reason, there appeared in the 1980s the prospect of a third standard that lay between the Court's full-blown rule of reason and per se illegality: quick-look standards.[154] The quick-look relieves an antitrust plaintiff from an extensive detailed market analysis in its prima facie case.[155] "If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful."[156] The antitrust plaintiff need not prove as part of its prima facie case the relevant product and geographic market. Instead, the burden shifts to defendants to establish the restraint's procompetitive benefits.[157] Encouraged by the Court's openness to a quick-look,[158] the

retailer with sufficient profit margins for the retailer to invest in providing the necessary promotion, services, advertising and other efforts to promote the product and increase consumer demand.

[154] *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-59 (1986) (condemning challenged conduct without "elaborate industry analysis"); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla. (*NCAA*), 468 U.S. 85, 109 (1984).

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

[156] Polygram Holding, Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005).

[157] *NCAA*, 468 U.S. at 109-10.

[158] The Court in *NCAA* recognized that restraints that fall outside the category of per se illegal restraints can be condemned short of a full-blown rule of reason. *NCAA*, 468 U.S. at 117. If competitors agreed not to compete in terms of price or output, then "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 109 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)). Such naked restraints "on price and output [require] some competitive justification even in the absence of a detailed market analysis." *Id.* at 110. The Court appeared open in applying the rule of reason "in the twinkling of an eye." *Id.* at 109 n.39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Fed. Judicial Ctr., June 1981)).

FTC and DOJ refined these standards,[159] which sparked further discussion within antitrust circles.[160]

But the Court's later articulation of quick-look in *California Dental Ass'n v. FTC* impeded the doctrine's development.[161] In *California*

[159] *See In re* Mass. Bd. of Registration in Optometry, No. 9195, 110 F.T.C. 549, 1988 WL 1025476, at *11-13 (F.T.C. 1988); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.4 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm; Joel Klein, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address at American Bar Association's Antitrust Section Semi-Annual Fall Policy Program 4-6 (Nov. 7, 1996) (available at http://www.usdoj.gov/atr/public/speeches/0979.pdf).

[160] *See, e.g.*, ABA MONOGRAPH, *supra* note 24, at 103-04, 142-61, 175-76 (discussing differing quick-look standards); Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 625 (1996) (stating that vague concept of "inherently suspect" in *Massachusetts Board* was inherently elastic and is being applied to broad range of situations far outside realm of per se or borderline per se conduct); William J. Kolasky, Jr., *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, 12 SPG. ANTITRUST 41 (1998) (stating that stepwise approach places heavy burden on parties to justify legitimate business arrangement without regard to whether they pose any real danger to competition); Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 ANTITRUST L.J. 773, 773-75 (1998) (emphasizing that *Massachusetts Board* standard encourages courts to listen to justifications rather than determining that conduct is per se illegal).

[161] 526 U.S. 756 (1999) (*Cal. Dental III*). Approximately three-quarters of California dentists belonged to the voluntary nonprofit California Dental Association ("CDA"). *Id.* at 759. The CDA's code of ethics prohibited false and misleading advertising. *Id.* at 760. Violators were subject to censure, suspension, or expulsion from CDA. *Id.* at 761-62. The FTC sued CDA, not for its code of ethics, but for its application of the code. CDA allegedly restricted truthful, nondeceptive (i) price advertising and (ii) advertisements relating to the quality of dental services. *Id.* at 762. Without regard to whether the discount advertising was false or misleading, CDA required its members to include additional disclosures, such as

> (i) the dentist's regular price for the dentist service;
>
> (ii) the discount price (either the dollar amount of the discounted fee or the percentage of the discount for the specific service);
>
> (iii) the length of time, if any, the discount would be honored;
>
> (iv) a list of verifiable fees; and
>
> (v) identification of specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount.

Id. at 761. CDA also objected to across-the-board discounts (that is discounts on each service provided) that resulted in charges below the regular fee. Cal. Dental Ass'n (*Cal. Dental I*), 121 F.T.C. 190, 227 (1996). As a result, a member dentist could not simply

Dental, rather than simplify antitrust litigation and provide greater predictability, the Court increased the uncertainty for litigants, district courts, and market participants. The Court said that its categories of analysis are "less fixed" than they appear. No categorical lines separate the per se, quick-look, and rule-of-reason standards. Instead, a lower court can choose a standard somewhere along the continuum between rule of reason and per se illegality based on its personal "enquiry" for the antitrust case, and its view of "the circumstances, details, and logic of a restraint."[162] But instead of clarifying its quick-look doctrine to enhance predictability, the Court added another totality-of-economic-circumstances test with *California Dental*. Under that test, if the quality of proof varies with each case's particular circumstances, predictability diminishes.

A continuum, of course, has benefits. Ideally, a continuum would efficiently reduce the risks of false positives — characterizing procompetitive behavior as anticompetitive — and false negatives — characterizing anticompetitive behavior as procompetitive — without

advertise "senior citizen discounts" or a "20% military discount." *Id.* Some of the complaining dentists noted that the CDA discount advertising rules effectively precluded across-the-board offers: dentists, to comply with the CDA rules, must include the regular fee for 100 to 300 different procedures, which would make the ad resemble a telephone book. *Id.* at 228-29. CDA also prohibited advertised claims as to the quality of dentistry services that were not susceptible to measurement or verification, such as "gentle dentistry team," "quality dentistry in a pleasant and positive manner," or "leading edge technology." *Id.* at 230-31. The FTC treated CDA's advertising restraints as per se illegal or, in the alternative, illegal under a "quick-look" standard. The FTC found that although CDA's verifiable requirement "may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement the CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts." *Id.* at 301. The Ninth Circuit held that the FTC should not have applied the per se standard to the restraint, but agreed that these restraints were illegal under an abbreviated "quick-look" rule of reason. *Cal. Dental III*, 526 U.S. at 763-64. The Court, however, disagreed, noting that the lower court should not have applied a "quick-look" rule of reason analysis, which is limited to where "the likelihood of anticompetitive effects" of the challenged restraint are "comparably obvious." *Id.* at 771. The Court assumed that even if the CDA essentially barred member dentists from advertising "across-the-board" discounts, "it [did] not obviously follow that such a ban would have a net anticompetitive effect. . . ." *Id.* at 774. The CDA's calculus was that any costs to competition associated with the elimination of across-the-board advertising (e.g., 20 percent off all services) were outweighed by gains to consumer information (and competition) by requiring discount advertising that is exact, accurate, and more easily verifiable. Although the CDA's view may have been ultimately wrong, the Court found it plausible and thus not presumptively illegal under the antitrust laws. *Id.* at 775.

[162] *Cal. Dental III*, 526 U.S. at 781.

necessarily subjecting the parties to the cost and time of a full-blown, rule-of-reason analysis. A continuum would promote the capacity for further developing the rule of reason. Rather than swinging from one extreme (rule of reason) to another (per se illegality), the standard might evolve incrementally in defining and limiting the elements of the antitrust cause of action, legal presumptions, defenses, and evidentiary burdens.

But the Court never gave guidance as to where along its continuum the lower courts should evaluate specific kinds of restraints. Absent such guidance, antitrust plaintiffs face a difficult tactical decision: if they litigate only on a per se or quick-look theory, they may be prevented from further factfinding if the court opts for a rule-of-reason analysis.[163] Risk-averse counsel will ultimately prepare for a full-blown rule of reason, plead their case to include all three standards, and hope that the trial court opts for the quick-look or per se standard in a preliminary hearing. The necessity of a comprehensive trial strategy, however, defeats the purpose of the quick-look.[164] And trial courts are likely to opt for rule of reason to lower the risk of reversal because they lack guidance on the proper legal standard for particular restraints.

Not surprisingly, the quick-look standard is rarely applied and has fallen into disuse in actually resolving cases. On a few occasions since *California Dental*, an antitrust plaintiff, namely the FTC, has prevailed under a quick-look.[165] For example, in *Polygram Holding, Inc. v. FTC*, the D.C. Circuit accepted the FTC's quick-look analytical framework to condemn the joint venturers' agreement not to discount or advertise

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[163] *See, e.g.*, Cal. Dental Ass'n v. FTC (*Cal. Dental II*), 224 F.3d 942 (9th Cir. 2000) (agreeing with defendant that "further factfinding would give the FTC an unwarranted second bite at the apple"); Fox v. Good Samaritan Hosp., No. C 04-00874 RS, 2008 WL 2805407 (N.D. Cal. July 17, 2008) (finding claims not viable under rule-of-reason theory when court earlier dismissed claims when styled as per se).

[164] *See* United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 344 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003) (holding it unnecessary to consider whether to decide case on "quick look" because "[a]s a practical matter, the parties and the court have already undertaken a thorough analysis of the alleged restraints and their impact on the relevant markets" and "it would make little sense for the court to disregard any of the evidence presented.").

[165] *See, e.g.*, N. Tex. Speciality Physicians v. FTC, 528 F.3d 346, 370 (5th Cir. 2008) (concluding that FTC's "look" into the North Texas Speciality Physicians' ("NTSP") challenged practices, although "less than a fullblown market analysis," was enough); Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34-37 (D.C. Cir. 2005) (noting that restraint presumed unlawful if "it is obvious that a restraint of trade likely impairs competition"); *cf. In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (applying per se, yet only quickly looking at defendants' justifications).

similar products that were outside their joint venture.[166] Although the federal competition agencies cannot create antitrust's legal standards, they can play an important role in advocating to the courts where along the continuum certain categories of restraints should be evaluated. Despite the FTC's commendable efforts in *Polygram* and *North Texas Speciality Physicians v. FTC*,[167] the FTC's quick-look

[166] 416 F.3d at 37. Defendants Polygram and Warner entered into a joint venture to distribute the upcoming recording of three noted tenors (José Carreras, Placido Domingo, and Luciano Pavarotti). *Id.* at 31. Defendants' earlier recorded concerts of the Three Tenors, however, competed with the joint venture's sales. *Id.* at 32. Warner distributed the recording of the Three Tenors' 1994 concert album; Polygram distributed the 1990 concert. *Id.* at 31. The defendants privately agreed to suspend advertising and discounting the recordings of the two earlier Three Tenors concerts while they jointly promoted the upcoming 1998 release. *Id.* at 31-32. The FTC successfully challenged the defendants' restraint on advertising and discounting under its quick-look. *Id.* at 32-33. The FTC argued that because defendants' restraint was "inherently suspect" — that is on its face likely to restrict competition and decrease output — it should be presumed illegal under section 5 of the FTC Act (which employs the same antitrust analysis as under the Sherman Act). *Id.* Thus, the burden should shift to the defendants to identify some competitive justification for their restraint. *Id.* at 35-36. If the defendants offer a procompetitive justification, then the FTC, under its quick-look, must either (i) explain why it can confidently conclude without adducing evidence that the defendants' restraint very likely harmed competition or (ii) provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. *Id.* at 36. If the FTC succeeds under either way, "then the evidentiary burden shifts to the defendant[s] to show the restraint in fact does not harm consumers or has 'procompetitive virtues' that outweigh its burden upon consumers." *Id.* Polygram, on appeal, argued that the FTC under the rule of reason must first prove that the challenged restraints actually harmed competition before it required defendants to proffer a competitive justification. *Id.* The D.C. Circuit rejected such formalism. *Id.* The FTC's quick-look framework, as applied, addresses the Sherman Act's central inquiry: "whether the challenged restraint hinders competition." *Id.* The defendants' agreement to curtail advertising and discounting for products outside the joint venture bore a close family resemblance to price fixing, which, absent any joint venture, would be summarily condemned as per se illegal. *Id.* at 37. Part of the FTC's success with the quick-look is attributable to the FTC's efforts in developing this standard; another factor may be that the opinion's author was Chief Judge Ginsburg, an antitrust scholar. *See id.* at 31.

[167] 528 F.3d at 352 (upholding FTC's challenge under quick-look of collective-bargaining and information sharing program among competing doctors). The North Texas Speciality Physicians accounted for many competing specialists practicing in Tarrant County, Texas. *Id.* NTSP annually polled its member physicians as for each doctor's minimum acceptable rate for a nonrisk (fee-for-service) contract with different local health insurance companies and other payors. The NTSP shared survey results with its members and negotiated on the doctors' behalf with payors for a contract for the participating doctors' services. *Id.* at 353. If the insurance company offered a price below the minimum acceptable rate, the NTSP rejected it and did not forward the offer to the members. *Id.* at 365. If the payor tried to circumvent the NTSP and negotiate directly with some of the doctors, the doctors would tell the

efforts have not provided the framework used in other antitrust cases.[168] Moreover, the ABA Section of Antitrust Law recently observed that no coherent quick-look legal standard has emerged between, or within, the federal antitrust agencies.[169] At times, the quick-look is justification for quickly disposing of the antitrust claim.[170] More often, however, the lower courts refuse to apply the quick-look, opting instead for the rule of reason.[171]

payor to negotiate with the NTSP. *Id*. The participating doctors also agreed not to negotiate separately with the payor unless and until the NTSP notified them that it permanently discontinued negotiations with that payor. *Id.* at 353. The FTC found that the competing doctors, acting through the NTSP, sought to secure higher fees. The FTC indicated that it could have challenged this price-fixing arrangement among competitors as per se illegal. *Id.* at 354. It opted instead for the quick-look because (i) "the Supreme Court has urged caution in the application of the per se label to conduct in a professional setting," which includes physicians, and (ii) the FTC wanted to "*encourage* providers to engage in efficiency-enhancing collaborative activity." *Id.* at 359. The Fifth Circuit agreed that the NTSP's practices bore "a very close resemblance" to those price-fixing agreements ordinarily struck down as per se illegal. *Id.* at 362. NTSP failed to establish how its justification of higher quality healthcare resulted from, or were connected to, its challenged conduct. *Id*. at 369.

[168] A February 15, 2009 Westlaw search identified only three judicial decisions that cite *Polygram*: (i) *North Texas Speciality Physicians*, discussed *supra* note 167; (ii) *Rambus Inc. v. FTC*, 522 F.3d 456, 462-63, 467 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009) (citing *Polygram* not for quick-look framework but as to general legal standard for reviewing FTC's construction and application of antitrust laws); and (iii) *Meijer, Inc. v. Barr Pharmaceuticals, Inc.*, 572 F. Supp. 2d 38, 49, 51 (D.D.C. 2008) (citing *Polygram* not for quick-look framework but for proposition that "Supreme Court's approach to evaluating a § 1 claim has gone though [sic] a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry;" and contrary to *Polygram* quick-look framework, insisting that antitrust plaintiffs establish relevant antitrust market for inherently suspect agreement between brand-name and generic drug manufacturer to delay market entry of generic version of contraceptive). An online search did not identify any judicial decision that cites *North Texas Speciality Physicians* (Westlaw, Feb. 15, 2009).

[169] The ABA Section of Antitrust Law recently recommended that the incoming Obama administration should "provide more clarity regarding truncated rule of reason analysis, determine whether their staffs are performing such analysis consistently, and obtain input from the legal, economic, and business community regarding the appropriate analytical framework." AM. BAR ASS'N SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 42 (2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/11-08/obamabiden.shtml [hereinafter ABA TRANSITION REPORT]. The Section recognized the quick-look's utility in avoiding the time, expense, and data required for a full-blown rule-of-reason analysis. "But based on interviews and individual attorneys' experiences, it is not clear to the Section that both agencies — or even different staffs within the same agency — are employing quick look analysis under similar factual circumstances, or are utilizing the same analytical framework." *Id.*

[170] Wallace v. Int'l Bus. Machine Corp., 467 F.3d 1104, 1108 (7th Cir. 2006); Viazis v. Am. Ass'n of Orthodontists, 314 F.3d 758, 766 (5th Cir. 2002); Blubaugh v.

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As this history makes evident, the development of antitrust doctrines has been long and contentious, dating back to the enactment of the Sherman Antitrust Act. The Court, over the years, has employed several different standards: per se illegality, quick-look standards, and the rule of reason. But since 1977, for a number of reasons, the rule of reason dominates. The Court has constricted its per se standard to some horizontal restraints like price fixing and market allocation. The quick-look has fallen into disuse, as litigants fear that the court will revert to the rule of reason. And the Court has repeatedly noted of late that its rule of reason is the prevailing, usual,

Am. Contract Bridge League, No. IP 01-358-C H/K, 2004 WL 392930, at *17 (S.D. Ind. Feb. 18, 2004).

[171] *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 334 (2d Cir. 2008) (finding no error when district court reviewed antitrust claim under rule of reason, rather than quick look); Madison Square Garden, L.P. v. Nat'l Hockey League, 270 Fed. App'x 56, 58 (2d Cir. 2008) (finding no error when district court briefly applied "quick look" before returning to rule of reason after defendant offered several procompetitive benefits); Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 385-86 (8th Cir. 2007); Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir. 2005); Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 957 (6th Cir. 2004) (concluding that district court erred in applying quick look); Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) ("Because hockey leagues involve the same types of restraints discussed by the Supreme Court in [*NCAA v.]Board of Regents*[*of the University of Oklahoma*, 468 U.S. 85 (1984)], the district court erred in failing to apply the rule of reason analysis."); Berlyn Inc. v. Gazette Newspapers, Inc., 73 F. App'x 576, 585, 2003 WL 21958335, at *7 (4th Cir. 2003); Dickson v. Microsoft Corp., 309 F.3d 193, 205-06 (4th Cir. 2002); Va. Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 284 (4th Cir. 2002) (describing parties dispute of standard, but dismissed for lack of anticompetitive effects); Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 511 (4th Cir. 2002) ("In a nutshell, although the district court demonstrated mastery of many intricacies of antitrust law, it performed too quick an analysis on an insufficiently developed factual record."); Todd v. Exxon Corp., 275 F.3d 191, 207 (2d Cir. 2001); New England Carpenters Health Benefits Fund v. McKesson Corp., 573 F. Supp. 2d 431, 434-35 (D. Mass. 2008); Int'l Norcent Tech. v. Koninklijke Philips Elec. N.V., No. CV 07-00043 MMM (SSx), 2007 WL 4976364, at *5 n.46 (C.D. Cal. Oct. 29, 2007); Klickads, Inc. v. Real Estate Bd., Inc., No. 04 Civ. 8042(LBS), 2007 WL 2254721, at *6 n.1 (S.D.N.Y. Aug. 6, 2007); Jame Fine Chems., Inc. v. Hi-Tech Pharm. Co., Civ. No. 00-3545 (AET), 2007 U.S. Dist. LEXIS 21650, at *11 (D.N.J. Mar. 27, 2007) (deeming "Quick Look" analysis inapplicable because vertical nonprice restraints evaluated in Third Circuit under full Rule-of-Reason analysis); Major League Baseball Props., Inc. v. Salvino, Inc., 420 F. Supp. 2d 212, 220 (S.D.N.Y. 2005); Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 337 F. Supp. 2d 563, 573 (S.D.N.Y. 2004); Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002); Carter v. Variflex, Inc., 101 F. Supp. 2d 1261, 1266 (C.D. Cal. 2000) (describing quick-look analysis as exception, not rule).

and accepted standard for evaluating conduct under the Sherman Act. Although the rule of reason is approaching its 100th anniversary, it continues to suffer from the infirmities that President Taft and Justice Harlan's dissent in *Standard Oil* identified: it is too fluid an analysis to create clear objective rules that business leaders and lawyers can follow. This raises fundamental questions as to whether the rule of reason can ever be reconciled with rule-of-law principles.

II. EVALUATING THE RULE OF REASON UNDER THE RULE OF LAW

Having reviewed in Part I the development and ensuing controversy over the rule of reason, including the Court's attempt to reverse course and provide more administrable rules and its return after 1977 to the rule of reason, this Part examines the rule of reason's shortcomings under rule-of-law principles. This Part outlines several rule-of-law principles and the importance of the rule of law as a precondition for effective antitrust enforcement. It next discusses seven infirmities that the rule of reason has under these rule-of-law principles, and shows how these infirmities can have significant implications on antitrust enforcement and competition policy generally.

A. Rule-of-Law Principles

Although the term "rule of law" is frequently cited,[172] the "high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning."[173] This Article incorporates and applies several principles underlying the rule of law to the rule of reason. To accomplish this, we must first establish what these principles are. Rule-of-law principles guide impartial courts in quickly and economically[174] enforcing laws that:

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[172] A Google search of the term yielded approximately 15.3 million websites. A Westlaw search on February 13, 2009 identified more than 10,000 federal and state court decisions citing the term.

[173] Simon Chesterman, *An International Rule of Law*?, 56 AM. J. COMP. L. 331, 332 (2008); *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (observing while term is much celebrated, its meaning has always been contested).

[174] Any rule must aspire to minimize, and if possible eliminate, unjustifiable expense and delay. 257,507 civil cases and 68,413 criminal cases were commenced in federal district court during the 12 months ending September 2007. ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 208 (2008), *available at* http://www.uscourts.gov/judbus2007/appendices/D00CSep07.pdf (documenting criminal cases); *id.* at 139 (documenting civil cases). Given this caseload, functionality requires some predictability and

- are "prospective, accessible and clear" to constrain the government (both the executive and judiciary) from exercising its power arbitrarily;[175]
- make "it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge";[176]
- apply to all persons equally, offering equal protection without prejudicial discrimination; and
- are "of general application and consistent implementation; [they] should be capable of being obeyed."[177]

A key component of these rule-of-law principles is that enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly. The law should be sufficiently specific and its enforcement predictable and fair.

B. Rule of Law Is a Precondition for Effective Antitrust Enforcement

If the rule of law applies to the law generally, it should apply to competition law specifically. Few dispute the rule of law's critical role in supporting our economy, generally, and with respect to prohibiting anticompetitive behavior specifically. This subpart briefly discusses several reasons why adherence to the rule-of-law principles is important for effective antitrust enforcement.

First, the competition laws help create the rules of the game. If the rules enhance welfare and outline with sufficient clarity what is impermissible, then all can rely on these rules in channeling their behavior in welfare-enhancing directions.[178] When this does not

efficiency. Otherwise, trial preparation would be costly and protracted. When potentially everything is relevant, anticipating what evidence is admissible (and for what purpose) is difficult.

[175] Chesterman, *supra* note 173, at 342; *see also* Fallon, *supra* note 173, at 8.

[176] F.A. HAYEK, THE ROAD TO SERFDOM 112 (2007); *see also*, Fallon, *supra* note 173, at 7-8.

[177] Chesterman, *supra* note 173, at 342. Fairness in administration also minimizes forum shopping and the predilections of particular fact-finders.

[178] Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs. Rule of Reason,"* 2 J. COMPETITION L. & ECON. 215, 219 (2006); Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 41 (1953).

happen, firms cannot form expectations as to the boundaries of their competitors' behavior.[179] Suppose, for example, a competitor abides by these rules (and incurs costs to do so), while its rival cheats (and seeks a competitive advantage). Failure to uniformly enforce the rules invites others to cheat as well. Without rules yielding predictable legal outcomes, firms may refrain from welfare-enhancing activity and opt for less efficient forms of doing business.[180] Alternatively, competitors may engage in socially harmful activity but rely on lawyers and lobbyists to try to clear them of legal difficulties.[181] Thus, the rule of law can reduce the negative welfare effects associated with such rent-seeking activities.[182] As the Nobel laureate economist Friedrich August von Hayek frames it, "The important thing is that the rule enables us to predict other people's behavior correctly, and this requires that it should apply to all cases — even if in a particular instance we feel it to be unjust."[183]

Second, although the law "fixes the rules of the game,"[184] and "proscribe[s] specific actions deemed socially undesirable,"[185] the government is not exogenous to the free market. The laissez-faire approach is to exclude the government from the market.[186] But the law, as a positive force, provides the needed scaffolding for a market economy; it facilitates commerce and economic growth.[187] Thus, the

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[179] As a former DOJ official wrote:

> It is well to remember that every anti-trust action is initiated because some business men have complained about the oppressive tactics of others. An anti-trust suit against some is fundamentally designed to help others. It is a business baseball game with the court as an umpire.

Wendell Berge, *Can We End Monopoly?*, N.Y. TIMES, Sept. 26, 1943, at SM12.

[180] *See* Christiansen & Kerber, *supra* note 178, at 220 ("The basic idea is that following an appropriate rule without trying to optimize in any specific case might produce on average fewer wrong decisions. If we also take into account that rule-following requires less information and, therefore, leads to much lower costs than case-by-case maximization, then the application of rules can be a very economical way of dealing with knowledge problems.").

[181] For a grim account of the role of lobbyists in one recent antitrust investigation, see Nicholas Thompson & Fred Vogelstein, *The Plot to Kill Google*, WIRED MAG., Jan. 19, 2009, http://www.wired.com/techbiz/it/magazine/17-02/ff_killgoogle.

[182] Christiansen & Kerber, *supra* note 178, at 220.

[183] HAYEK, *supra* note 176, at 117.

[184] Kahn, *supra* note 178, at 30.

[185] *Id.*

[186] *Laissez-faire*, *in* THE OXFORD DICTIONARY OF ECONOMICS, *supra* note 136, at 264.

[187] Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 1011-31 (2008).

rule of law enables political institutions to "provide the necessary underpinnings of public goods essential for a well-functioning economy and at the same time limit the discretion and authority of government and of the individual actors within government."[188]

Third, clear rules mitigate the "knowledge and information problems that can lead to decision errors."[189] With a general totality-of-economic-circumstances standard, the current administration may be more sympathetic to one industry or firm than another.[190] As Professor Hayek warned, a vague standard fosters central planning and concentrates more power in the hands of the privileged. As central planning "becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is 'fair' or 'reasonable' . . . [T]his means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question."[191]

Fourth, by reducing uncertainty, the rule of law generally can lower transaction costs, which in turn can foster transactions and allocative efficiency.[192] The parties, for example, need not incorporate into their contractual dealings a dispute resolution system with all the rules to interpret and enforce the contract, including remedies if breached,[193] or insure against complaints by third parties that their agreement is anticompetitive.

Given these benefits, it is not surprising that the OECD's ideal characteristics of a competition standard dovetail with these rule-of-law principles. An antitrust standard should promote the following:

- *Accuracy* — the standard should minimize false positives and negatives;

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[188] NORTH, *supra* note 2, at 85.

[189] Christiansen & Kerber, *supra* note 178, at 220.

[190] HAYEK, *supra* note 176, at 115 (stating that where "precise effects of government policy on particular people are known, where the government aims directly at such particular effects, it cannot help knowing these effects, and therefore it cannot be impartial").

[191] *Id.* at 116.

[192] *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 114-19 (U. Chicago Press 1988). Allocative efficiency "means allocating goods between consumers so that it would not be possible by any reallocation to make some people better off without making anybody else worse off." *Efficiency*, *in* THE OXFORD DICTIONARY OF ECONOMICS, *supra* note 136, at 137.

[193] Simeon Djankov et al., *Courts: The Lex Mundi Project* 37 (Yale ICF, Working Paper No. 02-18; Harv. Inst. of Econ., Research Paper No. 1951, 2002), *available at* http://ssrn.com/abstract_id=304453.

- *Administrability* — the standard should be easy to apply;
- *Consistency* — the standard should yield predictable results;
- *Objectivity* — the standard should leave no subjective input from the decision makers;
- *Applicability* — the standard should reach as wide a scope of conduct as possible; and
- *Transparency* — the standard and its objectives should be understandable.[194]

Thus, if the rule of law is a necessary prerequisite for an effective free-market system, then the competition laws, which seek to maximize the benefits from a free-market economy while minimizing its attendant risks and correcting its failures, should comport with these rule-of-law principles. To argue otherwise renders the following illogical conclusion: the law generally must comport with these rule-of-law principles for our market economy to function properly; but competition law, which directly governs market behavior, is somehow exempt.

C. The Rule of Reason's Infirmities Under Rule-of-Law Principles

So how does the rule of reason, the Court's "prevailing,"[195] "usual"[196] and "accepted standard"[197] for evaluating conduct under the Sherman Act, fare under these rule-of-law principles? Poorly. As this subpart discusses, the rule of reason has been criticized for its inaccuracy, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results.[198] As Justice Scalia observed, "One can hardly imagine a prescription more vague" than the Sherman Act's prohibition of contracts, combinations, or conspiracies in restraint of trade. But Justice Scalia noted, "[W]e have not interpreted it to require a totality of circumstances approach in every case."[199] Since he made

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[194] COMPETITION COMM., OECD, POLICY ROUNDTABLES: COMPETITION ON THE MERITS 23 (2005), http://www.oecd.org/dataoecd/7/13/35911017.pdf [hereinafter OECD, COMPETITION ON THE MERITS].

[195] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

[196] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. at 2710.

[197] *Id.* at 2712.

[198] *See* OECD, COMPETITION ON THE MERITS, *supra* note 194, at 255 (discussing debate between ex-ante form-based versus ex-post effects-based standards).

[199] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

those statements, the Court, with Justice Scalia in the majority, has embraced with greater fervor its totality-of-economic-circumstances test for federal antitrust claims.[200] Justice Scalia is correct that totality-of-circumstances tests will remain. But rather than reflexively embrace its rule of reason, the Court should assess the infirmities of the rule of reason under rule-of-law principles and the extent to which its standard contributes to antitrust's ailments. In doing so, the Court would more likely avoid the rule of reason "where possible."[201]

1. Under the Rule of Reason, Market Participants Cannot Foresee with Fair Certainty How the Authority Will Use Its Coercive Power in Given Circumstances and Therefore Cannot Effectively Plan Their Affairs.

The rule of reason simply does not give market participants enough certainty. This stems, in part, from the judicial application of a rule of reason. As discussed above, the *CBOT* decision enumerated various factors to determine liability under the antitrust laws. The rule of reason's flexibility does little to constrain the Supreme Court's or the lower courts' discretion.[202] Companies therefore have little guidance in predicting whether courts will later deem their or other market participants' actions as *unreasonable* restraints of trade.[203] But this lack of certainty also stems from the inability to translate the rule of reason into simple norms. Were that so, business executives could readily internalize those norms into their daily business behavior.[204]

[200] *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (narrowing scope of quick look and opting enquiry particular to that case and circumstances, details, and logic of challenged restraint); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (opting for rule of reason over per se rule); *Leegin*, 127 S.Ct. at 2725 (opting for rule of reason over per se rule).

[201] Scalia, *supra* note 199, at 1187.

[202] *See, e.g.*, ABA MONOGRAPH, *supra* note 24, at 102 (stating that "rule of reason — and its application in particular cases — has remained imprecise and unpredictable"); Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1489 (1983) ("[P]redictability with respect to likely legal consequences is virtually impossible since the various relevant factors rarely point unanimously and unambiguously to a particular result."); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 14-15 (1981).

[203] As the Court noted before its recent decisions eliminating the per se rules, "businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." United States v. Topco Assocs., Inc. 405 U.S. 596, 609 n.10 (1972).

[204] Thomas A. Piraino, Jr., *A New Approach to the Antitrust Analysis of Mergers*, 83 B.U. L. REV. 785, 807 (2003) (arguing rule of reason had "become so confusing that it

Moreover, those norms would foster a culture of competition.[205] But without this simplicity, the rule of reason leaves businesses searching in the dark.

The Court recently used its antitrust standards' unpredictability to curtail antitrust enforcement:

> [A]ntitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.[206]

The Court, however, never admitted the extent that its own rule of reason contributes to this "unusually high risk" of inconsistent verdicts.[207]

In reality, the Court may have overstated the degree of uncertainty from its rule of reason. The empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose.[208] For example, in one

precluded antitrust practitioners from advising their clients as to the legality of particular conduct").

[205] Stucke, *supra* note 187, at 1030.

[206] Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2395 (2007); *see also id.* ("Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another . . . ." (quoting Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 629 (2003)).

[207] The majority never responded to Justice Breyer's dissenting point that "[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2730 (2007) (Breyer, J., dissenting).

[208] *See* Adkinson et al., *supra* note 144, at 15; Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (noting 84 percent of rule of reason cases examined were disposed after plaintiff failed to make prima facie showing of restraint's actual anticompetitive effects or likely effects using defendants' significant market share); Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 70-71 (1991) (observing that plaintiffs lost 41 of 45 (more than 90 percent) nonprice vertical restraint cases studied, but no

recent survey of judicial resolutions of private section 2 Sherman Act claims, all of which are governed by the rule of reason, defendants prevailed ninety-seven percent of the time (335 of the 344 cases). Nearly all of the defendants' wins (313) came on motions to dismiss or summary judgment.[209]

So why is the rule of reason unpredictable, if antitrust plaintiffs predictably lose? Although many antitrust plaintiffs lose in the decided cases, these surveys do not reflect the number of cases where the parties settle.[210] Defendants whose motion to dismiss is denied may settle when the settlement is cheaper than protracted and costly discovery under the rule of reason. And those defendants who continue with discovery may settle after their summary judgment motion is denied if settling is cheaper than the potential exposure to an unfavorable jury verdict. Thus, one older survey found that antitrust cases have higher rates of settlement and that antitrust plaintiffs prevail in a lower percentage of judgments than is true generally in federal district courts.[211] Although the statistics temper claims of runaway juries and high risks of false positives in antitrust litigation, the Court's perception of uncertainty (which affects in turn its increasing barriers for antitrust plaintiffs) remains. So too remains the uncertainty facing market participants.

Acknowledging the uncertainty caused by the rule of reason does not explain why the rule is so unyielding to rule-of-law principles. At least four factors contribute to this uncertainty. First, the rule of reason focuses on the conduct's subsequent competitive effects.[212] This is not a concern for blatantly anticompetitive conduct. The nefarious purposes and effects of such conduct are either well known or the companies, once aware of their conduct's anticompetitive effects, choose to persist in the behavior. So if a dominant firm, for example, acquires its remaining smaller competitors, commits the former executives at the acquired firms to lengthy noncompete agreements, and closes the competitors' facilities to further curtail output, the monopoly cannot complain when the court later finds its behavior anticompetitive under the antitrust laws. But for other conduct, a company is still liable even though it cannot predict the

analysis of merits of rule-of-reason claims).

[209] *See* Adkinson et al., *supra* note 208, at 6 n.17.

[210] *See id.* at 14 n.86, 15-16 (noting that "plaintiffs may also affect dominant-firm conduct by obtaining favorable settlements").

[211] *See also* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1011-12 (1986).

[212] OECD, COMPETITION ON THE MERITS, *supra* note 194, at 9-10.

competitive effect of its conduct. Lack of anticompetitive intent is not a defense.[213] Competition officials and courts, like private actors, suffer informational asymmetries and may be little better in predicting such conduct's future anticompetitive harm (and thus illegality). In contrast, the per se standard has a different focus: a company (no matter how inconsequential its market power) that *agrees* with its competitors to fix prices, allocate customers or markets, or reduce output can reasonably expect antitrust prosecution, regardless of the competitive outcome.[214]

Second, the rule of reason is unpredictable because of the way in which claims are proved. Frequently, antitrust plaintiffs seek to establish a defendant's market power not with direct evidence of actual anticompetitive effects, but circumstantially with evidence of a high market share.[215] Market power and liability thus hinge on how broadly the fact-finder defines the relevant antitrust market.[216] As Professor (and former FTC Chair) Pitofsky once observed, the "measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement."[217] In investigating various industries over the years, I found few where the business executives and antitrust economists viewed market definition similarly.[218]

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[213] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984); Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 342 (1897).

[214] Indeed, conspirators in hard-core cartels take extraordinary steps to keep their activities secret, such as burning bid files in bonfires and hiding computer files in the eaves of one employee's grandmother's house. *See* Stucke, *supra* note 50, at 494 & n.182. Even if cartel members do not appreciate their action's illegality, the per se rules foster a general moral opprobrium toward these antitrust violations. *Id.* at 500.

[215] *See also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007) ("Whether the businesses involved have market power is a further, significant consideration" under rule of reason).

[216] *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1037 (D.C. Cir. 2008) (discussing key role of market definition in instant litigation).

[217] Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 825 (1987); *see also Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting) ("The Court's invitation to consider the existence of 'market power,' for example, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets." (internal citations omitted)); COMM. ON COMPETITION LAW & POLICY, OECD, POLICY ROUNDTABLES: ABUSE OF DOMINANCE & MONOPOLISATION 8 (1996), http://www.oecd.org/dataoecd/0/61/2379408.pdf [hereinafter OECD MONOPOLISATION] ("'Market share seems to be an almost universally applied criterion, although the details of measurement are undoubtedly different.'").

[218] The merging parties' business plans frequently contain Strengths/Weaknesses/Opportunities/Threats (SWOT) analysis, but rarely studies of own- or cross-elasticity

Debates over market definition needlessly consume litigation resources to such a degree that the litigation's outcome often hinges on whether the court adopts the plaintiff's or defendant's proposed market definition.[219]

Third, the rule of reason fosters uncertainty as courts, to date, often use neoclassical economic theories to determine the challenged restraint's likely anticompetitive effects. Antitrust's theories assume that profit-maximizing market participants pursue their economic self-interest with perfect knowledge and willpower. Using facts and methods from other social sciences, the behavioral economics literature over the past few decades has tested the limits of these assumptions concerning individuals' rationality, willpower, and self-interest.[220] Contrary to neoclassical economic theory, actual behavior,

of demand. *See, e.g.*, Franklin M. Fisher, *Economic Analysis and "Bright-Line" Tests*, 4 J. COMPETITION L. & ECON. 129, 132 (2008) (explaining business people usually do not use "market," term of art in antitrust cases, consistently). With two-sided markets (such as daily newspapers that must optimally price their content to attract readers, and then garner the optimal number of readers to maximize advertising revenue), market definition issues increase in complexity.

[219] *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96 n.20 (1985). In this tribute to faulty market destination, no one seriously contended that the Aspen, Colorado, ski resorts exercised market power for *destination* skiers. Skiers seeking a week-long holiday can consider resorts in Utah, British Columbia, Vermont, New Mexico, the Alps, and elsewhere. Thus, if the geographic market were national or international, then defendant's market share (and inference of market power) diminishes. Defendant's trial counsel, however, never specifically objected to the jury instruction on relevant market. Defense counsel objected only that the court should not submit the issue of relevant market to the jury; instead, the court, as a matter of law, should decide the issue. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1513-16 (10th Cir. 1984). The Tenth Circuit did not find plain error (i.e., the district court's instructions on the relevant market resulted in a "miscarriage of justice" or were "patently plainly erroneous and prejudicial"). *Id.* at 1516.

[220] Long before behavioral economics, others questioned these simplistic, unrealistic assumptions of human behavior. If these assumptions were true, then market behavior is easy to predict. A state planner arguably could model any scenario using the hypothetical profit-maximizer, and centrally plan the same outcome. But there is no reason to favor laissez-faire competition over a centrally planned economy. The complexity and unpredictability of the competitive process, imperfections of human knowledge, and the variety of conditions intrinsic to or affecting markets, such as legal, cultural, and moral norms, technology, production, and service norms, all undermine economic policies premised on either rational profit-maximizing agents or central planners. An inverse relationship exists between the two concepts: the greater the infirmities of the rationality assumptions, the less practical a centrally planned economy becomes. For interesting surveys of the many areas of behavioral economics research, see generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); ADVANCES IN

characterized as bounded rationality, may vary. Individuals, however, may react differently depending on how the choice is phrased, elect suboptimal outcomes based on certain heuristics, or be far more charitable and fair than the rational profit-maximizer. Neither the state nor private economic agents are endowed with perfect knowledge, but adopt a "satisficing and adaptive behavior."[221] Ultimately, competition occurs on various dimensions (e.g., price, quality, choice, innovation) across markets with different levels of product differentiation, entry barriers, transparency, stages of the product life cycle, demands for technological innovation, and operating at different levels of efficiency, none of which can be shoe-horned into a single definition of perfect competition or rationality.

Courts, then, are confronted with conflicting testimony of the parties' retained expert economists, who typically are academics or consulting economists with little (if any) regular interaction or experience in the affected industry.[222] Each party also gathers customers favoring, neutral toward, or opposing the challenged restraint, and company documents that support or undermine the neoclassical economic theory.[223] The fact-finder must wade through this conflicting evidence and decide which outcome is more likely under neoclassical economic theory, premised on a profit-maximizer.[224] Not surprisingly, the predicted outcome, like the underlying data, may be divorced from reality.[225]

BEHAVIORAL ECONOMICS (Colin F. Camerer et al. eds., 2004); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487 (1998); Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1665-67 (2003). For a broader survey of literature attacking the conventional economic theories, see generally ERIC D. BEINHOCKER, THE ORIGIN OF WEALTH: THE RADICAL REMAKING OF ECONOMICS AND WHAT IT MEANS FOR BUSINESS AND SOCIETY (2007). At the 2007 annual meeting of the American Economic Association, the Nobel laureate George A. Akerlof also questioned the assumptions of human behavior underlying neoclassical economic theory and called for a greater focus on actual human nature and the detailed facts of experience. *See* Louis Uchitelle, *Encouraging More Reality in Economics*, N.Y. TIMES, Jan. 6, 2007, at C1.

[221] François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 851 (2003).

[222] John M. Connor, *Forensic Economics: An Introduction with Special Emphasis on Price Fixing*, 4 J. COMPETITION L. & ECON. 31, 41 (2008).

[223] *See, e.g.*, United States v. Sunguard Data Sys., Inc., 172 F. Supp. 2d 172, 190 (D.D.C. 2001) (acknowledging court's difficulties in defining relevant market "given the conflicting evidence from the parties' economists, as well as the conflicting customer statements submitted by the parties").

[224] Stucke, *supra* note 44, at 536-46.

[225] Behavioral economics, until recently, made little headway into antitrust. *See id.* at 584. But there are several promising signs. At its past annual meeting, the American

A fourth explanation for the rule of reason's unpredictability is its steady stream of defenses. To its credit, the Court over the years has foreclosed certain defenses, such as "ruinous competition" or that competition itself is "bad."[226] But defendants today need not argue that price competition itself is ruinous to justify its vertical price-fixing. The defendant can redefine competition itself under a vague total welfare standard. Defendant can argue that consumers are better off paying more for the defendant's goods because the consumers are benefiting from greater services, more interbrand competition, or the satisfaction that defendant's premium products indeed carry a premium price. The Court in *Topco* notably foreclosed this defense of reducing intrabrand competition to promote interbrand competition as a trade-off neither antitrust defendants nor courts could make. But the Court in *Leegin* resurrected it. Although a vertical restraint may lead to higher retail prices (and reduced intrabrand competition), a post-*Leegin* defendant can offer the prospect of more services, or greater interbrand competition as a justification.[227] Such a vague test of public welfare, warned Professor Kahn, provides antitrust defendants "with an unlimited supply of legal loopholes."[228] In another troubling development, despite a clearly worded savings clause in another recent case, the defendant can now more easily allege that the securities laws (or some other statute) impliedly pre-empt the Sherman Act's application altogether for certain anticompetitive practices.[229] The rise

Antitrust Institute's keynote speaker and panelists discussed the applicability of behavioral economics to competition policy. Audio recordings: American Antitrust Institute's 10th Anniversary Conference, Behavioral Economics Keynote & Panel Discussion, held at the National Press Club in Washington, D.C. (June 18-19, 2008), *available at* http://www.antitrustinstitute.org/Archives/2008conferenceaudio.ashx. The AAI's transition report recommended that the incoming Obama administration study the relevance of behavioral economics for antitrust policy and proposed specific empirical analyses. AAI TRANSITION REPORT, *supra* note 24, at 26 (discussing cartels); *id.* at 172 (discussing mergers); *id.* at 185, 196, 200-01, 272-75 (discussing media industries). The FTC, with respect to consumer protection, held a workshop on behavioral economics. JOSEPH P. MULHOLLAND, SUMMARY REPORT ON THE FTC BEHAVIORAL ECONOMICS CONFERENCE 1 (2007), *available at* http://www.ftc.gov/be/consumerbehavior/docs/070914mulhollandrpt.pdf.

[226] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

[227] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715-16 (2007).

[228] Kahn, *supra* note 178, at 41; *see* Arthur, *supra* note 24, at 340 (arguing that overly broad standard can tempt "courts to create ways to avoid needless overregulation, especially of sympathetic defendants, leading to formalistic distinctions that detract from the very certainty that the standard was designed to promote").

[229] Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2395 (2007) (holding

of these vague defenses means that the Court is heading in the wrong direction — away from certainty.

2. The Rule Of Reason Is Ill Suited to a Legal System in Which the Supreme Court Reviews an Insignificant Proportion of Decided Cases.

Justice Scalia correctly noted the pitfalls of a discretion-conferring approach: the "idyllic notion of 'the court' gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent — that notion simply cannot be applied to a court that will revisit the area in question with great infrequency."[230] Moreover, appellate courts do not have the luxury of undertaking their own fact-based, totality-of-economic-circumstances analysis. Instead they must defer to the district court's findings of fact, setting them aside only if clearly erroneous.[231]

The Court's limited docket and time exacerbate the problems with the rule of reason. To articulate an objective rule of reason that accurately predicts competitive effects, the Court would need to review de novo the factual findings of many cases and continually reassess various restraints' effects in different industries. So far, the Roberts Court is hearing more antitrust cases annually than the Rehnquist Court.[232] But the Court overall has decided relatively few antitrust cases. Since 1890, the Court has decided fewer than 500

that federal securities laws, despite their broad savings clauses that preserve other rights and remedies, impliedly preempted federal antitrust law's application to defendants' challenged anticompetitive conduct).

[230] Scalia, *supra* note 199, at 1178; *see also* Michelson v. United States, 335 U.S. 469, 486 (1948) ("It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.").

[231] United States v. Microsoft, 253 F.3d 34, 50 (D.C. Cir. 2001).

[232] Between September 1986 and 2005, the Rehnquist Court handed down approximately 27 antitrust decisions. Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 COMPETITION POL'Y INT'L, Autumn 2007, at 14. The Roberts Court has handed down eight antitrust decisions (all in defendants' favor). *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1114-17 (2009); *Leegin*, 127 S. Ct. at 2710, 2712, 2725; Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2397 (2007); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569-70 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325-26 (2007); Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006); Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006); Volvo Trucks NA, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180-82 (2006).

antitrust cases.[233] That is half the number of antitrust cases filed in 2007 in federal district courts alone.[234] The absolute numbers are, in part, affected by the Court's trend to take fewer appeals.[235] A change in the Expediting Act, which governs appeals in the government's civil antitrust cases, also limits the number of Supreme Court opinions.[236] Because the Court decides so few antitrust cases annually, it is unrealistic to expect its totality-of-economic-circumstances test to provide comprehensive guidance to the lower courts.[237]

But increasing the number of antitrust cases will not necessarily improve the rule of reason unless the Court also develops it. Rather than developing its rule of reason over the past ninety years, the Court has simply repeated the *CBOT* factors.[238] As a result, "[t]he content of

[233] An online search found 457 Supreme Court decisions that cite the key antitrust statutes, 15 U.S.C. §§ 1, 2, 13, 14, 18, or 45. Only 282 cases have antitrust as a topic. (Westlaw, Mar. 2009).

[234] SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, 444 tbl. 5.41 (2003) http://www.albany.edu/sourcebook/pdf/t5412007.pdf (last visited Apr. 19, 2009).

[235] *See* Schauer, *supra* note 22, at 205 ("One of the remarkable features of the Supreme Court's declining workload is that during the period when the Court's own decisional output has dropped to less than half of what it had been in the not-so-distant past, the caseloads of the state and lower federal courts have been increasing substantially."); Signed Opinions by Term: 1926-2007, http://www.scotusblog.com/wp/wp-content/uploads/2008/04/opinionchart.pdf (last visited Apr. 21, 2009).

[236] As one DOJ official observed, until 1974, appeals in the government's civil antitrust cases originally went directly to the Supreme Court under the Expediting Act, 15 U.S.C. § 29 (2006). That statute was amended in 1974 "to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of 'general public importance in the administration of justice.'" R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Law in the U.S. Supreme Court, Speech at British Institute of International and Comparative Law Conference (May 11, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/204136.htm. Even then, the Court retains discretion to remand the case to the court of appeals. District courts certified for direct appeal three cases, including *Microsoft*, which the Court declined to hear and remanded to the court of appeals. *Id.*

[237] *See* Scalia, *supra* note 199, at 1179 ("[I]t is not *we* who will be 'closing in on the law' in the foreseeable future, but rather thirteen different courts of appeals . . . . To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue."). Moreover, the Court is unlikely to review whether a trial or appellate court achieved the proper balance in particular cases.

[238] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712-13 (2007) (citing *CBOT* and standards set therein as quoted throughout Supreme Court jurisprudence on rule of reason cases); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (same); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (quoting directly Justice Brandeis for statement of rule). Indeed the Court, one year after *Sylvania*, recognized its standard's shortcomings: "Nor has judicial

the Rule of Reason is largely unknown," wrote Judge Posner; "in practice, it is little more than a euphemism for nonliability."[239] The Court in its 1977 *Sylvania* decision "was deceived if it thought it was subjecting those restrictions to scrutiny under a well-understood legal standard."[240] "To be told to look to the history, circumstances, purposes, and effects of a challenged restriction," Judge Posner continues, "is not to be provided with usable criteria of illegality."[241]

elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the 'rule of reason' have been applied to broad classes of conduct falling within the purview of the Act's general provisions." United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978); *see also* AAI TRANSITION REPORT, *supra* note 24, at 202; ABA MONOGRAPH, *supra* note 24, at 101 (commenting that Supreme Court decisions since *Sylvania* "have not greatly clarified the muddy waters of rule of reason jurisprudence").

[239] Posner, *supra* note 24, at 14; *see also* Stephen Calkins, California Dental Association*: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 521 (2000) ("Beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win.").

[240] Posner, *supra* note 24, at 14; *see also* Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 34 (1978); GTE Sylvania, Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 1026-27 (9th Cir. 1976) (en banc) (Browning, J., dissenting) ("If the courts were required to review such issues under a 'rule of reason,' unpredictable ad hoc determinations as to what is or is not illegal under the Sherman Act would result . . . . A judge or jury should not be expected to determine whether Sylvania's locations practice contributed to Sylvania's success in interbrand competition when Sylvania's expert witness was unable to do so. Because the interbrand effects of Sylvania's location practice cannot be measured, a decision . . . whether the net effect of the practice was procompetitive would be sheer guesswork."), *aff'd*, 433 U.S. 36 (1977). Two antitrust counsel similarly observed that *Leegin* left unanswered

> how the Rule of Reason will be applied in vertically imposed minimum [RPM] agreements and what factors would allow a jury to find a specific practice illegal. What is clear is that challenges to minimum [RPM] agreements will be expensive and unpredictable except in the circumstance where the justification for the minimum price is obvious and undisputed or when there is no justification for a minimum price.

Conrad M. Shumadine & Michael R. Katchmark, *Antitrust and the Media*, 917 P.L.I./PAT. 393, 405 (2007); *see also* Mark D. Bauer, *Whither* Dr. Miles*?*, 20 LOY. CONSUMER L. REV. 1, 12 n.64 (2007); Schauer, *supra* note 22, at 230 (saying outcome will be "good news for the Leegin Creative Leather Products Company, for some economists, and for some lawyers," but bad news for those desiring from Court or from antitrust doctrine clear statement as to those practices permissible and impermissible under Act).

[241] Posner, *supra* note 24, at 15; *see also* Posner, *supra* note 202, at 8 ("The Rule of Reason standard lacks content and so does not provide guidance to judges, juries, or the Federal Trade Commission.").

The law, like Professor Hayek observed for culture, is "the transmission in time of our accumulated stock of knowledge."[242] But grounded as it is in case-specific facts, rule-of-reason analysis does not transmit our accumulated stock of knowledge. Although lawyers labor to satisfy the standard, no rule emerges at the end to provide greater certainty or guidance about a practice's legality in a different context.[243] Each restraint in a particular industry and time period is treated differently.

It is true that lower courts, with their multi-step rule-of-reason analyses, have provided contours to *CBOT*'s open-ended factors.[244] But there is no complete uniformity among the lower courts as to the number of steps under the rule of reason, what each step entails,[245] and who bears the burden of production for each step.[246] Some courts require antitrust plaintiffs to undertake the detailed analysis of

[242] F.A. HAYEK, THE CONSTITUTION OF LIBERTY 27 (1960).

[243] *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982) ("Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context." (citation omitted)).

[244] *See supra* notes 37-43 and accompanying text.

[245] *See, e.g.*, Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 546 (2d Cir. 1993) (noting that precise role that "market power plays in rule of reason analysis of horizontal combinations or conspiracies is a matter of some dispute," as some have argued that "unless an antitrust plaintiff makes a threshold demonstration that the defendants possess significant market power, defendants' cooperative effort is immune from further rule of reason inquiry"); *In re* Wellbutrin XL Antitrust Litig., No. 08-2431, 2009 WL 678631, at *6 (E.D. Pa. Mar. 13, 2009) (stating that under rule of reason, plaintiff needs "to establish the relevant product and geographic markets, as well as the defendants' market power"); New Eng. Carpenters Health Benefits Fund v. McKesson Corp., 573 F. Supp. 2d 431, 435 (D. Mass. 2008) (stating that rule of reason in First Circuit requires that (1)"the alleged agreement involved the exercise of [market] power in a relevant economic market;" (2) "this exercise had anticompetitive consequences;" and (3) "those detriments outweighed efficiencies or other economic benefits").

[246] *Compare* Spanish Broad. Sys. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071 (11th Cir. 2004) (stating that plaintiff must first prove (i) "the anticompetitive effect of the defendant's conduct on the relevant market" and (ii) "that the defendant's conduct has no pro-competitive benefit or justification"), *with In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1332 (Fed. Cir. 2008) (stating that under Second Circuit law, rule-of-reason analysis is three-step process, where (i) "plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market"; (ii) "if plaintiff succeeds, the burden shifts to the defendant to establish [its action's] pro-competitive redeeming virtues"; and (iii) should defendant carry this burden, plaintiff must show that defendant could achieve same procompetitive effect "through an alternative means that is less restrictive of competition").

defining a relevant antitrust market at the rule of reason's onset.[247] Others do not require such analysis (allowing instead plaintiff to show the rough contours of the area of commerce affected) if plaintiffs introduce evidence of actual anticompetitive effects.[248] Although the lower courts' multistep analyses have considerably improved the Court's *CBOT* factors, many of the rule of reason's fundamental deficiencies remain. As the Supreme Court and lower courts agree, the rule of reason remains "burdensome"[249] and "onerous."[250]

[247] *See, e.g.*, Meijer, Inc. v. Barr Pharms., Inc., 572 F. Supp. 2d 38, 53 (D.D.C. 2008) ("A rule of reason analysis almost always begins with the definition of the relevant market, without which there is little context to discuss competition, anticompetitive effects, or procompetitive benefits."); Holmes, *supra* note 12, § 2:10, at 167-69 n.4 (collecting cases where courts held that proof of relevant antitrust market is essential first step under rule of reason).

[248] *See, e.g.*, FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 460-61 (1986) ("'[P]roof of actual detrimental effects, such as reduction of output,' can obviate need for market power, which is but a 'surrogate for detrimental effects.'"); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (stating market share in properly defined market is "only [one] way of estimating market power[;]" the other way is through direct evidence of anticompetitive effects); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998) (stating market definition "is not an end unto itself but rather exists to illuminate a practice's effect on competition": "Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces."); Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 847-48 (9th Cir. 1996) (stating that although plaintiff "ordinarily 'must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly[,]'" "'formal market analysis becomes unnecessary'" when challenged restraint "'actually produced significant anticompetitive effects, such as a reduction in output'"); Corey Airport Servs., Inc. v. City of Atlanta, 1:04-CV-3243-CAP, 2008 WL 4452386, at *49 (N.D. Ga. Sept. 30, 2008) (citing *Ind. Fed. of Dentists*, 476 U.S. at 460-61); Mellon v. Cessna Aircraft Co., 7 F. Supp. 2d 1183, 1192 (D. Kan. 1998) (same); COLLABORATION GUIDELINES, *supra* note 10, § 1.2, at 4 ("[W]here the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis," which involves defining relevant markets, calculating market shares and concentration.); J. Thomas Rosch, Commissioner, FTC, Litigating Merger Challenges: Lessons Learned, Prepared Remarks Before the Bates White Fifth Annual Antitrust Conference (June 2, 2008).

[249] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.25 (1984); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19 n.33 (1979) (noting "the burdensome analysis required under the rule of reason"); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004); Calabrese v. St. Mary's of Michigan, No. 06-13908-BC, 2007 WL 518912, at *1 (E.D. Mich. Feb.

3. In Changing the Sherman Act's Goals, the Court Further Reduces Accuracy, Objectivity, and Predictability Under Its Rule-of-Reason Standard.

Under the rule of law, the Court's role would be to interpret the Sherman Act based on (i) the original law and (ii) precedent that is true to the original law. It would not interpret the Act based on what it believes to be the latest economic thinking on competition policy.[251] By declaring specific principles, Congress would be assured that the courts, under a rule of law, would construe the Sherman Act to further those principles, and would circumscribe the courts from arbitrarily reaching standards (or results) inconsistent with those principles. The Court could not announce any general rule without "a solid textual anchor or an established social norm from which to derive the general rule"; otherwise such a pronouncement "appears uncomfortably like legislation."[252]

Today's conventional wisdom holds that the Court ran amok with per se liability rules between the 1940s and early 1970s.[253] But during that period, the Court did seek administrable rules in furtherance of the Sherman Act's principles.[254] To give content to the Sherman Act, said the Court, "it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed."[255] One could argue that the Court adopted the wrong mechanism to further those principles or that its per se rules hindered, rather than furthered, such principles.

By contrast, today's Court is no longer anchored by the Sherman Act's principles. The Court now holds that its antitrust doctrines "evolve with new circumstances and new wisdom."[256] The Court's justification is that Congress incorporated into the Sherman Act the

15, 2007); Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1267 (N.D. Okla. 2006); PSW, Inc. v. VISA U.S.A., Inc., No. C.A. 04-347T, 2006 WL 519670, at *5 (D. R.I. Feb. 28, 2006); McMorris v. Williamsport Hosp., 597 F. Supp. 899, 910 (M.D. Pa. 1984).

[250] *McKesson*, 573 F. Supp. 2d at 435.

[251] *See* Spencer Weber Waller, Microsoft *and* Trinko*: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 749 ("*Trinko* Court's pronouncements on this score stand merely as a naked assertion of a policy preference that has been rejected since the passage of the antitrust laws themselves.").

[252] Scalia, *supra* note 199, at 1185.

[253] *See, e.g.*, AMC REPORT, *supra* note 23, at 33, 34, 36.

[254] *See supra* notes 127-37 and accompanying text.

[255] Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

[256] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2724 (2007).

common law's evolving standards; by doing so, Congress delegated to the courts the duty of fixing the standard for each case.[257] Citing the common-law nature of the Sherman Act, the Court argues that principles of stare decisis are less significant for the Sherman Act than other federal criminal or civil statutes.[258]

The current Court articulates a new objective of the antitrust laws (based on its conception of "modern" economic theory) and a rule to promote that new objective.[259] For example, in *Leegin*, the Court justified a reduction in intrabrand competition by opining that the antitrust laws' primary purpose is to protect *interbrand* competition.[260] But this policy statement never came from the Sherman Act or its

[257] *Id.* at 2720-21; State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[G]eneral presumption that legislative changes should be left to Congress has less force . . . to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978))).

[258] For over 90 years, the Court viewed RPM as per se illegal. The Court's aim in *Leegin* was not to reconcile its abrupt departure with stare decisis principles, but to show why these principles did not burden the Court. One of the few businesses submitting an amicus brief in *Leegin* noted the importance of stare decisis given the essential part of the regulatory background against which many discount retailers financed, structured, and operated their businesses. Brief for Burlington Coat Factory Warehouse Corp. as Amicus Curiae Supporting Respondent at 5-7, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621854, at *2-8. Although the dissent observed, "whole sectors of the economy have come to rely upon the *per se* rule," the majority never responded to Burlington's or Justice Breyer's arguments. *Leegin*, 127 S. Ct. at 2735 (Breyer, J., dissenting).

[259] Likewise, to reorient rule-of-reason analysis to its ideology, the Chicago School first recharacterized the antitrust laws' objectives. Judge Bork argued that contrary to early thinking, the Sherman Act's legislative history "displays the clear and exclusive policy intention of promoting consumer welfare," a term which Judge Bork gave a different meaning than others. BORK, *supra* note 24, at 61. His interpretation was so roundly discredited that some have called for a halt of its bashing. Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882 (1990); *see also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 873 (1999). But as the Chicago School recognized, defining the goal of antitrust is paramount. "Everything else follows from the answer we give." BORK, *supra* note 24, at 50. After the Chicago School followers characterized the Sherman Act's goal as their conception of efficiency, the Chicago School standards naturally followed. Thus to make the rule of reason "more manageable," the Chicago School adopted the position "that the essential spirit of the Rule is to condemn only those practices that are, on balance, inefficient in the economic sense." Posner, *supra* note 24, at 16. With their goal in place, the Chicago School adherents could "exclude some of the factors listed in the standard formulation of the Rule of Reason." *Id.*

[260] *Leegin*, 127 S. Ct. at 2715 (quoting *Khan*, 522 U.S. at 15).

legislative history. It originated in a footnote in *Sylvania*.[261] The Court's economic theory is sound for fungible products,[262] but flawed for branded differentiated products. It ignores what every business executive knows: "the most direct and effective competition for a branded product, especially one that is highly advertised, is a firm selling the same brand."[263]

[261] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52 n.19 (1977) ("Interbrand competition . . . is the primary concern of antitrust law."). The Court viewed *inter*brand competition as competition among the manufacturers of the same "*generic*" product — television sets in that case. It is not apparent, however, that television sets are generic. Television sets range in size, type (plasma or LCD), features, and price. A recent search of one national electronics retailer found a wide dispersion in prices for a 42-inch 1080p flat-panel LCD HDTV among the 11 brands sold: Pioneer ($2,699); Sony ($2,299); Philips ($1,999); HP ($1,899); Panasonic ($1,799); Sharp ($1,799); Toshiba ($1,699); JVC ($1,299); LG ($1,299); Insignia ($996); and Westinghouse ($996). Television sets were also among the differentiated products fair-traded when RPM was legal under certain states' "Fair Trade" laws. S. REP. No. 94-466, at 2 (1975) ("The principle products fair traded are stereo components, television sets, major appliances, mattresses, toiletries, kitchenware, watches, jewelry, glassware, wallpapers, bicycles, some types of clothing, liquor, and prescription drugs."). Moreover, a DOJ study estimated a price discrepancy of 18 to 27 percent between states that did and did not enact Fair Trade laws: "For example, a set of golf clubs that lists for $220 can be purchased in non-fair-trade areas for $136; a $49 electric shaver for $32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483." *Id.* at 3.

[262] The Court was correct that "when interbrand competition exists" among fungible commodities, "it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Sylvania*, 433 U.S. at 51-52 n.19. If Farmer Smith, for example, seeks to impose RPM for her carrots sold at the local supermarket, consumers would switch to other farmers' carrots. Thus, intrabrand competition is of little consequence for fungible products where producers likely are price-takers.

[263] Pitofsky, *supra* note 217, at 826. For example, with the advent of our fourth child, I recently haggled with Toyota and Honda dealers for the lowest price for a new minivan. The Sienna and Odyssey models bore similar features, and safety, reliability, and quality ratings. Under the Court's logic, this interbrand competition should have maximized my consumer surplus. But the sales representatives were uninterested in the price of their rival's minivan. Only when presented with a price for the same vehicle from a rival dealer did the haggling commence in earnest. One recent study examined the effects of RPM in the car industry when Toyota implemented its "no-haggle" program in certain Canadian provinces. Honda did not implement a similar RPM program; its customers could still haggle with dealers. The study found that Toyota's RPM program had the effect of increasing prices for both Toyota and Honda autos (the authors posit that Toyota's RPM gave Honda the flexibility to increase price) but did not affect Toyota's sales (Honda's sales increased). Xiaohua Zeng et al., *The Competitive Implications of a "No-Haggle" Pricing Policy: The Access Toyota Case* 2-3 (2008), *available at* http://management.ucsd.edu/faculty/seminars/2008/papers/weinburg.pdf.

Under the Court's flawed economic theories, antitrust standards will continue to stray further from rule-of-law principles.[264] Evolving (and disputed) economic theory cannot provide the requisite rules for civil and criminal illegality. As one study of the antitrust laws puts it, "[l]egal requirements are prescribed by legislatures and courts, not by economic science."[265] Each new "wisdom" can affect criminal liability under the Sherman Act.[266] Neoclassical economics cannot predict

Some Toyota customers did note better service, but it is unclear to what degree this was the result of RPM or the shift from price competition between Honda and Toyota to nonprice competition. Moreover, the extent to which customers preferred service over price is also unclear. The EC also found the importance of *intra*brand competition in *Grundig*. Without *intra*brand competition, consumers for differentiated goods were forced to buy branded products at an excessive mark-up because no competition existed in the distribution of the product: "the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish." Joined Cases 56 & 58/64, Etablissements Consten S.A.R.L. v. Comm'n, 1966 E.C.R. 299, 343, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8046 (E.C.R. 1966). The EC found that wholesale prices for Grundig products in France ranged between 23 and 44 percent higher than those in Germany, net of customs duties and taxes and after taking discounts into consideration. A tougher issue is if after RPM, output for the branded differentiated good increases. Suppose, for example, Toyota authorized fewer dealers per geographic region, and each dealer sold Toyotas at a fixed retail price. Output for Toyotas thereafter increases nationally. Some will argue that the vertical restraint had the effect of increasing services for, or reputation of, Toyota autos, thereby making them more attractive to consumers. Besides the correlation/causation issue, the output test, while a good indicator for undifferentiated goods, is unsatisfactory for highly differentiated goods (like minivans or TV sets). If the Toyota Sienna remains cheaper than the Honda Odyssey, the marginal consumer may purchase the Toyota (thus output increases), but cannot extract that last bit of consumer surplus though intrabrand competition. *See also* Brief for Comanor & Scherer as Amici Curiae Supporting Neither Party at 4-5, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173679 (arguing consumer welfare can decline despite increase in output).

[264] *See* Arthur, *supra* note 24, at 338 ("Clarity in antitrust law is not possible under the current conception of the Sherman Act as a standardless delegation to the federal courts to engage in microeconomic regulation, especially in view of the 'explosive expansion of Sherman Act coverage' beyond the subjects that dominated antitrust for its first half century.").

[265] STANLEY N. BARNES ET AL., THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955); *see also Leegin*, 127 S. Ct. at 2729 ("[A]ntitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views.").

[266] Aware that the government can prosecute Sherman Act violations criminally or civilly, Justice O'Connor argued that the Act

> does not authorize courts to develop standards for the imposition of criminal punishment. To the contrary, this Court determined that the objective

myriad behavior across markets today.[267] Given many markets' dynamic nature, courts cannot expect to optimize allocative efficiency through the rule of reason. Despite claims of being descriptive in nature, any economics-based competition policy ultimately is normative.[268] Subjective value judgments underlie "objective" economic standards,[269] and the objectives vary.[270] For example, although lower courts recently described the ultimate goal of the antitrust laws as protecting consumers or enhancing consumer welfare,[271] no consensus exists as to the meaning of "consumer welfare."[272] Legal standards that are premised on the Court's

> standard to be used in deciding whether conduct violates the Sherman Act — the rule of reason — was evinced by the language and the legislative history of the Act. It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.

United States v. Kozminski, 487 U.S. 931, 951 (1988) (citations omitted).

[267] Stucke, *supra* note 44, at 513, 527-31.

[268] Kahn, *supra* note 178, at 39 (saying fair competition "indissolubly linked with the non-economic values of free enterprise — equality of opportunity, the channeling of the profit motive into socially constructive channels, and the diffusion of economic power"). *See generally* Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, *in* ECONOMIC THEORY AND COMPETITION LAW (Josef Drexl et al. eds., forthcoming 2009) (positing that "normative [economic] foundations of competition law" remain undeveloped), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075265.

[269] As the OECD recognized, an "objective" standard reflects the antitrust enforcers' objectives. OECD MONOPOLISATION, *supra* note 217, at 9-10, 14-15; *see also* Stucke, *supra* note 187, at 1001-07.

[270] UNILATERAL CONDUCT WORKING GROUP, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 2, 5 (2007) (survey of 33 members identified 10 policy objectives regarding monopolistic behavior), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf [hereinafter ICN STUDY]; ADVOCACY WORKING GROUP, INT'L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT 32-33 (2002) (discussing how "objectives of competition laws vary widely from one jurisdiction to another"), *available at* http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf.

[271] *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211-37 (2008) (collecting cases).

[272] Although 30 of 33 ICN respondents identified this objective, most "do not specifically define consumer welfare and appear to have different economic

assessment of the latest prevailing economic thinking simply afford too much discretion to the judiciary.

Congress never intended to give the courts unfettered discretion to interpret the Sherman Act for the advancement of a particular judge's ideologies.[273] Ultimately, the goals of competition law and their ordering must reflect citizens' preferences and must be determined politically, not judicially.[274]

4. In Making Competition Policy Tradeoffs, the Court Further Reduces Accuracy, Objectivity, and Predictability Under the Rule of Reason.

Between the 1940s and 1970s, the Court articulated rules to constrain itself and the lower courts from weighing increases in competition in one sector versus losses in another. Under Justice Scalia's logic, that approach displays more judicial restraint than to announce that "'on balance,' we think the law was violated here — leaving ourselves free to say in the next case that, 'on balance,' it was not."[275] Ultimately, as the OECD Competition Committee has noted,

understandings of the term." ICN STUDY, *supra* note 270, at 9. The AMC's 449-page report addresses how "antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today," yet after spending three years and nearly $4 million, the AMC has never reached unanimity on the definition of "consumer welfare." AMC REPORT, *supra* note 23, at 1, 26 n.22. Its 12 Commissioners, all with backgrounds in competition policy, disagreed over a relatively straightforward question: "should efficiencies that benefit only the [merging] parties, with no prospect of being passed along to consumers, be counted in favor of a merger?" Commissioner Carlton, a University of Chicago professor, argued yes. Total surplus is "used routinely in cost-benefit analysis, a tool of widespread use in public policy." *Id.* at 401. Commissioner Jacobson disagreed: "[a]ny doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future." *Id.* at 423. Although the use of the total versus consumer surplus standard can have various implications for antitrust analysis, the cases in which the choice of standard makes a difference, the AMC concluded, "are relatively few." *Id.* at 26 n.22; *see also* EVANS, *supra* note 151, at 36 (quoting FIPRA's U.S. interviews, "[I]t became apparent that the term 'consumer welfare' was itself an ideologically loaded one"); HOVENKAMP, *supra* note 24, at 77 ("Although 'maximizing consumer welfare' is an appealing term, its content is ambiguous."); OECD GLOSSARY, *supra* note 18, at 29 (noting dispute over term's definition).

[273] Nor can Congress give up and transfer its legislative powers to the judiciary or executive branch. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[274] Kerber, *supra* note 268, at 17.

[275] Scalia, *supra* note 199, at 1179-80.

it is difficult "to have confidence that balancing tests can be applied accurately, objectively, and consistently."[276]

Courts, however, weigh competing interests across numerous other causes of action.[277] Some may be unfazed if the fact-finder, under antitrust's rule of reason, weighs the challenged restraint's pro- and anticompetitive effects. Why is antitrust any different?

Antitrust is different in two important ways. First, weighing competing societal interests may be appropriate when the cause of action is in its infancy (such as a prima facie tort) or for novel cases. But it is suboptimal for the majority of adjudications over the long-term.[278]

Second, competition policy should not arise from judicial balancing. Under the rule of reason, the "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[279] Weighing a particular restraint's competitive benefits and harms, however, is often beyond the litigants', judiciary's, and antitrust agencies' capacity.[280] Weighing incommensurable societal interests in determining antitrust liability also exceeds judicial and regulatory competence.[281] Thus noneconomic societal interests are often,[282] but not always,[283] excluded from antitrust analysis.

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[276] OECD, COMPETITION ON THE MERITS, *supra* note 194, at 11.

[277] In negligence cases, for example, courts weigh whether the challenged behavior's societal harm exceeds its benefits. For tortious interference claims, the Restatement's multi-factor test determines the propriety of the interference. RESTATEMENT (SECOND) OF TORTS § 767 (1979).

[278] For criticisms of some business torts' nebulous standards, see, for example, Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 348 (1980) (criticizing legal standards for tortious interference claims); Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487 (1986) (noting tort causes of actions are too broad); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993) (noting inconsistencies in tortious interference law); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982) (criticizing legal standards for tortious interference claims).

[279] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).

[280] The Court "has not provided practical guidance on how to perform the required balancing, the weight to be given various factors, or the analytical rigor with which the balancing must be done." ABA MONOGRAPH, *supra* note 24, at 125. Moreover, courts are ill-suited to decide the optimal competitive outcome out of the spectrum of possibilities. F. SCHERER & D. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 336-37 (3d ed. 1990).

[281] In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-95 (1978), for example, the competing engineers agreed "to refuse to discuss prices with potential customers until after negotiations . . . [which] resulted in the initial selection of

The greater danger today is not the last step of the rule-of-reason analysis, when the fact finder weighs the pro- and anticompetitive effects. Instead, it "is now conventional wisdom for antitrust lawyers to observe that courts . . . almost never explicitly balance the procompetitive and anticompetitive effects of an alleged restraint."[284] Instead, the balancing "occurs at each preceding step of the analysis, rather than at the end."[285] Thus, the greater danger exists in the preceding steps when the court makes policy trade-offs of what is pro- and anticompetitive in the first place.

Competition policy has many unsettled trade-offs. Antitrust policy makers have long disagreed whether to evaluate mergers or other restraints under a total-welfare or consumer-welfare standard.[286] Nor is there consensus on what either standard encompasses.[287] Much depends on what is measured and is actually measurable over what

an engineer." The Society justified its anticompetitive restraint on bidding with incommensurable noneconomic concerns — namely, low bids would tempt individual engineers to do inferior work with consequent risk to public safety and health. The Court recognized its inability (and its lack of authority under the Sherman Act) to weigh the loss of price competition with the public benefit of preventing inferior engineering work and insuring ethical behavior. Instead, the engineers' justifications were "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

[282] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (explaining social justifications have no effect); *Prof'l Eng'rs*, 435 U.S. at 688 (explaining that rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason" and that "[i]nstead, it focuses directly on the challenged restraint's impact on competitive conditions").

[283] *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993) (remanding so district court could more fully investigate and weigh MIT's noneconomic justifications); Holmes, *supra* note 12, § 2:10, at 189-90 (collecting cases).

[284] William J. Kolasky, Jr., *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 87 (2008); *see also* ABA MONOGRAPH, *supra* note 24, at 126 (balancing rarely undertaken); 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1912, at 339 (2005) ("[The] set of rough judgments we make in antitrust litigation does not even come close to this 'balancing' metaphor. Indeed, most courts do not define a unit of measurement in which the quantities to be balanced can be measured . . . . To the best of our knowledge, this has never been done in any antitrust case."); Carrier, *supra* note 208, at 1268 (pointing out that fact-finder reached last stage of balancing pro- and anticompetitive effects in only 20 of 495 rule-of-reason cases studied). *But see* Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074, 1077 (1982) (disagreeing with appellate court, which "gave too little weight to the procompetitive features of the cross-ownership rule and engaged in excessive speculation as to its anticompetitive effect") (Rehnquist, J., dissenting from denial of certiorari).

[285] Kolasky, *supra* note 284, at 87.

[286] Stucke, *supra* note 187, at 993-95.

[287] *Id.*

period.[288] Economists, much less judicial fact-finders, are ill-equipped to quantify the value of different forms of competition, such as inter- and intrabrand competition, static versus dynamic efficiency, and a restraint's impact on that competition.[289] Even if such weighing were feasible, no consensus exists on the relative weights for each factor.[290] In certain industries, society may seek to promote innovation (dynamic efficiency) more than lower prices (static efficiency).[291] Moreover, the weighing ignores the distributional effects of the challenged restraint. In balancing pro- and anticompetitive effects, the fact-finder does not consider whether one group bears the brunt of anticompetitive effects over time.[292]

The *Leegin* Court resurrected two trade-offs. The five justices never assessed their competency to make these normative trade-offs, their authority under the Sherman Act to do so, nor the implications under the rule of law. Instead, first, the Court willingly traded off the reduction of intrabrand price competition (the reduction in price competition for Leegin Brighton brand products among retailers) for the prospect of increased interbrand competition (greater competition between Leegin's Brighton brand products and other manufacturers'

[288] The deadweight welfare loss, for example, represents the social costs arising from supra-competitive pricing. It misses anticompetitive practices' other social costs. Professor Williamson's trade-off calculus for weighing the effects on total welfare, include, to the extent quantifiable: (i) the cost from slower (or the lack of) technological progress once a monopolist or cartel lays claims to a national market, and (ii) the other social costs the monopolist or cartel imposes (or incurs), such as the political implications of control over wealth, a matter for "serious" concern. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 24, 28 (1968). Chicago School adherents, however, exclude these social costs from their equation.

[289] Even if one could determine whether conduct enhances or reduces total or consumer welfare, "it can be quite challenging, if not impossible, to measure the magnitude of those changes." OECD, COMPETITION ON THE MERITS, *supra* note 194, at 11.

[290] Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, *in* UNIQUE VALUE: COMPETITION BASED ON INNOVATION: CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, EDUCATION AND BEYOND 154, 156-57 (Charles D. Weller ed., 2004), *available at* http://www.isc.hbs.edu/053002antitrust.pdf (questioning whether antitrust should be focused primarily on price competition when other parameters of competition, such as innovation or productivity, may play more important role).

[291] Kerber, *supra* note 268, at 6-7.

[292] EVANS, *supra* note 151, at 18 (noting "Kaldor compensation principle works as a one off shot, but fails in situations where multiple detriments occur to the same group of people"); Kerber, *supra* note 268, at 9-13 (discussing criticisms of Kaldor-Hicks as normative criterion for economic analysis of legal rules when gains and losses are distributed unevenly among population).

brands of leather goods and accessories).[293] Although price surveys show that RPM often increased the products' retail prices,[294] the Court reasoned, "prices can be increased in the course of promoting procompetitive effects."[295] While waiting for these procompetitive benefits, consumers pay more.[296] In contrast, the *Topco* Court found it beyond its competency and authority under the Sherman Act "to determine the respective values of competition in various sectors of the economy;" the politically accountable Congress must make this tradeoff between inter- and intrabrand competition.[297]

[293] The Court recognized that a manufacturer's use of vertical price restraints "tends to eliminate intrabrand price competition." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007). But eliminating this form of price competition was acceptable, reasoned the Court, because it viewed the antitrust laws' primary purpose as promoting interbrand competition. The Court then offered some examples from the economic literature of how RPM at times may promote interbrand competition. *Id.* at 2714-16. This fares no better than the majority's response in *Sylvania* to Continental's contention that balancing intra- and interbrand competitive effects of vertical nonprice restrictions is not a "proper part of the judicial function." Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56 n.27 (1977). The majority replied that its reasoning in *Schwinn*, which the *Sylvania* Court criticized and overruled, refuted this claim. *Id.* But reliance on *Schwinn* is suspect, as the Court stated, without any analysis that the rule of reason "cannot be confined to intrabrand competition." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967). Never addressing its concerns in *Topco*, the *Sylvania* Court weakly distinguished its earlier decision as involving "a horizontal restriction among ostensible competitors." *Sylvania*, 433 U.S. at 56 n.27. But Topco generally justified restricting its members' intrabrand competition to promote interbrand competition. The Court in *Topco* noted its incapacity (and lack of authority) to make such trade-offs generally. It never suggested that its abilities to make such a trade-off somehow improves when the trade-off involves a vertical, rather than a horizontal, restraint.

[294] *Leegin*, 127 S. Ct. at 2727-28. *See generally* Brief for Comanor & Scherer as Amici Curiae Supporting Neither Party at 4, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 WL 173679 (acknowledging general acceptance that RPM and other vertical restraints lead to higher consumer prices and these increases can be substantial).

[295] *Leegin*, 127 S. Ct. at 2718. In contrast, the Court elsewhere emphasized how "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318 (2007) (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990)); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (quoting same); *see also* State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (quoting same).

[296] The Court speculates that RPM may reduce retail prices if manufacturers resorted to costlier alternatives to control resale prices. *Leegin*, 127 S. Ct. at 2718. Under that logic, legalization of facilitating practices (or cartels) lowers the defendants' transaction costs in circumventing the legal prohibitions against collusion, and thereby leads to lower fixed prices.

[297] The *Leegin* Court lacked a rich empirical record to confidently trade off intra- for interbrand competition. The empirical evidence, it admitted, was "limited." *Id.* at

Second, the *Leegin* Court accepted a reduction of one facet of competition (intrabrand price competition), believing it might promote another facet of competition: encouraging "retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers."[298] Thus, with intrabrand "price competition decreased, the manufacturer's retailers compete among themselves over services."[299] But in *Catalano, Inc. v. Target Sales, Inc.*, the Court refused to trade off one facet of competition for a possible increase in another.[300] One distinction from

2717; *see also* Bauer, *supra* note 240, at 9 ("Few scholars have performed empirical research on RPM."). Congress can solicit the views of various constituencies and independently gather facts; the Court is limited to the facts and views presented. *See Leegin*, 127 S. Ct. at 2737 (Breyer, J., dissenting). The supposed villains in *Leegin* are profit-maximizing consumers; they shamelessly consumed some retailers' free services and then patronized the discounters. *Id.* at 2715-16. Actual consumers were not a party in *Leegin* nor had the opportunity to defend themselves against this empirically suspect allegation. *See id.* at 2710. Rational choice theory predicts individuals will free ride when confronted with a public good. Neither the antitrust agencies nor the Court addressed the more recent empirical behavioral economics literature, which undercuts the "rationality" assumptions underlying the Chicago School's dated economic wisdom. Stucke, *supra* note 44, at 969-71. In behavioral experiments, many individuals do not free ride at all (or not to the extent predicted under rational choice theory). In these public good experiments, "people have a tendency to cooperate until experience shows that those with whom they're interacting are taking advantage of them." RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 14 (1992); *see also* Comanor & Scherer, *supra* note 263, at 6 (noting "skepticism in the economic literature about how often [free-riding] actually occurs"); EVANS, *supra* note 151, at 10 (recommending additional empirical work on market-by-market basis to determine "who the marginal consumer is, how they make choices and to what extent they can actually act as the market-disciplining marginal consumer"); Prentice, *supra* note 220, at 1675-76. Even if free-riding were significant in some industries, the Court lacked the empirical foundation for assessing its trade-off, namely, how much consumer surplus is lost when intrabrand price competition is eliminated versus the gains from interbrand competition.

[298] *Leegin*, 127 S. Ct. at 2715.

[299] *Id.* at 2716.

[300] 446 U.S. 643, 644 (1980). In *Catalano*, defendant beer wholesalers allegedly agreed to eliminate interest-free credit to the retailers. Before their secret agreement, defendants extended interest-free credit up to the 30- and 42-day limits "permitted by state law." *Id.* at 644-45. Before the alleged agreement, defendants competed with respect to trade credit; "the credit terms for individual retailers varied substantially. After entering into the agreement, defendants uniformly refused to extend any credit at all." *Id.* The Ninth Circuit believed the credit-fixing agreement might enhance competition: (1) "by removing a barrier perceived by some sellers to market entry," and (2) "by the increased visibility of price made possible by the agreement to eliminate credit." *Id.* The Supreme Court rejected both claims. *Id.* As a matter of neo-classical economic theory, the defendants' agreement on one facet of competition will encourage competition in other facets where cheating is less detectable. *See*

Leegin, however, is that *Catalano* involved a horizontal restraint (thus price competition is eliminated across the defendants' competing products) whereas *Leegin* involved a vertical restraint (price competition is eliminated only for one manufacturer's brand).[301] But even for this one brand, the Court never articulates how consumers will benefit in the long-run from this trade-off. Moreover, when brands are more differentiated, interbrand competition is less significant relative to the intrabrand competition.

These trade-offs increase the rule of reason's unpredictability. The Court in *Leegin*, for example, never indicates how much manufacturers can raise the minimum retail price for their goods to deter free-riding. The assumption is that the manufacturer's and consumers' interests are aligned: the manufacturer will not raise prices beyond levels necessary to effectuate the requisite services.[302] The Court in *Leegin* never cites any empirical evidence of the extent to which manufacturers' and consumers' incentives are aligned. It is, of course, perfectly rational for manufacturers to avoid competition by differentiating their branded products.[303] Moreover, a manufacturer can use RPM to avoid a retail price war, which may ultimately squeeze its profit margins.[304] But how then can the fact-finder quantify the

Posner, *supra* note 202, at 20 ("One should not conclude from this that a cartelized market is as competitive as a noncartelized market, though in different ways."). When rates are regulated, the regulated companies (such as airlines and railroads) often compete on nonprice dimensions, like quality and service. As the Court found in the regulated transportation industry, "there is frequently no real rate competition at all and such effective competition as actually thrives takes other forms." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 12 (1958). Nonetheless, the Court rejected this trade-off that "the informing function of the agreement, the increased price visibility, justif[ies] its restraint on the individual wholesaler's freedom to select his own prices and terms of sale." *Catalano*, 446 U.S. at 649.

[301] *Leegin*, 127 S. Ct. at 2710; *Catalano*, 446 U.S. at 644.

[302] *See Leegin*, 127 S. Ct. at 2719-20.

[303] Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 86. Such differentiation can enhance consumer welfare by offering a greater variety of products and services. At other times, image advertising leads to greater corporate profits, without significant product or services improvements. Although "rational" consumers opt for the generic, less expensive alternative, others fall spell to the marketing campaign. Moreover, RPM can be simply used as presenting a premium image to consumers though a premium price. As one manufacturer justified RPM, "We don't want consumers to think we're the cheapest guys in the world." Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 18, 2008, at A1.

[304] Retailers, whose margins are squeezed, will likely turn for relief to their wholesalers, who in turn look for relief from the price war from the manufacturer. For example, the FTC alleged the major music labels employed RPM to end such a price

incremental value of services to assure that the manufacturer, under pressure from its dealers, does not exceed it? The *Leegin* Court never explained the justifications for RPM "with sufficient clarity for a generalist judge to understand."[305] As a result, it is unclear how the rule of reason will be applied to RPM.[306] Not surprisingly, as one retailer described the post-*Leegin* rule-of-reason world, "'it's becoming a nightmare operating a business.'"[307]

5. Because the Rule Of Reason Is Not Prospective, Accessible, and Clear, It Does Not Constrain the Executive Branch from Exercising Power Arbitrarily.

Legal standards of inadequate clarity or precision are criticized "as undemocratic — and, in the extreme, unconstitutional — because they leave too much to be decided by persons other than the people's representatives."[308] This criticism is supported by at least four concerns: (i) government's susceptibility to rent-seeking behavior; (ii) selective enforcement; and (iii) administrative inaction; and (iv) potential economic influence of target companies.

war. Complaint, *In re* Universal Music & Video Distribution Corp. & UMG Recordings, Inc. (F.T.C. 2000) (No. C-3974), *available at* http://www.ftc.gov/os/2000/09/unicomp.htm. In the early 1990s, several large consumer electronics chains began selling and aggressively discounting compact discs and other prerecorded music products. *Id.* A price war ensued. Some retailers requested margin protection from defendant Universal Music & Video Distribution Corp. *Id.* Universal, concerned that declining retail prices could affect its wholesale price, introduced a Minimum Advertised Pricing policy that set minimum advertised prices for most prerecorded music products. *Id.* In 1992 and 1993, the other major distributors (which with Universal accounted for 85 percent of all compact discs sold in the United States) adopted similar policies. *Id.* In 1995 and 1996, retail prices increased. *Id.* Distributors increased their prices, and thereafter, wholesale music prices increased. *Id.* The FTC reached separate settlements with the five music distributors to discontinue for seven years their Minimum Advertised Pricing programs. For 13 years thereafter, defendants cannot condition promotional money on the retail prices contained in advertisements they do not pay for. Defendants also cannot terminate relationships with any retailer based on that retailer's prices. Press Release, Fed. Trade Comm'n, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market: All Five Major Distributors Agree to Abandon Advertising Pricing Policies (May 10, 2000) (http://www.ftc.gov/opa/2000/05/cdpres.shtm); *see also* S. Robson Walton, *Antitrust, RPM, and the Big Brands: Discounting in Small-Town America (II)*, 15 ANTITRUST L. & ECON. REV. 11, 15-16 (1983).

[305] *Leegin*, 127 S. Ct. at 2733 (Breyer, J., dissenting).

[306] *See* AAI TRANSITION REPORT, *supra* note 24, at 202; ABA TRANSITION REPORT, *supra* note 169, at 63.

[307] Pereira, *supra* note 303.

[308] Scalia, *supra* note 199, at 1176.

If governments have a wide discretionary scope, their policies are prone to distortion by rent-seeking behavior.[309] The vague rule of reason creates opportunities for competitors to lobby executive agencies to punish their competitors or to prevent being punished themselves. For example, before its antitrust headaches, Microsoft devoted little energy to lobbying efforts. At least one D.C. journalist believes this neglect exposed Microsoft to the government's antitrust prosecution.[310] As the Washington Post commented, "For a couple of embarrassing years in the mid-1990s, Microsoft's primary lobbying presence was 'Jack and his Jeep' — Jack Krumholz, the software giant's lone in-house lobbyist, who drove a Jeep Grand Cherokee to lobbying visits."[311] After the DOJ filed the antitrust lawsuit in 1998, Microsoft "began what was then considered the largest government-affairs makeover in corporate history" and now has "one of the most dominating, multifaceted, and sophisticated influence machines around — one that spends tens of millions a year."[312] Of the twenty-three people now working out of Microsoft's government affairs office in Washington, sixteen are lobbyists.[313]

Companies increasingly manage exogenous risks, such as currency rate fluctuations, through an array of financial instruments. But to hedge against antitrust risks, companies cannot rely on rule-of-law principles. Instead, they can steer clear of behavior that is potentially precompetitive, but under the rule of reason poses a significant risk of antitrust liability. They can resort to lobbyists and lawyers, which can waste scarce resources.[314] Clear rules circumscribe the agencies'

[309] The more vague the standard, the more criteria one can consider (and weigh), the greater the danger of both political pressure and/or the parties' direct interventions can influence the competition authorities' decisions and produce decision errors. Christiansen & Kerber, *supra* note 178, at 216.

[310] Jeffrey H. Birnbaum, *Learning From Microsoft's Error, Google Builds a Lobbying Engine*, WASH. POST, June 20, 2007, at D1.

[311] *Id.*

[312] *Id.*

[313] *Id.* What Microsoft spent in lobbying just in the third quarter of 2008 (almost $2 million) nearly equaled what Google spent in the first nine months of 2008, which itself exceeds Google's lobbying expenses in 2007. Joelle Tessler, *Microsoft's Lobbying Tab Dwarfs Google's Tally: Software Giant Spent $2 Million for the Third Quarter Alone*, ASSOCIATED PRESS, Nov. 11, 2008, *available at* http://www.msnbc.msn.com/id/27669103/wid/18298287.

[314] FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTIONS, AND POLITICAL EXTORTION 124-31 (1997).

discretion and mitigate this rent-seeking, which is condemned by the Chicago School, post-Chicago, and non-Chicago commentators alike.[315]

A second concern with the vague rule of reason is that a particular administration can selectively enforce the Sherman Act to achieve its political (or personal) ends. Antitrust enforcement can be ideological[316] and highly politicized. The federal agencies have tremendous discretion when, if at all, and on whom to focus their pervasive prosecutorial antitrust powers. It is naïve to view the agencies as beyond political pressure.[317] For example, President Lyndon B. Johnson permitted a merger between two Houston banks in exchange for favorable coverage in the Houston Chronicle.[318]

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[315] *See, e.g.*, A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 226, 226 n.79 (1994) (collecting literature); *see also* ADVOCACY WORKING GROUP, ADVOCACY & COMPETITION POLICY REPORT, at ii (2002), *available at* http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf.

[316] This conflict in ideologies within the United States extends to divergences between some U.S. and E.U. competition policymakers on issues of abuse of dominance and vertical restraints. *See* EVANS, *supra* note 151, at 74 (observing divergence in ideologies is exacerbated by "lack of tools and a consensus on the balancing of consumer welfare, efficiency and innovation").

[317] Some Republicans in 2000 charged the DOJ under the Clinton administration as too political and argued for restoring the agency's integrity. "'There's been a leadership vacuum, and the department has been politicized,'" said William Barr, who served as Attorney General in the George H.W. Bush administration. "'The primary task will be to rebuild professionalism and morale — the department has to be re-professionalized.'" Byron York, *Restoring Justice — If Bush Wins, A Great and Urgent Task*, NAT'L REV., June 5, 2000, *available at* 2000 WLNR 6447647. One of George W. Bush's campaign promises was to make the DOJ less political. He said that his new Attorney General would perform his duties "'guided by principle, not by politics.'" Bush added, "'I wanted someone who would have a commitment to fair and firm and impartial administration of justice. I am confident I've found that person in John Ashcroft.'" Jill Zuckman, *Bush Draws from Ends of Political Spectrum: Ashcroft Nominated for Attorney General, Whitman for EPA Chief*, CHICAGO TRIB., Dec. 23, 2000, *available at* 2000 WLNR 8271610. Seven years later, recounting some of the many egregious political abuses at the DOJ under the Bush administration, newspapers were calling for restoring the rule of law to the DOJ. *See, e.g.*, Editorial, *Restoring Faith in Justice*, ST. LOUIS POST-DISPATCH, Sept. 3, 2007, at B8 (calling for new Attorney General to place law before politics following Alberto Gonzales's resignation); Pedro Ruz Gutierrez & Tony Mauro, *Getting Over Gonzales: DOJ Seeks to Recover: As the Attorney General's Bumpy Reign Comes to a Close, What Will It Take To Repair Main Justice?*, LEGAL TIMES, Sept. 3, 2007 (noting Alberto Gonzales's reign as Attorney General served as rubber stamp for White House); Opinion, *Our View: Gonzales' Resignation*, 30 NAT'L L.J., 23 Sept. 3, 2007 (reiterating earlier concerns regarding Gonzales's lack of independence from White House).

[318] MICHAEL R. BESCHLOSS, TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES,

President Nixon used the antitrust laws as a sword of Damocles against the media networks[319] and thwarted the antitrust litigation against campaign contributor International Telephone & Telegraph Corp.[320] The ITT scandal led to the criminal conviction of an Attorney General,[321] part of the articles of impeachment against Nixon,[322] and

1963-64, at 141-42 (1997) (recording exchange in which LBJ wants letter saying "'the paper is going to support your administration as long as you're there. Sincerely, your friend, John Jones.' . . . I don't see a damn thing wrong with that . . . Both Justice and Treasury will uncock me right quick, if I [approve the merger] . . . and I ain't going to do it, George, unless [Chronicle president] John Jones is willing to say to me that he's my friend.'"). After receiving the letter, the administration cleared the bank merger.

[319] President Nixon in 1971 discussed intimidating the nation's three major television networks by keeping the constant threat of an antitrust suit hanging over them. In a July 2, 1971 taped recorded discussion, aide Charles W. Colson told Nixon that whether filing an antitrust case against ABC, NBC, and CBS "is good or not is perhaps not the major political consideration. But keeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks . . . something of a sword of Damocles." Nixon responded, "Our gain is more important than the economic gain. We don't give a goddam about the economic gain. Our game here is solely political. . . . As far as screwing them is concerned, I'm very glad to do it." Walter Pincus & George Lardner, Jr., *Nixon Hoped Antitrust Threat Would Sway Network Coverage*, WASH. POST, Dec. 1, 1997, at A1, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm.

"'If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat,'" said Nixon. "'Don't screw them now. [Otherwise] they'll figure that we're done.'" *Id.* As for the antitrust actions, the White House kept the DOJ from filing suit until April 1972, when the government accused the networks of restraining trade and monopolizing prime-time entertainment with their own programs. The suits were dismissed without prejudice in 1974 after the government was unable to identify the requested documents. BERNARD M. HOLLANDER, ORAL HISTORY: FIFTY-EIGHT YEARS IN THE ANTITRUST DIVISION: 1949-2007, at 174-79 (2008). "The Ford administration renewed the complaints and subsequent consent decrees curtailed prime-time productions by the networks." Pincus & Lardner, *supra*.

[320] The DOJ settled its antitrust suit challenging ITT's mergers with several other corporations. Critics alleged that campaign contributions to Nixon's reelection effort in 1972 influenced the administration. Consumer advocates unsuccessfully attempted to have the district court overturn the settlement. "'[T]here was no meaningful judicial scrutiny of the terms of the consent decree and no consideration of whether it was in the public interest.'" Lloyd C. Anderson, United States v. Microsoft*, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 8 (1996), *available at* http://bulk.resource.org/gpo.gov/record/2004/2004_S03616.pdf

[321] Nixon's Attorney General Richard Kleindienst was convicted for lying during his Senate confirmation hearings. When asked whether the White House interfered with the DOJ's antitrust action against ITT, Kleindienst testified, "I was not interfered with by anybody at the White House." Kleindienst testified that the Assistant Attorney General of the Antitrust Division, Richard McLaren, settled the ITT cases on his own, with no political pressure from anyone. Asked if Nixon played any role in the cases, Kleindienst assured the committee the president had not. David Stout, *Richard G. Kleindienst, Figure in Watergate Era, Dies at 76*, N.Y. TIMES, Feb. 4, 2000, at

the Tunney Act, which requires a federal district court to find the DOJ consent decrees in the public interest.[323]

A third concern with the vague rule of reason is that a particular administration can abdicate through inaction its obligation to execute faithfully the laws. Although antitrust has always been political, the ideological shift within the Republican Party in 1980 toward antitrust[324] was even more important to its enforcement than the shift

A27. The White House tapes show Nixon repeatedly ordering Kleindienst and others "to leave the . . . thing alone." Transcript Prepared by the Impeachment Inquiry Staff for the House Judiciary Committee of a Recording of a Meeting Among the President, John Ehrlichman and George Shultz on April 19, 1971 from 3:03 to 3:34 P.M., http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf (last visited Feb. 25, 2009); The Washington Post, Protecting ITT: President Nixon and Richard G. Kleindienst, http://www.washingtonpost.com/wp-dyn/content/video/2007/05/22/VI2007052200656.html (last visited Apr. 13, 2009).

[322] Article 2, § 4 of the Articles of Impeachment cited Nixon's failure "to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial and legislative entities concerning . . . the confirmation of Richard Kleindienst as Attorney General of the United States." Articles of Impeachment Adopted by the Committee on the Judiciary, Article 2, July 27, 1974, *available at* http://www.watergate.info/impeachment/impeachment-articles.shtml#2 (last visited Apr. 19, 2009).

[323] Enacted in 1974, the Tunney Act sought to remove political influence from the DOJ's decision to settle antitrust cases. 15 U.S.C. § 16 (2006). As Senator Tunney later attested in a declaration submitted in the Microsoft antitrust litigation:

> The Tunney Act was never intended to allow for a situation where, in theory, prolific lobbying could be conducted by the defendant prior to the time the presiding judge has ordered settlement negotiations, without public disclosure. If allowed, the Tunney Act would not have reformed the practices utilized in settlement of the ITT case, which in significant fashion demonstrated the need for the legislation in the first instance. The disclosure provisions were designed to help ensure that no defendant can ever achieve through political activities what it cannot obtain through the legal process. Failure to comply with these provisions raises an inference or, at a minimum, an appearance of impropriety.

Affidavit of John V. Tunney ¶ 7, Comments Provided by the United States to the Court, *in* United States v. Microsoft Corp., Civil Action No. 98-1232 (CKK), 231 F. Supp. 2d 144 (D.D.C. 2002), *available at* http://www.usdoj.gov/atr/cases/ms-major.htm.

[324] Before Reagan, the Republican Presidential Platforms generally supported antitrust enforcement. The head of the DOJ Antitrust Division during the Eisenhower administration, for example, noted how "[e]very political platform of both major parties since 1848 has contained an antimonopoly plank or pledge." Stanley N. Barnes, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Competition: Current Antitrust Problems and Policies, Speech Before the Metropolitan Economic Association 986 (Oct. 25, 1954) (on file with author); *see, e.g.*, John T. Woolley & Gerhard Peters, The American Presidency Project, Republican

from Democratic to Republican control of the Presidency.[325] From the post-WWII period through President Carter's term, antitrust enforcement enjoyed greater bipartisan support than it currently does.[326] But under the Reagan administration, antitrust enforcement became highly politicized.[327] Congress expressed concern over the

Party Platforms: Republican Party Platform of 1976, http://www.presidency.ucsb.edu/ws/?pid=25843 (last visited Apr. 13, 2009) ("The Republican Party believes in and endorses the concept that the American economy is traditionally dependent upon fair competition in the marketplace. To assure fair competition, antitrust laws must treat all segments of the economy equally. Vigorous and equitable enforcement of antitrust laws heightens competition and enables consumers to obtain the lowest possible price in the marketplace."); John T. Woolley & Gerhard Peters, The American Presidency Project, Republican Party Platforms: Republican Party Platform of 1968, http://www.presidency.ucsb.edu/ws/?pid=25841 (last visited Apr. 13, 2009) ("In addition to vigorous enforcement of the antitrust statutes, we pledge a thorough analysis of the structure and operation of these laws at home and abroad in the light of changes in the economy, in order to update our antitrust policy and enable it to serve us well in the future."); John T. Woolley & Gerhard Peters, The American Presidency Project, Republican Party Platforms: Republican Party Platform of 1956, http://www.presidency.ucsb.edu/ws/?pid=25838 (last visited Apr. 13, 2009) (proposing "Legislation to enable closer Federal scrutiny of mergers which have a significant or potential monopolistic connotations" and "Procedural changes in the antitrust laws to facilitate their enforcement"). The Republican Party Platform of 1980, had a more laissez-faire attitude toward antitrust: "The forces of the free market must be brought to bear to promote competition, reduce costs, and improve the return on investment to stimulate capital formation in the private sector. The role of government must change from one of overbearing regulation to one of providing incentives for technological and innovative developments, while assuring through anti-trust enforcement that neither predatory competitive pricing nor price gouging of captive customers will occur." John T. Woolley & Gerhard Peters, The American Presidency Project, Republican Party Platforms: Republican Party Platform of 1980, http://www.presidency.ucsb.edu/ws/?pid=25844 (last visited Apr. 13, 2009).

[325] The Republican Party controlled the Executive Branch for 20 of the 28 years between January 1981 and 2009.

[326] Before Reagan, some continuity existed in enforcement between administrations. Between 1958 and the 1970s, more section 1 and 2 cases were brought under Republican Presidents, but this may only reflect an idiosyncratic increase in enforcement in a two-year period under Nixon. Vivek Ghosal, *Regime Shift in Antitrust* 21-22 (Feb. 2007), *available at* http://ssrn.com/abstract=1020448.

[327] In a memo to the Attorney General, John Roberts (before he became Chief Justice) discussed an upset conservative's upcoming visit: he "will doubtless arrive with many criticisms of the Department for not advancing conservative ideals." Among the points Roberts mentioned: "More reasonable [approach] to antitrust law, epitomized in the dropping of the IBM case." Memorandum from John Roberts to Attorney General on Talking Points for Meeting with Lofton of Conservative Digest, (Jan. 27, 1982) (http://www.archives.gov/news/john-roberts/accession-60-89-0372/doc053.pdf).

DOJ's clear shift in antitrust enforcement priorities.[328] The Reagan administration actively prosecuted price-fixing or bid rigging in local road construction cases (246 cases, or forty-seven percent of the criminal antitrust cases brought between 1982 and 1988) and government procurement (forty-three cases, or eight percent).[329] They "brought the same case over and over again — a long series of challenges to interrelated regional and local conspiracies in the construction industry."[330] Unlike earlier administrations, the Reagan administration never challenged vertical restraints or (after settling the 1974 suit against AT&T[331]) monopolies.[332]

After a resurgence of civil antitrust enforcement during the Clinton administration, the head of the Antitrust Division under President George W. Bush promised continuity under the rule of law:

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[328] This ideological shift, Professor Ghosal demonstrates, is reflected in a clear compositional change in U.S. antitrust enforcement between 1958 and 2002. In 1979, criminal cases targeting per se illegal cartel activity increased. Civil antitrust cases (namely, rule-of-reason offenses and per se offenses that an administration elects to prosecute civilly) decreased. After this regime shift in the 1970s, Republican administrations initiated more per se criminal cases, and fewer rule-of-reason civil cases, than the Democratic Clinton administration. Ghosal, *supra* note 326, at 20. The Reagan administration argued that its enforcement policies followed the law's evolution. But the DOJ "actively encouraged many of those changes by participating in court proceedings as an *amicus curiae* (friend of the court)." U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, JUSTICE DEPARTMENT: CHANGES IN ANTITRUST ENFORCEMENT POLICIES & ACTIVITIES 10 (1990), *available at* http://archive.gao.gov/d22t8/142779.pdf. [hereinafter GAO STUDY]. Congress included language in the Antitrust Division's appropriation prohibiting it from using any funds to overturn or alter the per se prohibition against RPM under the antitrust laws. *Id.* at 33. President Reagan took issue and interpreted the bill "narrowly to apply only to attempts to seek a reversal of the holdings of a certain line of previously decided cases." President Ronald Reagan, Statement on Signing a Fiscal Year 1984 Appropriations Bill (Nov. 28, 1983), *available at* http://www.reagan.utexas.edu/archives/speeches/1983/112883a.htm.

[329] GAO STUDY, *supra* note 328, at 43.

[330] Pitofsky, *supra* note 217, at 819.

[331] *See* United States v. AT&T, 552 F. Supp. 131, 137 (D.D.C. 1982).

[332] GAO STUDY, *supra* note 328, at 44. The DOJ had other antitrust offenses to prosecute. One political appointee during the Reagan administration declined to bring many antitrust cases that the staff attorneys claimed were winnable under existing legal precedent. In his view, these cases made no "economic sense" or were not in the public interest. *Id.* at 45; *see also* Robert Pitofsky, *Antitrust in the Decade Ahead: Some Predictions About Merger Enforcement*, 57 ANTITRUST L.J. 65, 71 (1988) (referring to Senate Judiciary Committee identifying 10 mergers where relevant Antitrust Division Section Chief recommended challenging, "only to see that recommendation overruled by the front office").

> In thinking about the "transition" and what, if any, implications this organizational change might have on the Division, let me just say clearly and unequivocally that the Division's current mission is no different today than it was under my predecessors. The core values of antitrust law, as interpreted by the courts, remain constant. Under the rule of law, it is those values, not the predispositions of the person holding my job, that dictate the enforcement agenda. Anyone . . . expecting a major shift in enforcement policy is likely to be disappointed.[333]

But this turned out to be a platitude. Antitrust enforcement policy underwent a major shift. The DOJ officials under the George W. Bush administration, for example, erected an enforcement hierarchy that focused primarily on criminal cartel behavior.[334] Unlike the European Commission, which prosecuted Microsoft and is now investigating Intel and Microsoft over new offenses, the DOJ never challenged any significant monopolistic abuses during the Bush era.[335] Civil antitrust enforcement actually declined under his administration.[336] This

[333] Charles A. James, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Be Careful What You Wish For: Some Thoughts On The Merger Review Process, Speech Before the American Bar Association Antitrust Section (Aug. 7, 2001) (http://www.usdoj.gov/atr/public/speeches/8764.htm).

[334] *See, e.g.*, *Protecting and Promoting Competition, Message from the AAG: Our Hierarchy of Antitrust Enforcement*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE UPDATE, (U.S. Dep't of Justice, Wash., D.C.) Spring 2005, at 1 (on file with author) (describing focus on cartel enforcement); R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, International Anti-cartel Enforcement, Speech at 2004 ICN Cartels Workshop (Nov. 21, 2004) (http://www.usdoj.gov/atr/public/speeches/206428.htm) (noting enforcement of criminal cartel behavior as top priority for U.S. Department of Justice); R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Securing the Benefits of Global Competition, Speech at Tokyo American Center (Sept. 10, 2004) (http://www.usdoj.gov/atr/public/speeches/205389.htm) (listing enforcement of criminal cartel behavior as core priority in American antitrust enforcement hierarchy).

[335] Between 1998 and 2000, for example, the DOJ filed five section 2 monopolization cases. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, WORKLOAD STATISTICS: FY 1997–2006. In the six years thereafter, the DOJ cites one civil action, which involved, among other things, a section 2 violation. *Id.*

[336] Between 1995 and 1999, the DOJ opened 76 section 2 investigations, and filed seven civil actions challenging monopolistic abuses. That dropped to 50 investigations between 2000 and 2004 and two filed civil actions, dropped further to 17 actions between 2005-2007 and no civil actions challenging monopolistic abuses. The decrease in section 2 activity was not offset by more section 1 or section 7 investigations or lawsuits. Instead, the number of civil and criminal section 1 actions dropped between 2000 and 2004, as did the number of merger investigations and section 7 lawsuits.

decline in antitrust enforcement was noted by the press,[337] antitrust scholars,[338] politicians,[339] and practitioners.[340] Moreover, this decline was not attributable to want of cases, reduced staffing, or any lack of interest from DOJ trial attorneys, who were actively prosecuting these types of violations during the Clinton administration.

Besides the ideological skewing of antitrust enforcement, another concern is that that economic power of the target companies can distort antitrust enforcement. This was evident in the Tunney Act,

According to one source, the DOJ was involved in the fewest number of filed antitrust cases in 2001, 2002, and 2003 than any other year this past quarter of a century. *See* Sourcebook of Criminal Justice Statistics, *supra* note 234, at 444 tbl. 5.41. This decline in antitrust enforcement is not attributable to staffing (the number of Division attorneys in these two time-periods was similar) or budget (which when factoring inflation increased after 1999). *See also* Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, 21 SUM ANTITRUST 74, 74 (2007).

[337] *See, e.g.*, Christopher O'Leary, *Sizing Up the Candidates: Depending Who Wins the Presidency, Dealmakers Could See the M&A Landscape Significantly Altered*, MERGERS & ACQUISITIONS: DEALMAKER'S J., Mar. 2008, (noting that "Bush administration's placid, laissez-faire attitude toward antitrust enforcement has a rapidly approaching expiration date" with upcoming election); Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J., Jan. 16, 2007, at C1 ("The federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish."); Mark Boslet, *Europe Takes Greater Role: Microsoft Won't Fight Ruling in EU Court*, S.J. MERCURY NEWS, Oct. 23, 2007, at 1C (noting how "center of gravity" of antitrust enforcement shifted overseas during G.W. Bush administration); Stephen Labaton, *Legal Beat; New View Of Antitrust Law: See No Evil, Hear No Evil*, N.Y. TIMES, May 5, 2006, at C5 (saying that besides cartel enforcement, Bush administration "has taken the most relaxed and least aggressive approach since the last years of the Reagan presidency"); Stephen Labaton, *Sirius Chief Talks of Ways to Get XM Deal Approved*, N.Y. TIMES, Mar. 1, 2007, at C3 ("Bush administration has been more permissive on antitrust issues than any administration in modern times."); Steven Pearlstein, *Here in D.C., The Quiet Rise of a Software Powerhouse*, WASH. POST, May 31, 2006, at D1 (stating G.W. Bush administration's "quiet approval" of Blackboard's acquisition of WebCT "is the best evidence yet that the Bush administration has abandoned antitrust enforcement").

[338] *See* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* 17 (2007), *available at* http://faculty.haas.berkeley.edu/Shapiro/mergerpolicy.pdf.

[339] Christopher S. Rugaber, *Senators Criticize Bush Administration for Lax Antitrust Enforcement*, ASSOCIATED PRESS, Mar. 7, 2007, *available at* http://www.signonsandiego.com/news/politics/20070307-1402-antitrust-congress.html; Senator Barack Obama, Statement for the American Antitrust Institute 1 (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[340] Feinstein, *supra* note 336, at 74; Kolasky, *supra* note 284, at 43; ABA TRANSITION REPORT, *supra* note 169, at 3; *see*, AAI TRANSITION REPORT, *supra* note 24, at 32, 51 (noting decline in criminal cartel cases); *id.* at 158-59, 164 (discussing mergers).

which was enacted in 1974 after Nixon's misdeeds came to light.[341] The Tunney Act enables courts to examine antitrust settlements to "deter and prevent settlements motivated either by corruption, undue corporate influence, or which were plainly inadequate."[342] Although the Tunney Act increases transparency for antitrust settlements, the decision to prosecute rests entirely in the prosecutor's discretion.[343] There remains little actual accountability when the antitrust agencies do nothing. Lack of transparency and accountability compounds the dangers of the vague rule of reason.[344] In a positive step during the George W. Bush administration, the antitrust agencies issued statements that explained why they closed several high-profile investigations.[345] Unlike the European Commission, which must provide a reasoned decision when not challenging a merger, and at times must defend its decision to not challenge in court,[346] the U.S. competition authorities need not defend their inactivity. It thus remains difficult to appraise whether the agencies made the right call, especially when the agencies do not systematically examine the consequences of their earlier decisions.[347] Under the rule of reason, liability depends upon case-specific facts, which are known to the

[341] 119 CONG. REC. 3451 (1973) ("Increasing concentration of economic power, such as occurred in the flood of conglomerate mergers, carries with it a very tangible threat of concentration of political power. Put simply, the bigger the company, the greater the leverage it has in Washington.") (statement of Sen. Tunney).

[342] 150 CONG. REC. S3616 (daily ed. Apr. 2, 2004) *available at* http://bulk.resource.org/gpo.gov/record/2004/2004_S03616.pdf.

[343] United States v. Armstrong, 517 U.S. 456, 464 (1996); ANTITRUST DIVISION MANUAL, *supra* note 50, at III-7.

[344] *See* Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 943 (2003).

[345] *See, e.g.*, Antitrust Div., U.S. Dep't of Justice, Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006) (http://www.redorbit.com/news/business/449295/department_of_justice_antitrust_division_statement_on_the_closing_of/) (setting forth background on transaction and reasons for allowing merger to proceed); Statement of Chairman Majoras, Commissioner Kovacic & Commissioner Rosch Concerning the Closing of the Investigation into Transactions Involving Comcast, Time Warner Cable and Adelphia Communications, FTC File No. 051-0151 (Jan. 31, 2006) (http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf) (approving decision by Bureau of Competition to close investigation, and setting forth reasons); *see also* Antitrust Div., U.S. Dep't of Justice, Issuance of Public Statements upon Closing of Investigations (Dec. 12, 2003); FTC, Commission Closing Letters (Sept. 2, 2008) (http://www.ftc.gov/os/closings/commclosing.htm) (collecting number of FTC's closing letters).

[346] Case T-464/04, Impala v. Comm'n, 2006 E.C.R. II-02289, ¶ 15 (E.C.R. 2006).

[347] Stucke, *supra* note 44, at 575-79.

agency, but unknown to individual citizens. The ABA Antitrust Section's transition report to the incoming administration noted, "[w]ithout the underlying factual information on which the enforcement decisions are made, it is impossible to determine with any certainty whether decisions on particular cases were appropriate."[348] Thus competition authorities can respond, "Tell me the mergers we should have challenged. Tell me the facts we missed." Given this informational asymmetry,[349] the public entrusts the Executive Branch to faithfully execute the laws. The political appointees may encounter pointed questioning at a few Congressional oversight hearings.[350] But by the time the competitive effects of their decisions manifest, the appointees have left.

6. Because the Rule of Reason Is Not Prospective, Accessible, and Clear, It Does Not Constrain Rent-Seeking nor Prevent the Judiciary from Exercising Its Power Arbitrarily.

In applying the law, judges "cannot act wisely unless they know the source of law, the reason of it, and why it is subject to change, and why they have authority to change it."[351] Vague standards invite some judges to inject their ideological beliefs into competition policy,[352] which can reduce the judiciary's effectiveness in providing social order.[353] The burgeoning "New Legal Realism" scholarship has examined the influence of the judge's ideology on the outcome.[354]

[348] ABA TRANSITION REPORT, *supra* note 169, at 3 n.6.

[349] The Freedom of Information Act (FOIA) does not correct this informational asymmetry. As the Division Manual states, FOIA "does not require disclosure of materials obtained through . . . [Civil Investigative Demands] (such as documents, interrogatory responses, and transcripts of oral testimony) or materials obtained as part of the HSR process." ANTITRUST DIVISION MANUAL, *supra* note 50, at III-18; 15 U.S.C. § 1314(g) (2006) (exempting from FOIA disclosure any "documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under" Antitrust Civil Process Act); 15 U.S.C. § 18a(h) (2006) (HSR documents and information exempt from FOIA disclosure).

[350] *See, e.g.*, Rugaber, *supra* note 339.

[351] Edwin W. Smith, *Law and the Function of Legislation*, 46 AM. L. REV. 161, 169 (1912).

[352] Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 6 (2004) ("What judges have done is little different from what the FTC does as one political party or another acquires control of that agency and endows it with a different economic perspective.").

[353] WORLD BANK, *supra* note 1, at 129.

[354] One recent empirical study, for example, found a strong correlation between the validation rate and the ideological alignment of judges and agencies: in reviewing EPA and NLRB decisions for arbitrariness, Republican (Democratic) appointed judges are

Business lobbyists, once focusing on legislation, are now more active in the selection of state supreme court judges.[355]

The Court's decision in *Bush v. Gore* served as a springboard into its current politicization.[356] Recently the Court received its first negative rating from a politically divided survey group,[357] and according to one

more likely to invalidate liberal (conservative) decisions than conservative (liberal) ones. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism* 13 (Univ. of Chi. Law & Econ., Olin Working Paper No. 372; Univ. of Chi., Pub. Law Working Paper No. 191, 2007), *available at* http://ssrn.com/abstract=1070283. Republican-appointed judges are estimated to compose approximately 62 percent of the federal bench by the 2009 Presidential Inauguration (higher than the 50 percent when President Bush took office in 2001), and constitute a majority of 10 of the 13 federal circuit courts. Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 28, 2008, http://www.nytimes.com/2008/10/29/us/29judges.html?partner=rssnyt.

[355] *See* Jonathan D. Glater, *To the Trenches: The Tort War Is Raging On*, N.Y. TIMES, June 22, 2008, at A1, *available at* http://www.nytimes.com/2008/06/22/business/22tort.html. In the 2006 judicial election campaigns, "[d]onors from the business community gave $15.3 million to high court candidates — more than twice the $7.4 million given by attorneys." JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS — AND HOW AMERICANS ARE FIGHTING BACK 2006, at vii (2007); *see also* Penny J. White, *An Independent and Impartial Judiciary: The New Urgency*, DICTA, Feb. 2009, at 12 (observing dramatic increase in money spent on state judicial campaigns and reliance on special interest groups' donations).

[356] *See, e.g.*, Clive Crook, *The Highest Political Bearpit in the Land*, FIN. TIMES, June 30, 2008, *available at* http://blogs.ft.com/crookblog/2008/06/column-the-highest-political-bearpit-in-the-land/ (using *Bush v. Gore* as example for claim that Supreme Court has become political body). Republican-nominated Supreme Court justices were in the minority during 1963-69, had a simple majority during 1970-71, and attained in 1972 (and maintained thereafter) a two-thirds majority. Ghosal, *supra* note 326, at 3. Not all Republican-nominated justices (e.g., Justices Stevens and Souter), however, are more conservative than Democratic-nominated justices. But analysis of Supreme Court voting between 1937-2006 found justices appointed by Republican presidents tend to vote more conservatively than those appointed by Democratic presidents. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 8-9 (Univ. of Chi. Law & Econ., Working Paper No. 404, 2008), *available at* http://ssrn.com/abstract=1126403. "More recent appointees have significantly higher ideology scores." *Id.* at 15. Republican-appointed appellate judges are "more likely to vote conservative, with the imbalance being greater among judges appointed by the most recent Republican Presidents — Reagan and the two Bushes." *Id.* at 23-24.

[357] Forty-three of those surveyed disapproved of the job the Court is doing, "the lowest rating in five years of Quinnipiac University surveys on the Court and the first time the Court has received a negative score." Press Release, Quinnipiac Univ. Polling Inst., American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government to Ban It 2 (July 17, 2008) (http://www.quinnipiac.edu/images/polling/us/us07172008.doc). Forty-two percent said that the Supreme Court is moving in the wrong direction. *Id.* at 2 But voters who identified themselves as Republican significantly differed in their opinion on the

ranking, five of the ten most conservative justices are on today's Court.[358] A CBS commentator summarized the Court's 2007-08 Term: "As they have every term over the past few decades, the Justices once again sided in most cases with employers over employees, with big business over consumers, and with the government over individuals."[359] The Court, of course, could debunk this perception by identifying recent decisions where consumers prevailed. But more than sixteen years have passed since the Court decided an antitrust case in a plaintiff's favor.[360] Over that stretch, defendants are 18–0.[361] Over a longer timeframe, the Court has shifted from ruling in the antitrust plaintiff's to the defendant's favor.[362] Again, this should not be determinative: the Court need not intercede when antitrust plaintiffs rightfully win, but only when the lower courts misapply antitrust law. But there is no empirical evidence that the lower courts are predisposed to antitrust plaintiffs, which would require the Court to veer them to the appropriate mean. Instead the evidence shows the lower courts overwhelmingly rule against antitrust plaintiffs' rule-of-reason claims.[363] Moreover, the Court's recent activism in *Leegin* and *Billing*,[364] and dicta in *Trinko*[365] raise independent concerns.

Courts' performance (46% approved/35% disapprove) from Democrats (34% approve/49% disapprove), women (33% approve/45% disapprove), and African-American voters (32% approve/53% disapprove). *Id.* at 3.

[358] *See* Landes & Posner, *supra* note 356, at 46 (ranking justices by fraction of conservative votes in nonunanimous cases between 1937 and 2006, as follows: Justices Thomas (1), Scalia (3), Roberts (4), Alito (5), Kennedy (10); 4 of the 5 remaining conservative justices were fairly recent: Rehnquist (2), Burger (6), O'Connor (7) and Powell (8)).

[359] Andrew Cohen, *Not Your Father's Court: Andrew Cohen Reviews the Decisions and Looks at Trends from the Past Supreme Court Term*, CBS NEWS, July 2, 2008, http://www.cbsnews.com/stories/2008/07/02/opinion/courtwatch/main4227922.shtml.

[360] *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 625 (1992); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 486 (1992).

[361] Brannon & Ginsburg, *supra* note 232, at 3, 14. The most recent decision in defendant's favor is *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1109 (2009). The Court in 2009 had the opportunity to reverse this trend and correct the D.C. Circuit's questionable causation analysis. Instead, the Court denied the FTC's petition for writ of certiorari. Rambus Inc. v. FTC, 522 F.3d 456, 459 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (mem.).

[362] Over the past four decades, the win percentage for antitrust defendants before the Court increased: 33% (Oct. 1967-Oct. 1976), 44% ('77-'86), 55% ('87-'96), 91% ('97-'06). Brannon & Ginsburg, *supra* note 232, at 17.

[363] *See supra* notes 208-09.

[364] *See supra* note 229.

[365] *See supra* note 220.

Given its interest in commercial cases and the lower costs of affecting competition policy (a rent-seeker as an amicus need only convince five justices rather than a majority of Congress and the President), the Court has become an attractive magnet for corporate rent-seekers.[366] Although the Court on average grants certiorari to less than two percent of petitions, the U.S. Chamber of Commerce's backed-petitions between 2004 and 2007 were granted at a disproportionate rate of twenty-six percent.[367] During oral argument in *Leegin*, Justice Scalia observed that discount retailers, if concerned over the Court's prospective departure from its ninety-six-year precedent, would have petitioned the Court:

> I mean, if it was really the case that they were going to be losing, losing profits, I think they would have been here. I mean, we talk about the Wal-Marts and the Targets. They're not here on amicus briefs because they're — what they're selling is cheap.[368]

One could construe from Justice Scalia's comment that if discount retailers were concerned about any departure from the per se rule and resulting economic harm, they would have petitioned the Court as amici. But under the rule of law, discounters need not lobby the Court. Spending time and money to get the Court to change its rules so as to make one's business more profitable, while discouraged under rule-of-law principles, perhaps represents today's business reality. The American Petroleum Institute, for example, filed amicus positions in five recent antitrust decisions, including *Leegin*, all on the prevailing side. When antitrust devolves into a contest among rent-seekers, it loses its legitimacy under the rule of law.[369]

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[366] *See* Rosen, *supra* note 29.

[367] *Id.* One popular blog tracks the won-loss for business interests, and in particular the U.S. Chamber of Commerce's litigation arm. The Chamber filed 16 briefs in the Court's 2006-2007 Term; of the Court's 14 signed opinions, the Chamber's side won 12. In the 2007-2008 Term, the Chamber's winning percentage dropped from 85.7 percent to 53.3 percent (eight of 15 cases in which it was party or wrote amicus in 2007). Posting of Max Schwartz to http://www.scotusblog.com/wp/ot-07-business-docket-review/#more-7642 (July 3, 2008, 16:35 EST); *see also* Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490-91 (2008) (detailing rise in Court's recent business docket, its favorable response to legal arguments raised on behalf of business interests by private Supreme Court Bar).

[368] Transcript of Oral Argument, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 967030, at *31-32.

[369] *See* Brief for Am. Petroleum Inst. as Amicus Curiae Supporting Petitioner, *Leegin*, 127 S. Ct. 2705 (2007) (No 06-480), 2007 WL 160781.

With its vague legal standards and often high financial stakes, antitrust litigation is inherently attractive for rent-seeking. Moreover, in recent years, the Court has ceded antitrust's consumer protections to politically unaccountable independent agencies and self-regulatory agencies, which are also susceptible to regulatory capture.[370]

7. The Rule of Reason Prevents Courts from Enforcing the Antitrust Laws Quickly and Inexpensively.

Under the rule of law, rules are "construed and administered to secure the just, speedy, and inexpensive determination of every action."[371] The goal is a legal system that adjudicates cases "cheaply, quickly, and fairly, while maximizing access."[372] Otherwise, if it is too costly to vindicate one's legal rights, the law is majestic in theory, but impractical in reality.[373] Clear rules inhibit strike suits[374] by plaintiff attorneys or competitors.[375]

[370] *See* Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2397 (2007) (ceding enforcement of abuses to SEC). In addition, the Court compounded the rent-seeking problem through its implied immunities. Under the Court's vague state-action doctrine, special interest groups can solicit anticompetitive legislation from their state government. With its "varied and inconsistent interpretations," this implied immunity permits anticompetitive competitive conduct and further hinders consumers and the politically less powerful. *See* AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, THE STATE OF FEDERAL ANTITRUST ENFORCEMENT — 2001: REPORT OF THE TASK FORCE ON THE FEDERAL ANTITRUST AGENCIES 42 (2001) ("[S]tate action immunity drives a large hole in the framework of the nation's competition laws."); Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 124-25 (2000) (observing state-action doctrine is inconsistent with regulatory reform normally promoted in international fora by United States and restricts United States' ability to obtain as great package of concessions from other nations).

[371] FED. R. CIV. P. 1; *see also* FED. R. CRIM. P. 2 (proffering rules interpreted "to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay").

[372] WORLD BANK, *supra* note 1, at 124.

[373] AMC REPORT, *supra* note 23, at 63 ("[W]hen parties are able to predict in advance what types of transactions are likely to result in enforcement actions, they can eschew them in the first instance, thereby reducing the need for costly investigations and enforcement actions.").

[374] Strike suits are actions "brought without legitimate claim (usually by a shareholder in the name of the company) in hopes of an inflated settlement." WEBSTER'S NEW WORLD LAW DICTIONARY 245 (2006).

[375] Indeed, the clearer, more predictable the rule, the greater the risk of Rule 11 sanctions for spurious cases.

Rule-of-reason litigation, however, is a crusade, enlisting legions of economists, lawyers, and paralegals. It is unclear how many private litigants (even with the prospect of trebled damages) will incur the "litany of costs" and risks associated with suing companies with market power[376] by embarking on such a crusade — especially if their chance of prevailing is less than one in three.[377]

The Supreme Court recently recognized how the "extensive scope" of antitrust discovery is "inevitably . . . protracted" and has an "unusually high cost."[378] Although the Court recognized that a rule-of-reason case is costlier to pursue than a per se case,[379] the Court

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[376] The rule of reason

> requires an elaborate inquiry into the challenged business practice; litigation on the competitive effects and the business justification of the challenged conduct is often extensive and complex; the judiciary frequently lacks the expertise in industrial market structures and behavior to determine with any confidence the effect of a practice on competition; the judicial inquiry in one area may provide little legal certainty or guidance about the legality of a practice in another context; and, finally, businesses can use private antitrust litigation, or the threat of it, to raise rivals' costs.

ABA MONOGRAPH, *supra* note 24, at 6; *see* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34 (D.C. Cir. 2005) (noting under rule of reason's exhaustive inquiry of myriad factors, "everything is relevant, nothing is dispositive. . . . Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason" (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984))); Shumadine & Katchmark, *supra* note 240, at 407 (observing rule-of-reason analysis "is enormously expensive, involving conflicting expert testimony and virtually unlimited discovery" and that "[t]here are few things about the operation of a business that would not be relevant in a Rule of Reason analysis").

[377] Antitrust damages, according to Senator Sherman, should be "commensurate with the difficulty of maintaining a private suit." 21 CONG. REC. 2456-60 (1890). Under neo-classical economic theory, the optimal penalty (which includes civil damages and criminal penalties) levied against an antitrust offender equals the violation's expected net harm to others (plus enforcement costs) divided by the probability of detection and successful prosecution. Stucke, *supra* note 50, at 458. Successful antitrust plaintiffs can recover their litigation costs, including reasonable attorney's fees, and trebled damages. 15 U.S.C. § 15 (2006). It is often unclear when the odds of an antitrust plaintiff prevailing with a meritorious rule-of-reason claim are at least 33 percent. *See supra* note 208.

[378] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (citations omitted); *see also* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343 (1982) ("The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex.").

[379] *Maricopa*, 457 U.S. at 344 n.14 (noting "'opinion, shared by a majority of

never asks why antitrust discovery is inevitably costly and protracted.[380]

One reason is that so many fact-intensive issues are relevant in a rule-of-reason case.[381] None of these issues is easily established. Defining the relevant market, by itself, is fact-intensive, time-consuming, costly, and imprecise.[382] Although some restraints are

American economists concerned with antitrust policy, . . . that in the present legal framework the costs of implementing a rule of reason would exceed the benefits derived from considering each restrictive agreement on its merits and prohibiting only those which appear unreasonable'" (quoting F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 440 (1970))).

[380] Compounding the problem are the incremental costs to retrieve and review electronic data, such as e-mail and back-up tapes. *See* AMC REPORT, *supra* note 23, at 165 (reporting statement of some commentators, "a ten-fold increase in the volume of documents collected per employee due to electronic documents"). But the costs involving electronic discovery extend beyond antitrust litigation. Among the themes from a recent survey of over 1,000 trial lawyers were that electronic discovery was a "morass," the civil discovery system is broken, and 85 percent thought that civil litigation generally and discovery particular are too expensive. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3-4 (2008) [hereinafter TRIAL LAWYERS SURVEY], *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650. Sixty-four percent said that many law firms' economic models encourage more discovery than necessary, and only 11 percent believes that clients, rather than attorneys, drive excessive discovery. *Id.* at 4, app. A-4. Although counsel who are billing hourly stand to profit, corporate plaintiffs and defendants ultimately incur the opportunity costs, disruption, and expense of extensive discovery. Stipulations, by reducing the number of contested issues, can reduce antitrust's discovery costs. But in my experience, antitrust defense counsel (perhaps in part due to malpractice concerns) were unwilling to stipulate any factual issue where they perceived a remote possibility of prevailing.

[381] *See* Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 399 (2000).

[382] Because businesses and antitrust economists generally viewed markets dissimilarly, it generally took, in my experience, a team of eight to 15 DOJ paralegals, lawyers, and economists between five to seven months for a HSR merger review. *See* AMC REPORT, *supra* note 23, at 164 ("For both agencies, the length of second request [merger] investigations averaged about six months from the opening of the investigation in FY2005."). Given the time constraints of a HSR merger (including the risk that talented executives leave the acquired firm), the parties generally expedite document production to achieve substantial compliance. Thus, the U.S. antitrust agencies' HSR merger review is considered fast-track compared to civil nonmerger investigations, which the ABA recently characterized as "'black holes' for agency resources, dragging on for months or years." ABA TRANSITION REPORT, *supra* note 169, at 9. In fairness to the agencies, the ABA recognized that this delay is attributable in part to the "targets of non-HSR [who] may have perverse incentives to delay cooperation and 'drag their feet' responding to agency requests in hopes that the investigation will eventually close due to

blatantly anticompetitive, others, such as tying arrangements,[383] are more nuanced. Neither the judiciary nor economic experts have sufficient expertise on the actual workings of the market to accurately assess the likely effects of these nuanced restraints.

As proof that plaintiffs *can* prevail under a rule-of-reason case, some cite the Government's protracted case against Visa and MasterCard. In December 1993, the DOJ opened a preliminary investigation on the overlapping structure of Visa and MasterCard.[384] During its five-year investigation of Visa's and MasterCard's activities, the DOJ's Civil Task Force interviewed "approximately 180 individuals."[385] Besides the many attorneys and paralegals, at least nine DOJ economists were involved.[386] On October 7, 1998, the United States finally sued the two credit card manufacturers.[387] The Government's complaint, however, alleged only two counts under section 1 of the Sherman Act.[388] Much of the forty-three-page complaint was devoted to issues

its length." *Id.* One study found that the "U.S. second request process is by far the most costly in the world, imposing twice the external costs (including payments for attorneys, economists, and document productions) than do second-phase investigations in the European Union." AMC REPORT, *supra* note 23, at 163. Another survey found "second request investigations took seven months and resulted in median compliance costs of $3.3 million." *Id.* The former FTC chair, Deborah Platt Majoras, in 2005 estimated the average Second Request compliance costs exceeded $5 million. ABA TRANSITION REPORT, *supra* note 169, at 7 n.13.

[383] Tying arrangements refer to situations where the sale of one good is conditioned on the purchase of another good. OECD GLOSSARY, *supra* note 18, at 83. Tying may be overall anticompetitive in foreclosing opportunities for rivals to sell related products or increasing entry barriers for those that do not offer a full line of products. But tying may be overall procompetitive by reducing costs of producing and distributing the line of products and ensuring that like quality products are used to complement the product being sold. *Id.*

[384] Moltenbrey Declaration ¶ 5, United States v. Visa U.S.A., Inc. (*Visa I*), 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (No. 98-7076), 1999 WL 34247436. In January 1996, the DOJ "began investigating the by-laws, rules, and policies that permit their member banks to issue both Visa and MasterCard cards without restriction but prohibit them from issuing American Express and Discover cards." *Id.*

[385] *Id.* ¶ 6. Approximately 115 of these individuals were officers and employees of defendants or their member banks. The remainder were "officers or employees of defendants' competitors or other industry participants." *Id.*

[386] Rozanski Declaration ¶ 5, *Visa I*, 163 F. Supp. 2d 322 (No. 98-7076), 1999 WL 34403481.

[387] Complaint at 1, *Visa I*, 163 F. Supp. 2d 322 (No. 98-7076), *available at* http://www.usdoj.gov/atr/cases/f1900/1973.htm (last visited Apr. 19, 2009).

[388] Count One involved Visa's and MasterCard's governance rules, which permitted each association's members to sit on either Visa's or MasterCard's Board of Directors, but not both. United States v. Visa U.S.A., Inc. (*Visa II*), 183 F. Supp. 2d 613, 615 (S.D.N.Y. 2001). Count Two targeted the associations' exclusionary rules, under

of market definition, defendants' market power in the network market, barriers to network entry, and competitive effects.[389] After nearly two more years of additional discovery, the case was tried before a district court sitting without a jury.[390] It lasted thirty-four trial days (from June 12 through August 22, 2000). The district court described the volume of evidence:

> In addition to considering the oral and written testimony of a number of current and former executives of the Visa and MasterCard associations and their member banks, as well as American Express and Discover, the court also heard expert testimony [from Richard Rapp and Professors Michael Katz, Richard Schmalensee, Ronald Gilson, and Robert Pindyck]. The court has considered over six thousand pages of trial testimony, volumes of deposition testimony, approximately six thousand admitted exhibits and *amicus curiae* briefs from American Express and Discover — among others.[391]

Faced with this massive quantity of evidence, it took the trial court one year after the trial (and by then nearly eight years had lapsed since the investigation began) for the district court to enter more than 145 pages of findings of fact and conclusions of law.[392] The Government prevailed on only one of its two counts.[393] After modifying its judgment,[394] in 2002 the district court stayed its judgment pending appeal.[395] Defendants, not the Government, appealed, but the Second

which each association's members can issue credit or charge cards of the other association, but not American Express or Discover cards. *Id.*

[389] *See generally* Complaint, *Visa I*, 163 F. Supp. 2d 322 (describing myriad issues integral to claims).

[390] *Visa I*, 163 F. Supp. 2d at 330.

[391] *Id.* at 330-31.

[392] *See id.* at 327 (opinion and Proposed Final Judgment).

[393] The district court found (1) that the Government failed to prove that Visa and MasterCard associations' governance structures resulted in a significant adverse effect on competition or consumer welfare; but (2) the Government successfully demonstrated that the defendants' exclusionary rules and practices barring their member banks from issuing Amex or Discover cards resulted in such adverse effect and should be abolished, and permanently enjoined defendants from promulgating similar rules in the future. *See generally id.*; *Visa II*, 183 F. Supp. 2d 613 (modifications to Proposed Final Judgment) (modifying prior court's judgment regarding injunctive relief granted).

[394] *Visa II*, 183 F. Supp. 2d at 613.

[395] United States v. Visa U.S.A., Inc., No. 98 Civ. 7076 BSJ, 2002 WL 638537, at *2 (S.D.N.Y. Feb. 7, 2002). "In February 2004, after the court of appeals denied rehearing this case, American Express and MBNA (a member of both the Visa and

Circuit affirmed the one count.[396] A decade after the DOJ's investigation began, the Supreme Court denied defendants' petition for certiorari.[397] The costs in prosecuting and defending this action must have been staggering.[398] But compared to some other rule-of-reason cases, this one was quick.[399]

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Consequently the rule of reason has been rightly criticized for its inaccuracy and inconsistent results. Market participants cannot always foresee with fair certainty how the authority will use its coercive power in given circumstances. Nor will the rule of reason naturally orient itself toward rule-of-law principles. The Court, with its limited docket, cannot provide a case-by-case tutorial on how to apply its rule of reason. If anything, the Court further reduced the rule of reason's accuracy, objectivity, and predictability when it

MasterCard associations) announced an agreement under which MBNA would begin issuing general purpose cards on the Amex network, while continuing to issue cards on the Visa and MasterCard networks. [But b]ecause the district court issued a stay pending appeal, and the court of appeals stayed its mandate pending . . . the Supreme Court's review, the [challenged] exclusionary rules . . . [were still] in effect" and MBNA could not issue Amex cards. Brief for the United States in Opposition, Visa U.S.A., Inc. v. United States, 543 U.S. 811 (2004) (Nos. 03-1521 & 03-1532), 2004 WL 1836188, at *11 n.5, *available at* http://www.usdoj.gov/atr/cases/f205000/205051.htm.

396 United States v. Visa U.S.A., Inc., 344 F.3d 229, 234 (2d Cir. 2003).

397 *Visa*, 543 U.S. at 811.

398 In response to a written demand from U.S. Senator Slade Gorton, a Republican from Microsoft's home state of Washington, the DOJ in 1999 reported that its rule-of-reason monopolization case against Microsoft cost $13.3 million. This was "paltry" compared to the estimated expenses of other major antitrust cases, which "easily can run $750,000 each month." Ted Bridis, *U.S. Tab Is $13 Million in Microsoft Cases*, PHILA. INQUIRER, Oct. 7, 1999, at D08. RealNetworks reported spending in three months $3.7 million in legal expenses related to its antitrust lawsuit against Microsoft. Kim Peterson, *Profit Tiny, But Real Surprises Media Analysts*, SEATTLE TIMES, May 5, 2005, at D1. Estimates of the DOJ costs in other landmark rule-of-reason investigations and cases (all in 1999 dollars) run higher: the IBM investigation cost "well above $29 million;" the FTC spent an estimated $30 million investigating Exxon (an Exxon attorney estimated both sides' legal costs to exceed $200 million); the AT&T litigation cost about $20 million. James V. Grimaldi, *Microsoft Case Costs Justice Department $13.3 Million*, SEATTLE TIMES, Oct. 6, 1999.

399 One popular antitrust casebook describes the issues related to the "big case." PITOFSKY, *supra* note 101, at 113 ("In both government and private actions, it is not uncommon for discovery, trial, and appeal to take ten or more years and to involve a vast number of documents."). *Visa* was quickly compared to *IBM* and some of antitrust's other big cases. *See id.* at 113-17. Prosecuting criminal offenses, in contrast, is generally more straight-forward: often the law is settled, pleading the complaint or indictment is simpler, and discovery issues are less protracted.

reinvented the Sherman Act's goals to suit its new economic wisdom and in making competition policy trade-offs more suitable for Congress than the judiciary. Accordingly, the vacuous rule-of-reason standard fails to constrain the Executive and Judiciary Branches from exercising power arbitrarily and leaves the litigants mired in interminable and costly litigation.

D. The Rule of Reason's Infirmities Have Significant Implications for Antitrust Enforcement and Competition Policy

Having identified at least seven infirmities of the rule of reason under rule-of-law principles, this subpart considers several implications of those infirmities on competition policy: less antitrust enforcement, exposing consumers and smaller competitors to anticompetitive abuses, promoting undesirable market behavior and outcomes, hindering global convergence over antitrust rules and standards, and weakening the Court's remaining per se antitrust rules.

One implication is that because a rule-of-reason case is so costly to try, plaintiffs will bring fewer cases.[400] This is significant because private plaintiffs have brought the overwhelming majority of antitrust cases over the past thirty years.[401] Concerned about expenses, plaintiffs with meritorious claims may forego antitrust litigation. Expert economic testimony is often necessary for antitrust plaintiffs to prevail under the rule of reason.[402] Indeed, some have attributed

[400] Pitofsky, *supra* note 217, at 1489; Posner, *supra* note 24, at 15.

[401] Between 1975-2007, the United States brought 2,531 civil and criminal antitrust cases. Sourcebook of Criminal Justice Statistics, *supra* note 234, at 444 tbl.5.41. This represents 7.8 percent of all federal antitrust claims. *See id.* Annually, the federal government on average accounts for 8.5 percent of total claims, with the actual percentage significantly lower since 2000 (ranging between 3.4 and 5.9 percent). *Id.* One cannot place too great reliance on these ratios, as it is difficult to compare the relative overall value of a private claim (for example, three tag-along private suits) versus a government claim (for example, the United States' Microsoft litigation).

[402] *See* Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., No. CV407-42, 2008 WL 2811940, at *3 (S.D. Ga. July 21, 2008) ("'Construction of a relevant economic market cannot be based upon lay opinion testimony,' and the absence of economic expert testimony may require summary judgment in favor of the defendant." (quoting Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 (11th Cir. 1985)); Water Craft Mgmt., L.L.C. v. Mercury Marine, 361 F. Supp. 2d 518, 542 (M.D. La. 2004) ("Courts consistently require that expert testimony adequately define the relevant geographic and product markets in antitrust cases."); Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 294 F. Supp. 2d 1291, 1306 (M.D. Fla. 2003) ("Construction of the relevant market 'must be based on expert testimony.'"), *aff'd*, 479 F.3d 1310 (11th Cir. 2007); Berlyn, Inc. v. Gazette Newspapers, Inc., 223 F. Supp. 2d 718, 727 (D. Md. 2002) (stating that "to prove relevant market, expert

antitrust litigation's significant costs for economic experts as one factor for the decline of antitrust claims and growth of business torts claims.[403] One recent survey of trial attorneys found generally that "[e]xpert witness fees are a significant cost factor driving litigants to settle, ranking just slightly behind trial costs and attorneys fees in that respect."[404]

The Court fears that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment.[405] Yet the Court has not improved its own vague antitrust standards to redress its concerns. Moreover, although antitrust counsel can identify anecdotes of meritless claims, there does not appear to be any empirical evidence of widespread abuse.[406] Indeed, if this threat were significant, one would expect private antitrust claims to increase, not decrease, after *Sylvania*, which breathed new life into the rule of reason.[407] Instead, since the Court's *Sylvania* decision, there are fewer private federal antitrust cases.[408]

testimony is of utmost importance"; "[i]t is unclear whether expert testimony, as a matter of law, is a necessary predicate to a finding market definition. . . . As a practical matter, however, it would seem impossible to prove such a complex economic question without the assistance of a qualified expert, viz., an economist"), *aff'd*, 73 F. App'x 576 (4th Cir. 2003).

[403] Harvey I. Saferstein, *Antitrust Law Developments: The Ascendancy of Business Tort Claims in Antitrust Practice*, 59 ANTITRUST L.J. 379, 385-86 (1991).

[404] TRIAL LAWYERS SURVEY, *supra* note 380, at 4.

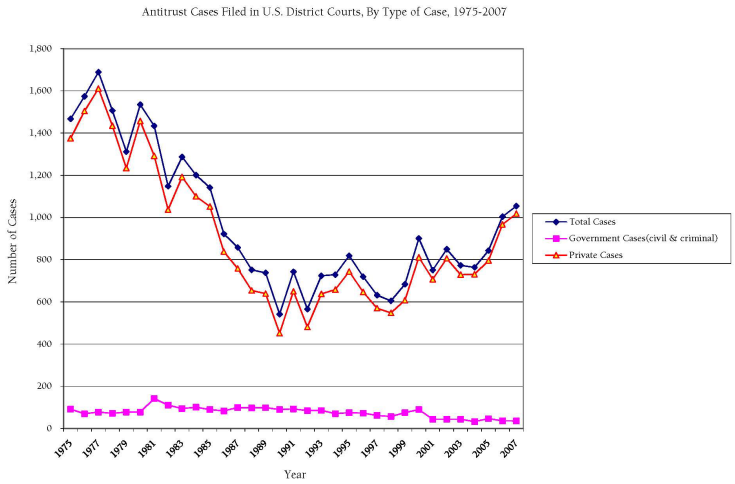
[405] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007). As a general matter, 83 percent of trial lawyers recently surveyed agreed that civil "litigation costs drive cases to settle that should not settle on the merits." TRIAL LAWYERS SURVEY, *supra* note 380, at app. A-6.

[406] AAI TRANSITION REPORT, *supra* note 24, at 231-32.

[407] *See infra* note 408 (showing decline in number of private antitrust claims after 1977).

[408] SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 234, at 444 tbl. 5.41.

Fewer antitrust cases are now brought annually relative to total litigation.[409] Some enterprising plaintiff lawyers instead seek redress under state business tort claims.[410] But others abandon their client's antitrust claims and forego litigation altogether.



The data do not distinguish between per se and rule-of-reason cases. After a low point in 1990, private antitrust cases increased. Part of the increase, after 2005, may be attributable to the Class Action Fairness Act of 2005, 28 U.S.C. § 1453 (2006), which makes removal of class actions filed in state court easier, and thereby affects incentives to rely on state or federal antitrust statutes. Moreover, after a high profile antitrust class action is filed, other similar private antitrust claims may be filed, with the expectation that the cases will be consolidated under the MDL rules for coordinated or consolidated pretrial proceedings. Thus, the number of private actions claims does not necessarily reflect distinct antitrust violations. The number of consolidated MDL antitrust class actions has remained fairly constant, averaging 8.6 per year between 1998 and 2007. AAI TRANSITION REPORT, *supra* note 24, at 228-29.

[409] Overall, the annual number of filed private federal antitrust claims is declining relative to the federal court's civil docket: federal antitrust claims have declined by about two-thirds, from 1.2 percent in 1977 to 0.4 percent in 2007 of the total number of civil claims filed in federal court. AAI TRANSITION REPORT, *supra* note 24, at 228. Of the 1,319,565 civil actions filed in federal district court between September 2000 and 2004, only 3,921 cases (0.3%) involved federal antitrust claims. Judicial Business of the United States Courts 2004, Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2000 Through 2004, *available at* http://www.uscourts.gov/judbus2004/appendices/c2a.pdf.

[410] *See, e.g.*, ABA SECTION OF ANTITRUST LAW, BUSINESS TORTS AND UNFAIR COMPETITION HANDBOOK, at xiii-xiv (2d ed. 2006) (noting shift in prominence of state business tort claims and federal antitrust claims); A. Michael Ferrill & James K. Spivey, *Clearing The* Sylvania *Hurdle: Developments in Business Torts and Dealer Termination*, 11 FALL ANTITRUST 5 (1996) (observing that, as with other traditional antitrust claims, "dealer complaints are increasingly being brought under state law tort

A second adverse effect on antitrust enforcement and competition is the potential loss of protection for consumers and smaller competitors. Unfortunately, an independent judiciary and the rule of law may be their only protections.[411] Powerful firms may not need judicial redress for any antitrust violations.[412] After all, "where force can be used, law is not needed."[413] Entrants with potentially innovative technologies may lack comparable means of self-preservation[414] and be foreclosed

theories," given availability of punitive damages, which "may far surpass treble damages available under antitrust laws," more receptive state courts, and "with infusion of economic theory into antitrust law . . . business torts often are easier to explain to jury, and ultimately to prove"); A. Michael Ferrill, *Survey of Antitrust Practitioners on the Interplay Between Antitrust & Business Tort Claims in Private Litigation*, 59 ANTITRUST L.J. 389, 398-99 (1991) (conveying responses of surveyed plaintiff attorneys); William L. Jaeger, *New Tools for the Plaintiff in the 1990s*, 4 SPG ANTITRUST 4 (1990) (noting "[c]onsigning state claims to second class status in an antitrust case may not be the wisest move for plaintiffs, in view of the increasing hostility of the federal courts to antitrust claims, and the eagerness of some courts to dismiss antitrust claims on summary judgment motions."); Harvey I. Saferstein, *supra* note 403, at 379 (describing perceived increase in state law tort claims and simultaneous decline in federal antitrust claims). I was unable to identify the number of business tort claims filed in the past 20 years (even with this number, it would be difficult to determine the number of business tort claims that substituted for antitrust claims). The number of tort cases overall filed in 30 surveyed states declined 21 percent between 1996 and 2005. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS, 2006: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (2007), *available at* http://www.ncsconline.org/D_Research/csp/2006_files/CaseloadTrends.pdf.

[411] As the World Bank found for developing countries, "the primary beneficiaries of well-functioning commercial courts are new, small firms unaffiliated with either private business groups or the state, run by those who do not necessarily have established social connections." WORLD BANK, *supra* note 1, at 119.

[412] Instead, if other competitors victimized them, firms with market power would favor increasing the barriers for challenging anticompetitive behavior. If the fringe firm were an annoyance, the dominant firm may resort to quicker, lower cost means to resolve their disputes, such as venturing with the fringe firm to increase mechanisms to punish unwanted behavior, retaliating with anticompetitive measures, or lobbying the government for relief.

[413] In addressing the Spartans, the Athenians were responding to their reputation of being litigious, as they resolved their contractual disputes with their allies through the courts. They noted the irony that an individual's "indignation, it seems, is more excited by legal wrong than by violent wrong; the first looks like being cheated by an equal, the second like being compelled by a superior." THUCYDIDES, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 44 (Robert B. Strassler ed., Richard Crawley trans., 1996).

[414] *See* WORLD BANK, *supra* note 1, at 119 ("Studies on commercial litigation in Italy, Romania, Russia, Slovakia, Ukraine and Vietnam show that newly created private enterprises, which do not have established supplier and customer networks or significant market power, are most likely to resort to the use of commercial courts.

from the market, which is troubling under an evolutionary economic perspective.[415] Indeed, a profit-maximizing competitor should opt for litigation when it represents the least costly or only remaining alternative.[416] The drafters of the Sherman Act recognized the inherent difficulties in challenging dominant firms' anticompetitive practices. To encourage victims to challenge dominant firms' anticompetitive behavior, the federal antitrust laws mandate that the successful plaintiffs recover three times their actual damages, the cost of their suit, and reasonable attorney's fees.[417] But the judicially created rule of reason makes these statutory incentives less appealing. Plaintiffs under the rule of reason still face the uncertainty of whether they will ever prevail for their antitrust injuries and must bear the upfront costs of expert and legal fees to wage their crusade.[418]

Third, the Court's choice of rules will affect future market behavior (and its future rules). As Nobel laureate economist Douglass North notes, "How the game is actually played is a consequence of the formal structure [e.g., formal rules, including those set by the government], the informal institutional constraints [e.g., societal norms and conventions], and the enforcement characteristics."[419] A market's performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. "Changing the [game's] rules" can lead to "different outcomes."[420] If the institutional constraints reward (or are indifferent to) monopolization, monopolies will be the likely outcome in markets conducive to monopolization.[421] "The ideal economic model," unlike the current rule of reason, "comprises a set of economic institutions

Older, especially state-owned, enterprises are often able to settle disputes out of court.").

[415] Stucke, *supra* note 187, at 984-87.

[416] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 447-48 (2d ed. 1977); J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 606 (1985).

[417] 15 U.S.C. § 15 (2006); *see generally* Harry First, *The Case for Antitrust Civil Penalties*, NYU Law & Economics Research Paper No. 08-38; NYU School of Law, Public Law Research Paper No. 08-43, *available at* http://ssrn.com/abstract=1162353.

[418] For example, a survey of the 40 percent of successful private antitrust actions found that plaintiffs recovered at least $18-$20 billion for their injuries, nearly half of which came from 15 cases that did not follow actions by federal, state or EU competition authorities. Robert H. Lande & Joshua P. David, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 891-93 (2008).

[419] NORTH, *supra* note 2, at 52.

[420] Kerber, *supra* note 268, at 16.

[421] *See* NORTH, *supra* note 2, at 50.

that provide incentives for individuals and organizations to engage in productive activity."[422]

Fourth, a suboptimal U.S. legal standard hinders global convergence among enforcement agencies. "A key objective of international cooperation between antitrust agencies is to achieve convergence as far as possible (taking into account differences that might exist in each jurisdiction), in rules and standards of review and remedies in order to facilitate the conduct of business in a global marketplace," reported the ABA Antitrust Section.[423] "Without such cooperation, inconsistent rules, standards, procedures and remedies can serve as an obstacle to business investment, growth, and economic expansion by imposing regulatory burdens that are costly or even impossible to reconcile."[424] Given the rule of reason's shortcomings under rule-of-law principles, U.S. competition authorities have difficulty in persuading other nations to converge to the rule of reason. They cannot plausibly argue that convergence is feasible when the Supreme Court remains wedded to its rule of reason; nor can the United States be of much assistance in having other nations model their competition standards after the United States' infirm rule-of-reason standard.[425]

In recent years, the Court has shown little interest in appraising its standard's costs or the extent its standard's deficiencies discourage productive activities. Instead, the Court simultaneously states that its rule of reason is the prevailing standard, while using its standard's negative effects to dismantle the antitrust scaffolding that supports, in part, the market structure. In *Billing*, the Court used its standard's deficiencies (i.e., the high risk of inconsistent outcomes) to contravene Congress's broad savings clauses in both the Securities Act and Securities Exchange Act, and thus further restrict antitrust enforcement in regulated industries.[426] In *Bell Atlantic Corp. v. Twombly*,[427] the Court cited the risk of false positives and high discovery costs arising from its per se antitrust standard to justify another layer of uncertainty for pleading all civil antitrust claims. This further limits antitrust plaintiffs' judicial access:

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[422] *Id.* at 158; *see also* Kerber, *supra* note 268, at 15 (noting Ordoliberal concept of shaping rules for this market game so that only quality of performance (merit) determines "market success").

[423] ABA TRANSITION REPORT, *supra* note 169, at 16.

[424] *Id.*

[425] An amorphous legal standard for some developing competition authorities can also hinder enforcement and foster corruption. *Id.* at 18.

[426] Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383, 2399 (2007).

[427] 127 S. Ct. 1955, 1964-66 (2007).

> Experience with litigating many 12(b)(6) motions, including through appeals, has shown problems enough under pre-*Twombly* pleading standards. It could take 4 or 5 years to reach the point of establishing that the complaint states a claim. What will lawyers and judges talk about under [*Twombly*'s] "plausibility" test? The test seems completely subjective, judge-by-judge. It will be as so many Rorschach blots, with self-same complaints interpreted differently by each viewer. Even now, motions to dismiss commonly assert that the complaint 'does not sufficiently allege * * *.' This has almost become a legal standard. To say that pleading requirements are 'contextual' does not much advance the inquiry or practice.[428]

Such increased procedural formalism will have rule-of-law implications. As one study found, it can bring "extreme costs and delays, unwillingness by potential participants to use the court system, and ultimately injustice."[429]

Finally, the Court's reliance on its rule of reason weakens its remaining per se rules,[430] which are critical in the DOJ's criminal

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[428] CIVIL RULES MINUTES, *supra* note 7, at 34. Because the Federal Rules of Civil Procedure are transsubstantive, *Twombly* generates ambiguity on the extent to which pleading standards now vary in civil litigation. Although Sherman Act violations can be civilly or criminally prosecuted, one district court refused to apply *Twombly*'s heightened pleading requirements for a criminal indictment alleging a section 1 violation. United States v. Northcutt, No. 07-60220-CR, 2008 WL 162753, at *2 (S.D. Fla. Jan. 16, 2008). Depending how courts apply *Twombly*, the United States may bear a lower pleading burden when seeking to incarcerate defendants (and fully deprive their liberty), than when seeking to enjoin certain behavior through a civil action.

[429] An analysis of legal procedures triggered by resolving two specific disputes — eviction of a nonpaying tenant and collection of bounced check — in 109 countries found lower procedural formalism in the richer countries, and greater procedural formalism in civil law countries (especially French civil law countries). Formalism was "nearly universally associated with lower survey measures of the quality of legal system, including judicial efficiency, access to justice, honesty, consistency, impartiality, fairness, and even human rights." Djankov et al., *supra* note 193, at 36-37.

[430] Expert Masonry, Inc. v. Boone County, 440 F.3d 336, 343 (6th Cir. 2006). But distinguishing restraints that warrant application of the per se rule from those that qualify for rule-of-reason analysis is not always easy or straightforward. As courts have taken a more explicitly economic approach to antitrust, the old distinction between per se and rule-of-reason analysis has lost some of its former clarity, resulting in the advent of the so-called "quick look" approach wherein the court must decide, in close cases, whether a restraint is facially anticompetitive before applying either per se or rule of reason analysis. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) ("[O]ur categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear . . . [;] 'there is

enforcement against hard-core cartels.[431] In *Leegin*, the Court further muddled the distinction between its standards.[432] An agreement between competitors to fix prices or allocate markets is per se illegal, regardless of the means employed. The agreement itself, not the means employed (whether by RPM or allocating exclusive territories to each conspirator), is determinative.[433] But the Court opined that if the cartel agrees to use RPM to fix prices, then its agreement "would have to be held unlawful under the rule of reason."[434] This makes no sense. If the agreement *has* to be held unlawful (regardless of the defenses or defendants' lack of market power), then the Court has reverted to per se illegality, and rule-of-reason analysis no longer applies. The Court's *Leegin* comment has already caused confusion.[435]

The Article thus far discussed the rule of reason's significant infirmities under rule-of-law principles and how those infirmities affect competition policy. But to complete the analysis, the next Part considers attendant risks when orientating antitrust standards toward rule-of-law principles.

III. SHORTCOMINGS OF THE RULE OF LAW

Even though antitrust's rule of reason suffers many deficiencies under rule-of-law principles, it does not automatically follow that the standard is deficient. The rule of law, like antitrust, is not an end, but a means to achieve some greater moral and social interest. For example, if a law permits torturing another nation's citizens, the law's application (although consistent with rule-of-law principles) is inconsistent with greater moral and social norms. Even as a means, the ideals underlying the rule of law can be approached, but not

often no bright line separating *per se* from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called 'per-se' condemnation is justified.").

[431] *See* Brief of Amicus for the United States at 30, Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (Nos. 04-805 & 04-814), 2005 U.S. S. Ct. Briefs LEXIS 598, at *45 ("Effective criminal prosecution of hardcore cartel conduct — such as horizontal price fixing, bid rigging, and market allocation — would be immensely more difficult if defendants were permitted to complicate jury trials with extended arguments about the reasonableness of such practices.").

[432] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2717 (2007).

[433] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

[434] *Leegin*, 127 S. Ct. at 2717.

[435] *See* Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008) (holding rule-of-reason analysis applies even when "plaintiff alleges that purpose of vertical agreement between manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers").

perfected.[436] Drafting, administering, and learning specific rules, as the thicket of tax codes attests, can be costly.[437] Thus, the marginal costs (in comparison to the marginal benefits) in approaching the rule-of-law principles must be considered.[438]

A. The Rule of Law Must Account for the Law's Development and Growth

A rigid conception of the rule of law does not account for the origin of a common law cause of action. For example, a prima facie intentional tort represents the tort at its infancy; weighing and unpredictability are at their zenith.[439] In each case, the fact-finder balances afresh the litigants' conflicting interests in light of society's social and economic interests generally.[440] As that cause of action matures, there is less need for such balancing.[441] Over time, legal rules replace or limit the factors to be balanced.[442] As it develops, a tort is formalized with specific elements. The defendant's interests are protected by established privileges, with their individual attributes set by legal rules.[443]

The legal rule, once developed, represents the existing order. But even developed law remains dynamic. One can consider the rule of law as complete when each new case is decided. Each case's relation to the whole gives an individual case its significance.[444] If a new legal

[436] Fallon, *supra* note 173, at 9.

[437] *See* William Klein, *Criteria for Good Laws of Business Association*, 2 BERKELEY BUS. L.J. 13, 24 (2005).

[438] *See* Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 32 (Carnegie Endowment, Working Paper No. 30, 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf.

[439] Tortfeasors, "who intentionally cause injury to another," are liable if their conduct "is generally culpable and not justifiable under the circumstances." RESTATEMENT (SECOND) OF TORTS § 870 (1979). Only a few states recognize a prima facie tort as an independent cause of action, but it serves as a useful analytical framework on a tort's evolutionary development. *See id.* § 870 cmt. a.

[440] *Id.* § 870 cmt. c.

[441] *Id.* § 870 cmt. d ("The more mature the stage of development" of the tort, "the more definite the contours of the tort and of the privileges that may be defenses to it.").

[442] *Id.* § 870 cmt. c ("[There is] no need of using the balancing process afresh for each case in which an established tort exists; and the task is merely to apply the legal rules to the facts.").

[443] *Id.*

[444] T.S. ELIOT, *The Function of Criticism*, *in* SELECTED ESSAYS 1917-1932, at 12, 12 (1932). In discussing relation of new to old in art, Eliot noted: "The existing order is complete before the new work arrives; for order to persist after the supervention of novelty, the *whole* existing order must be, if ever so slightly, altered; and so the

case is similar to an old case and conforms to current legal conventions, it, like any replica of past works, is soon forgotten. An attorney may seek to distinguish through a trifling difference her client's ordinary case from the existing order. But these ordinary cases are dispensed with ease; their treatment more closely approximates the rule-of-law ideals. Indeed, an affront to the rule of law occurs when ordinary cases are treated as if they are extraordinary. Rather than an affront to the rule of law, a novel legal case represents the law's incremental growth. In other words, a rule-of-reason standard must apply at the margins of any rule of law to respond flexibly with various alternatives and resolve novel problems that continually emerge over time.[445] A novel case readjusts the relations, proportions, and values of each legal precedent toward the whole, and thus becomes part of the whole.[446]

Absent this safety valve, the law becomes contorted. For example, Congress, in debating the hearsay exceptions under the Federal Rules of Evidence, expressed concern that without such a pressure release — namely a residual hearsay exception — frustrated judges would contort the existing hearsay exceptions to admit probative hearsay that had guarantees of trustworthiness equivalent to, or greater than, the guarantees reflected by the enumerated exceptions.[447] Antitrust's per

relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new." *Id.*

[445] *See* NORTH, *supra* note 2, at 154. For example, one study of the economic loss rule doctrine ("ELR") in 465 state appellate court decisions between 1970 and 2005 found the following pattern. In the survey's first 20 years, courts increasingly accepted the ELR. But in its last 10 years, courts moved away from strictly applying the ELR and more frequently invoked its generalized (and sometime idiosyncratic) exceptions. As the study's authors conclude, "[a]lthough the ELR is quite widely accepted, the law does not come to a rest, and states continue experimentation, often in ways inconsistent with the ELR and its generally recognized exceptions. Experience slows this experimentation down, as one would expect, but not completely." Anthony Niblett et al., *The Evolution of a Legal Rule* 37 (Nat'l Bureau of Econ. Research, Working Paper No. 13856, 2008), *available at* http://ssrn.com/abstract=1114941.

[446] What if most cases are unique, rather than common? This is unsurprising when the common law cause of action is at its infancy. If, after a century of jurisprudence, most cases remain novel, then the legal standard acts, not as a terminus, but a springboard for the court's fancy. In that event, the legal standard is badly in need of reform.

[447] Tension exists between two themes underlying the evidentiary rules: the need for uniformity and predictability versus flexibility (given the variety of cases where the Rules apply). The hearsay exceptions were "designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay." FED. R. EVID. 803(24) advisory committee's note, *reprinted in* II MOORE'S FEDERAL RULES

se rules, however, have no parallel residual exception. Consequently, courts became dissatisfied with the standard's imposition of liability for competitively neutral or procompetitive behavior. To find for defendant, courts began torturing the definition of the term "agreement" under section 1 of the Sherman Act.[448] For example,

PAMPHLET 2008 § 807.4[1] (2007). But the Advisory Committee thought it "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system." *Id.* The Committee wanted to leave some room for evidentiary law to develop. The House Judiciary Committee, however, deleted the catch-all, instead favoring uniformity. It thought the catch-all injected "too much uncertainty" into evidentiary law and impaired practitioners' ability to prepare for trial. *Id.* § 807.4[3]. The House Judiciary Committee believed that hearsay exceptions should grow by amendments to the Rules, not on a case-by-case basis. *Id.* The Senate Judiciary Committee disagreed: Without a safety valve, courts will shoehorn certain hearsay into the existing exceptions, rendering them "tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed)." *Id.* § 807.4[4]. Exceptional circumstances may arise where the court finds the hearsay to have guarantees of trustworthiness equivalent to, or greater than, the guarantees reflected by the enumerated exceptions. This evidence should be properly admissible. But the Senate was concerned that a broad hearsay exception offering too much flexibility could "emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rule." *Id.* So the Senate offered a compromise: provide the courts some flexibility for the exceptional circumstance, but not enough to authorize major judicial revisions of the hearsay rule, which is best accomplished by legislative action.

[448] Pre-*Sylvania*, courts generally construed vertical agreements liberally. Anything by the manufacturer beyond a simple statement of discounting policy and subsequent termination would likely constitute an "agreement." The Court had a "narrow channel" for manufacturers under *United States v. Colgate & Co.*, 250 U.S. 300 (1919). George W. Warner & Co. v. Black & Decker Mfg., 277 F.2d 787, 790 (2d Cir. 1960); PITOFSKY, *supra* note 101, at 684. Leading up to, and post-*Sylvania*, courts began construing "agreement" narrowly. *Sylvania* adopted the Chicago-school economic doctrine that manufacturers have strong legitimate business interest in maintaining prices to foster services and curb free-riders. Thus, evidence of pricing suggestions, persuasion, conversations, arguments, exposition or pressure no longer meant an "agreement." *See, e.g.*, Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909 (4th Cir. 1986) (holding that "regardless of whether competitor's complaints were mere expressions of dismay or constitute economic duress, coercion, and threats, the terminated distributor must still present additional evidence that the manufacturer and another distributor acted in concert to set or maintain prices"). Some courts required plaintiff to show that the manufacturers used "coercion" on retailers to comply with suggested prices. Part of this was attributable to commercial realities, as manufacturers' need to communicate with its retailers about its product's sales. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64 (1984). But the tortured definition of agreement for vertical restraints was also attributable to the reality that finding an "agreement" determined liability. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 48 n.14 (1977) (noting that "many courts 'have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity'"

courts' interpretation of "agreement" fluctuated depending on their attitude toward RPM's benefits and harms.[449] Similarly, the per se rule of group boycotts announced in *Klor's, Inc. v. Broadway-Hale Stores*[450] proved unworkable. The lower courts chafed,[451] and *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.* provided a safety valve.[452] So too did *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[453] and *NCAA v. Board of Regents of the University of Oklahoma*[454] provide a safety valve for procompetitive ventures among competitors.

Thus, the proper judicial response to the rule of reason is *not* more per se tests. Although these "bright-line" tests may offer greater predictability in the short-term, ultimately the lower courts will balk when applying these per se standards adversely affects incentives and competition. Nor is the Court likely to discover the optimal per se rule to apply across industries.

It is a misconception then that under the rule of law, the rules "become so fixed and rigid that they are difficult or impossible to change" and thus "necessarily become[] a clog upon national development, an incentive to revolutionary reform."[455] The rule of law must incorporate a mechanism to provide the judiciary enough flexibility for the exceptional and novel circumstance, but not enough to authorize major judicial revisions of the rule, which is best accomplished by the more democratically accountable legislative process.

(quoting Stanley D. Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 272 (1975)); *see* Arthur, *supra* note 24, at 351; Flynn, *supra* note 24, at 627.

[449] *See supra* note 448 and accompanying text.

[450] 359 U.S. 207, 212 (1959) (holding that group boycotts among competitors are per se illegal even if lower prices ensue or boycott temporarily stimulates competition because group boycotts fell within category of restraints which by their nature were unduly restrictive and accordingly condemned under common law and Sherman Act).

[451] *See, e.g.*, Larry V. Muko Inc. v. Sw. Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 429-31 (3d Cir. 1982) ("Though *Klor's* appears flatly to proscribe group boycotts, whatever their form or function, courts and commentators alike continue to resist the notion that all concerted refusals to deal fall automatically as per se violations of the antitrust laws.").

[452] 472 U.S. 284, 285 (1985) (stating that group boycotts are evaluated under rule of reason unless plaintiff shows that defendants possess market power or exclusive access to business element essential to effective competition (i.e., boycott cuts off access to supply, facility, or market necessary to enable boycotted firm to compete)).

[453] 441 U.S. 1 (1979).

[454] *See* 468 U.S. 85, 113-15 (1984).

[455] Frederic R. Coudert, *Certainty and Justice*, 14 YALE L.J. 361, 362 (1905).

B. The Rule of Law Does Require Judges to Centrally Plan

One criticism of Justice Scalia's conception of the rule of law is that it encourages the judge to anticipate future cases where the rule might be thought problematic and to dispose of them in advance.[456] In other words, the court legislates with a rule of law. A French Minister of Justice noted a century ago,

> The more the intellectual domain of humanity is enlarged, the more the development of industry and of science diversify forms of production and forms of property, the greater the political ascendancy of the proletariat tends to cause a recognition by society of new rights and of contracts heretofore unknown, the less can it be pretended that a code can contain and hem in the powerful movements of a nation's life.[457]

The law cannot anticipate every anticompetitive act. But an unworkable rules-based system does not mean a principles-based system is the sole alternative. Labeling a complex regulatory system as either a rules- or principles-based system is too simplistic.[458] Instead, an effective regulatory system is a combination of both. A purely principles-based approach is unworkable. Professor Hayek, among others, eschewed intervening on a case-by-case basis with ex post, totality-of-economic-circumstances standards. Instead, he advocated effecting economic policy through ex ante rules applying to general situations.[459] The more the state plans, the more often its actions are decided on the full circumstances of the particular moment; the less predictable or transparent the state becomes, and the more difficult planning becomes for the individual.[460]

On the other hand, relying on a myriad of specific behavioral prohibitions is suboptimal. Human behavior is hardly uniform in various contexts and thus does not often admit to simple predictive rules. Antitrust law cannot anticipate every socially undesirable anticompetitive action. Nor can a rule be self-contained to foreclose the novel cases. In those cases, the drafter assumes infallibility: The rule directs future action, but is incapable of being altered by the

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[456] Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 87 (1992).

[457] Coudert, *supra* note 455, at 370-71.

[458] Indeed, a tight statutory rule (as the Court originally construed the Sherman Act) can later be judicially transformed into a vague standard. Cunningham, *supra* note 16, at 1442-43.

[459] Christiansen & Kerber, *supra* note 178, at 220.

[460] *See* HAYEK, *supra* note 176, at 114.

present. Instead, events overtake the myriad specific rules.[461] These self-contained rules then become slalom poles for counsel, leading to absurd results (and a distortion of resources).

Myriad rules are also difficult to internalize.[462] Without an underlying moral or social principle, the law becomes unintelligible. It invites rent-seekers to secure statutory exceptions.[463] These special-interest exceptions cannot strike a discordant note because the rules themselves are not in harmony. Moral or social principles, however, can provide context, and thereby unify the myriad rules. A vague standard may then be preferable to specific, but suboptimal, rules.[464]

Antitrust need not digress into a binary approach, seeking either a rules- or principles-based system. Instead, antitrust law should blend rules with general principles to enhance predictability for ordinary cases while preserving flexibility for novel restraints.[465] The Court should articulate specific rules that further antitrust's general principles, while maintaining the rule of reason for novel cases. The workability of this tandem can be tested, in part, by the percentage of cases it efficiently resolves. For example, one consumer protection statute has specific rules on telephone directory listings for florists,[466] but its continued relevancy exists in the law's general prohibitions on unfair or deceptive acts.[467] The specific rule for florist listings

[461] The initial sections of the Tennessee Consumer Protection Act contain general prohibitions. *See, e.g.*, TENN. CODE ANN. § 47-18-104(b)(1) (2008) ("Falsely passing off goods or services as those of another."). Later sections become idiosyncratic. *See, e.g.*, *id.* § 47-18-104(b)(29) (prohibiting advertisements that business is "going out of business" more than 90 days before business ceases to operate); *id.* § 47-18-104(b)(36)(C) (requiring certain disclosures be printed in not less than 10-point type).

[462] If humans plan actions according to the law, one simple way is to internalize the norm. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 48 (1999) ("Standards that capture lay intuitions about right behavior (for example, the negligence standard) and that therefore are easy to learn may produce greater legal certainty than a network of precise but technical, nonintuitive rules covering the same ground."); Stucke, *supra* note 50, at 510-14.

[463] Todd J. Zywicki, *The Rule Of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 11 (2003).

[464] After *Socony*, some business groups lobbied for the rule of reason: "The old Rule of Reason, if applied, would cure part of the problem, if revived, because it is flexible — but it is also highly indefinite. Most businessmen and lawyers, even so, prefer the flexibility of a Rule of Reason, even with its indefiniteness." BUSINESS ADVISORY COUNCIL, EFFECTIVE COMPETITION 5 (1952).

[465] *See* Cunningham, *supra* note 21, at 1435.

[466] *See, e.g.*, TENN. CODE ANN. § 47-18-104(b)(32) (2008) (making act of misrepresenting florist location Class B misdemeanor).

[467] *See, e.g.*, TENN. CODE ANN. §§ 47-18-104(a), (b)(27) (2008) (rewriting statute to make act of misrepresenting any business person's location Class B misdemeanor).

illustrates the application of the general principles of unfair and deceptive practices for a specific practice in a particular industry.

IV. TOWARD A BETTER RULE OF REASON

Although a perfectly realized rule of law may be unattainable, antitrust standards must be reoriented toward rule-of-law ideals. Some Chicago School adherents may disagree. They applaud the Roberts Court's antitrust activism. But others recognize, as Professor Handler did in the 1950s, and as the Sherman Act's evolution affirmed, "In no branch of the law has dissent played a more significant role than in antitrust."[468] Under the guise of the burgeoning "post-modern" behavioral economics literature, a more paternalistic Court under the rule of reason could seek greater protections for irrational consumers.[469] The new economic wisdom would obliterate the Roberts and Rehnquist Courts' dated and empirically weak Chicago School social policies, without necessarily improving the rule of reason's accuracy and administrability or yielding greater consistency, objectivity, or transparency. Consequently, this Part offers three suggestions for reorienting antitrust's legal standards toward rule-of-law ideals. First, the Court should refrain from announcing new competition policies based on its perception of "modern" economic theory, and instead return to the Sherman Act's legislative aims. Second, the Court should endeavor to cast more intelligible standards that are consistent with these legislative aims. Third, to assist the Court toward that end, the U.S. competition authorities should step up and undertake more empirical analyses to better comprehend how markets operate and evolve.

A. Returning to the Legislative Policies Underlying the Sherman Act

Congress never drafted the Sherman Act as a vehicle for the Court to advance its own ideologies, nor those of certain economists. The Court should refrain from announcing new policies based on its perception of "modern" economic theory that run counter to the

[468] Handler, *supra* note 57, at 39.

[469] For an informative discussion on the topic, see ARIELY, *supra* note 220; THALER & SUNSTEIN, *supra* note 220; Colin F. Camerer & George Lowenstein, *Behavioral Economics: Past, Present, Future*, in ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 220, AT 3-14; Jolls et al., *supra* note 220, at 1487; Prentice, *supra* note 220, at 1664-70. For a broader survey of literature attacking the conventional economic theories to which the Court's recent antitrust jurisprudence adheres, see BEINHOCKER, *supra* note 220, at 19-45.

Sherman Act's originally intended and understood meaning.[470] The Court's earlier statements, such as its theory that antitrust law's primary concern is interbrand competition, have nurtured today's suboptimal competition policies.[471] Reckless statements, like one suggesting that monopoly pricing is an important element of the free-market system,[472] can lead to uninformed competition policies that are inconsistent with citizens' preferences[473] and the legislative policies underlying the Sherman Act. To give content to the Sherman Act, the Court should interpret the Act's "word[s] in the light of its legislative history and of the particular evils at which the legislation was aimed."[474] Any trade-off or policy pronouncement should come from Congress, rather than the democratically unaccountable judiciary.

One example, which I elaborate elsewhere,[475] is section 2 of the Sherman Act, which prohibits any person from monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce. In enacting section 2, Congress sought to preserve economic opportunity. It neither criminalized bigness per se, nor intended to target, as Judge Learned Hand characterized,[476] the

[470] Seven years after the Sherman Act's passage, the Court recognized the shortfalls of resorting to the Act's legislative history. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 312, 318-19 (1897). Judicial investigation of legislative history, the Court observed, is like "looking over a crowd and picking out your friends." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (citation omitted). Nonetheless, the number of party-goers is finite, unlike the variety of possible judicial justifications. Unlike the unstructured chatter at a party, the Court previously discerned several important themes from the Act's legislative history. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50, 52, 57, 83-84 (1911); *Trans-Mo. Freight*, 166 U.S. at 319.

[471] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007) ("The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" (quoting State Oil Co. v. Khan, 522 U.S. 3, 15 (1997))).

[472] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[473] Even if some economists share the Court's normative policies, citizens may reject them. Some economists are agnostic on price discrimination or believe in certain instances it is procompetitive; 91 percent of individuals in one survey thought charging higher prices to those more dependent on the product was offensive. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986).

[474] Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

[475] Stucke, *supra* note 45, at 534-42; Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?* (University of Tennessee Legal Studies Research Paper 2009), *available at* http://ssrn.com/abstract=1395076.

[476] United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 429-30 (2d Cir.

company that unwittingly finds itself a monopoly because of its "superior skill, foresight, and industry." Instead, Congress sought to prohibit monopolistic practices that make "it impossible for other persons to engage in fair competition."[477] The widespread belief was that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resorting to unfair practices. "Congress focused not on the end" — monopoly — "but the means of attaining (or maintaining) that end."[478] Were the means normatively fair (by virtue of the monopolist's superior skill in that particular product) or unfair (actions making it impossible for other persons to engage in fair competition with the monopoly)? Thus, selling better products at lower prices does not make it impossible for rivals to fairly compete. But section 2 *would* apply when the monopoly gradually restricts access to a key input necessary to compete[479] or engrosses (acquires) all other persons engaged in the same business.[480] Instead of forcing the parties and lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 is to deter these unfair anticompetitive methods of competition, which, at common law, includes a monopolist's anticompetitive deception.

Some may ask whether section 2's legislative policies are too broad to circumscribe the courts' discretion. That is not the case today as the Court in *Trinko* sings hymns in praise of monopolies and monopoly pricing, and the D.C. Circuit recently held that a

1945).

[477] 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar).

[478] Stucke, *supra* note 45, at 534-35.

[479] *See, e.g.*, United States v. Am. Tobacco Co., 221 U.S. 170 (1911) (monopolies controlling all elements essential to manufacture tobacco products, including licorice paste); *Alcoa*, 148 F.2d at 422 (extracting aluminum from alumina "requires very large amount of electrical energy, which is ordinarily, though not always, most cheaply obtained from water power"; aluminum monopoly in securing hydroelectric power contractually required several power companies "not to sell or let power to anyone else for manufacture of aluminum").

[480] *See, e.g.*, *Am. Tobacco*, 221 U.S. at 183 (detailing how defendant tobacco companies spent millions of dollars to purchase competitors' facilities, not with purpose of using them, but to close them down and render them useless for purposes of trade, and bind facilities' employees to long-term noncompete agreements). Similar allegations were recently made against IBM. After Platform Solutions "developed software that turned standard servers into systems that mimicked IBM's expensive mainframes[,]" IBM purchased Platform for $150 million, and promptly terminated Platform's innovative product. Ashlee Vance, *Rivals Say I.B.M. Stifles Competition to Mainframes*, N.Y. TIMES, Mar. 23, 2009, at B1, *available at* http://www.nytimes.com/2009/03/23/technology/companies/23mainframe.html?ref=business.

monopoly's use of deception to charge even higher prices is permissible under the Sherman Act.[481] Returning to the Sherman Act's legislative policies would deter further misadventures under the rule of reason. Any ensuing antitrust standards should be in accordance "with the originally intended and understood meaning of the directives of legitimate, democratically[]accountable lawmaking authorities."[482]

B. Crafting More Intelligible Standards Consistent with the Sherman Act's Principles

The Court's extreme standards (per se and rule of reason) are unsatisfactory for evaluating many ordinary competitive restraints. Rather than reflexively returning to ground zero — namely, the 1918 *CBOT* rule-of-reason factors — the Court should aim for differentiated rules that further the Sherman Act's legislative aims, and leave the rule of reason and per se rules for the exceptional cases.

Commonplace restraints do not merit the cumbersome rule of reason. As several scholars have argued, in many cases, simpler is better. This is especially true when resources are scarce and the increased complexity leads to slight marginal social benefits.[483] In crafting more differentiated rules, the Court must consider whether the new rule (in lieu of per se liability) reduces or increases error and enforcement costs. The majority in *Sylvania* and *Leegin*, for example, rejected any standard less than the full-blown rule of reason. Yet the fact-specific rule of reason suffers from both high error and enforcement costs. Justice White in *Sylvania*,[484] like Justice Breyer in *Leegin*,[485] offered an incremental shift away from per se liability with an intermediate standard. Their proposed standard would reduce the

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[481] Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008) (assuming that monopolies which use deception to "obtain higher prices . . . ha[ve] no particular tendency to exclude rivals and thus to diminish competition"); *see* Stucke, *supra* note 475 (examining D.C. Circuit's faulty arguments).

[482] Fallon, *supra* note 173, at 38.

[483] Christiansen & Kerber, *supra* note 178, at 229-33.

[484] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 71 (1977) (White, J., concurring) (proposing use of market power as screen and exception for infant industries: "Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the *Schwinn* restraints to justify a rule-of-reason standard, even if the same weight is given here as in *Schwinn* to dealer autonomy").

[485] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2737 (2007) (modifying per se rule to allow exception for more easily identifiable and temporary condition of new entry).

cost of error under the Court's per se rule, without imposing the high litigation costs under the rule of reason. Even if the majority of Justices have concerns with the intermediary standard, they cannot assume that its shortcomings are greater than the rule of reason's.

One easy category for simpler legal standards is when the challenged activity is both anticompetitive and independently wrongful (such as deception). The court must weigh (or consider) the undesirable conduct's procompetitive effects under the rule of reason. Microsoft, as the D.C. Circuit found, deceived Java developers to maintain illegally its monopoly.[486] Even if Microsoft proffered a procompetitive explanation for its deception (it did not), the plaintiff need not demonstrate that lesser restrictive alternatives existed or that the deception's anticompetitive harm outweighs its procompetitive benefits. If the challenged conduct is both independently wrongful conduct and reasonably appears capable of making a significant contribution to the defendant's maintaining or attaining its monopoly, then it violates section 2 of the Sherman Act. This legal standard furthers section 2's purpose of deterring unfair anticompetitive methods of competition, without the extra and unnecessary steps required under the rule of reason.

For otherwise legal conduct, the Court can restructure its legal standard to minimize judicial weighing. It can begin with legal presumptions of a restraint's anticompetitive effects, based on the available empirical evidence. One key issue (which the majority in *Leegin* avoids) is the percentage of cases where RPM leads to positive and negative effects.[487] The *Leegin* Court fell into the "never" fallacy:

[486] "Microsoft deceived Java developers regarding the Windows-specific nature of its tools. Microsoft's tools included 'certain keywords' and 'compiler directives' that only Microsoft's version of Java could . . . execute properly." United States v. Microsoft Corp., 253 F.3d 34, 76 (D.C. Cir. 2001). Java developers thus relied upon Microsoft's public commitment to cooperate with Sun Microsystems and used Microsoft's tools "to develop what Microsoft led them to believe were cross-platform applications." *Id.* Instead, the deceived Java developers ended up producing applications that ran only on Microsoft's Windows operating system. *Id.* Although Microsoft publicly denied the accusation, its internal documents showed the contrary: Microsoft intended to deceive Java developers, and predicted that the effect of its actions would be to generate Windows-dependent Java applications, and thwart Java's threat to Microsoft's monopoly in the operating systems market. *Id.* at 76-77.

[487] *See Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting) (opining that before settling on rule of reason, Court should ask how often are harms or benefits likely to occur, and "[h]ow easy is it to separate the beneficial sheep from the antitrust goats?"); Brief for Economists as Amici Curiae Supporting Petitioner at 16, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 U.S. S. Ct. Briefs LEXIS 68, at *28 (noting "some disagreement within the economics literature, and among *amici*, regarding the

"Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[488] But this is also true of horizontal agreements among competitors to fix price,[489] or of many possible criminal acts, like homicide, which can be legal or illegal depending on the surrounding circumstances.[490] The fact that at times killing can be justifiable does not justify the assessment of guilt under the rule of reason. The relevant issue is determining what percentage of cases the challenged restraint results in anticompetitive (compared to procompetitive) outcomes. If anticompetitive outcomes are more likely (or the discounted harm is greater than the discounted benefits), then the Court should create a legal presumption that the restraint violates the antitrust laws. Thus, the antitrust plaintiff can establish its prima facie case by showing that the defendant engaged in the challenged conduct in a specified area of trade or commerce.

Antitrust defendants could overcome the presumption of anticompetitive harm for discrete categories of business behavior. The Court would base these categories on the existing empirical evidence — namely, the challenged restraint in those discrete circumstances is more likely to lead to procompetitive efficiencies than anticompetitive

frequency of minimum RPM['s] pro[-] or anticompetitive effects"); Christiansen & Kerber, *supra* note 178, at 225.

[488] *Leegin*, 127 S. Ct. at 2717.

[489] "Literal" price fixing, as in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), may be benign. Defendants ASCAP and BMI, which had nonexclusive rights to their members' copyrighted musical compositions, each sold blanket licenses. These blanket licenses gave the licensee the right to perform any or all compositions owned by each defendant's members as often as it desired for the licensed term. *Id.* at 5. The issue before the Court was whether each defendant's blanket license at fees negotiated by each defendant (and its members) constituted per se illegal price fixing. *Id.* at 4. Although the competing musicians literally agreed to fix the price for the blanket license, their agreement was not per se illegal. Through their joint action, the musicians created a new product (the blanket license) that lowered transaction costs. *Id.* at 22-23. Thus the blanket license was designed to increase economic efficiency and render markets more (rather than less) competitive; it did not facially appear to restrict competition and decrease output. *Id.* at 19-20. Even "hard core" price fixing, as the Court recognized, may be competitively neutral. Thus, even for per se violations, private plaintiffs must prove antitrust injury. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 (1990).

[490] Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1338 (2008) ("Even murder statutes are rife with shifting value judgments, such as the beginning and ending of life, the status of the fetus, the criminality of assisted suicide, the basis for reduction of murder to manslaughter, and defenses based on various medical and psychological ailments.").

effects. As an example, resale price maintenance could be presumptively anticompetitive (rather than per se illegal). An antitrust defendant could overcome the presumption with sufficient evidence that RPM was reasonably necessary to achieve certain procompetitive outcomes (such as, using RPM to combat actual free-riding or to introduce a new product). If defendant makes such a showing, it prevails.

The Court's full-scale rule of reason, given its infirmities under the rule of law, would then be limited to instances where the courts have little experience with the challenged restraint. Even for the novel cases, the lower courts' multistep rule of reason can be improved. One improvement is to minimize contentious issues of market definition in the rule of reason's first step. Circumstantial evidence of market power via market definition is a weak proxy for direct evidence. If a challenged restraint has been in force for several years, an antitrust plaintiff should identify the restraint's anticompetitive effects.[491] To avoid the costly and often unproductive battle of experts, market definition would play a limited role, providing only some general contours to the area of trade or commerce adversely affected by the challenged restraint.[492] Focusing on the restraint's actual

[491] Using market share as circumstantial evidence of market power should be relegated to those few cases where the harm is largely prospective (e.g., mergers under section 7 or nascent anticompetitive threats). The antitrust plaintiff would establish both the severity and probability of the alleged likely anticompetitive effects, which the defendant can rebut with the magnitude and likelihood of procompetitive benefits. Kolasky, *supra* note 284, at 88. Even here, courts should giver greater weight to natural experiments than theoretical claims on functional interchangeability of the products. For example, although consumers can obtain office products through different outlets, the trial court properly focused on empirical evidence of localized competition between the merging parties and the differences in pricing in geographic markets when one faced competition with the other. FTC v. Staples, Inc., 970 F. Supp. 1066, 1073-81 (D.D.C. 1997).

[492] Indeed, the Court in *CBOT* noted that the challenged restraint "had no appreciable effect on general market prices" or on output — "the total volume of grain coming to Chicago." Bd. of Trade of Chi. v. United States, 246 U.S. 231, 240 (1918). Instead, the challenged restraint had several procompetitive benefits including increasing price transparency. Some courts appear to require the antitrust plaintiff to prove market power with both circumstantial evidence (high market share in a relevant antitrust market) and direct evidence (that the restraint produces significant anticompetitive effects within that relevant product and geographic market). *See, e.g.*, United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003) (noting that "government must demonstrate [both] that defendant conspirators have 'market power' in particular market for goods or services" and "defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality"). But this is cumulative. One can prove defendant's market power with direct evidence of anticompetitive effects or circumstantially with evidence of

anticompetitive effects leads to a second improvement to the rule of reason — minimizing the need for judicial balancing and eliminating the need to trade off reductions of competition in one sector for increases in another. If the challenged conduct's net result is higher prices and reduced output, then it is difficult to fathom what offsetting procompetitive justifications defendants could offer.[493] Even if defendants could establish that their practice fosters competition in another market, it is doubtful that the courts or antitrust agencies could quantify those pro- and anticompetitive effects. These trade-offs are beyond the judiciary's competence or authority under the Sherman Act.

The Court should also reserve its other extreme (per se liability) for cartels and other "naked" restraints of trade long-recognized as socially harmful. The courts, absent empirical evidence, should hesitate in categorically condemning any other particular practice without regard to its justification.

C. More Empirical Analyses to Better Comprehend How Markets Operate and Evolve

The Court cannot assume that these simpler differentiated rules will arise independently. Effective learning "requires accurate and immediate feedback about the relation between the situational conditions and the appropriate response."[494] Such feedback is lacking in antitrust analysis currently because:

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market share in a properly defined market. An antitrust plaintiff need not prove both. Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000).

[493] Some argue that without analyzing the justifications and considering the relative benefits and costs, the fact-finder cannot determine whether the practice harms consumers. Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 864-65 (1988). But if the antitrust plaintiff establishes actual significant anticompetitive effects, such as the evidence in *NCAA* that the challenged restraint raised price and reduced output, then the market has signaled the net effect. (At times, the challenged restraint may increase output and price, such as a monopolist devising a scheme to price discriminate; whether society is better off is a normative judgment.)

[494] Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS & PSYCHOLOGY 67, 90 (Richard M. Hogarth & M.W. Reder eds., 1987). Two recent business articles, for example, highlight this information flow. Gary L. Neilson et al., *The Secrets to Successful Strategy Execution*, HARV. BUS. REV., June 2008, at 61, 63 (summarizing survey of over 20,000 people in 31 companies, among more important traits to implement strategy are promoting information flow and feed-back of decisions' consequences on bottom-line); Hirotaka Takeuchi et al., *The Contradictions That Drive Toyota's Success*, HARV. BUS. REV., June 2008, at 96, 101 (encouraging experimentation and learning from successes and failures).

> (i) outcomes are commonly delayed and not easily attributable to a particular action; (ii) variability in the environment degrades the reliability of the feed-back, especially where outcomes of low probability are involved; (iii) there is often no information about what the outcome would have been if another decision had been taken; and (iv) most important decisions are unique and therefore provide little opportunity for learning.[495]

Accordingly, this learning requires dedicated resources. The Supreme Court and lower courts have not undertaken the empirical analysis to promote their understanding of the impact of the antitrust standards (and decisions) on the marketplace. Nor can they. Their view is limited to the evidence the parties supply. Courts do not unilaterally revisit a particular industry to assess the impact of their decision.

Nor can academia and the private bar fulfill this complex mission. Through division of labor and increased specialization, knowledge has dispersed in today's society. This dispersal "requires a complex structure of institutions and organizations to integrate and apply that knowledge."[496] Collecting information on how various markets work, and the impact of restraints on those markets, entails high transaction costs. Moreover, the relevant information is often nonpublic.

The U.S. competition authorities in the Obama administration should now undertake this empirical testing and learning. Unlike private litigants who are concerned with prevailing and promoting their parochial interests, the competition authorities are acting on the citizens' behalf. Their role should be less ideological and more objective. To assist the Court in crafting the proper legal standard for the challenged restraint, one would reasonably expect the competition authorities to rely on their recent empirical analyses. But any empirical analysis undertaken by either the FTC or DOJ over the past twenty years in support of RPM's costs and benefits was conspicuously absent from the United States' amicus brief in *Leegin*.[497] Consequently,

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[495] Tversky & Kahneman, *supra* note 494, at 90.

[496] NORTH, *supra* note 2, at 99.

[497] Justice Breyer in *Leegin* noted that "both Congress and the FTC, unlike courts, are well-equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2737 (2007) (Breyer, J., dissenting). The United States' amicus brief, however, does mention in one string citation a 1984 FTC study (but offers no elaboration as to its findings), and makes three brief references to a 1983 FTC study. *See* Brief for the United States as Amicus Curiae Supporting

to assist the courts in determining the proper legal standard for evaluating certain restraints, the federal antitrust agencies first must better comprehend how markets operate and evolve.[498] This requires more empirical analysis on the agencies' part.[499]

CONCLUSION

"Although we are accustomed to think of antitrust as part of our statutory law," observed Professor Handler, "actually all of its doctrines, both before and since 1890, are the creation of judges."[500] Over time, while those doctrines have battled for supremacy, their meaning has remained elusive. After the Court replaced its original literal construction of the Sherman Act with the rule of reason, that standard never evolved to something workable or consistent with rule-of-law ideals.

As Justice Scalia observed, by adopting a "totality of circumstances test" to explain its decision, the court "is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding."[501] This might be appropriate for cases at the margins,[502] or a prima facie tort. But it should not be the "usual" standard for a statute on the books for over a century. Indeed, Justice Scalia recognized, as did his brethren in the 1960s and 1970s, that the totality-of-economic-circumstances standard "is, in a way, a regrettable concession of defeat — an acknowledgment that we have passed the point where 'law,' properly speaking, has any further

Petitioner at 14, 20 nn.2-3, *Leegin*, 127 S. Ct. 2705 (No. 06-480), 2007 U.S. S. Ct. Briefs LEXIS 29, at *26, *35 (citing RONALD N. LAFFERTY ET AL., IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINTS CASES (1984) [hereinafter 1984 FTC Study], *and* THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE (1983)). In contrast to the Bush administration's amicus brief in *Leegin*, the 1984 FTC Study rejected the application of the rule of reason to RPM, which would likely increase "business uncertainty, litigation costs, and judicial application error." 1984 FTC Study at 41-42. Rather than a per se or rule-of-reason standard, the Study proposed a legal policy that allows manufacturers to select dealers on the basis of quality and to allow RPM for new entry. *Id.* at 44-45. Given the changes in the retail sector, with the growth of mass merchandisers and the Internet, more recent empirical analysis is warranted.

[498] Stucke, *supra* note 44, at 579-86.

[499] *See* Maurice E. Stucke, *New Antitrust Realism*, GLOBAL COMPETITION POL'Y MAG., Jan. 2009, at 2, *available at* http://ssrn.com/abstract=1323815.

[500] Handler, *supra* note 57, at 21.

[501] Scalia, *supra* note 199, at 1180-81.

[502] *Id.* at 1181.

application."[503] If the Court is regressing to the Sherman Act's infancy, indeed going beyond the common law legal presumptions, then Justice Scalia's fears are realized: "equality of treatment is difficult to demonstrate and, in a multitiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."[504]

The Court's outdated dichotomy of rule of reason and per se illegality leads to a feast or famine mentality for litigants. When reverting to rule of reason, the *Leegin* Court understood the likely outcry. Yet it never assessed its standard's failures or explored an intermediate standard consistent with the Sherman Act's principles.

Despite a century of litigation experience with the Sherman Act, the Court can only offer the weary Sisyphus the promise that its rule of reason one day may transform into something better. Future courts perhaps can "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[505] Future courts one day might "establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[506] Until then, businesses, consumers, and lower courts are stuck with the Court's rule of reason.

[503] *Id.* at 1182.

[504] *Id.*

[505] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007).

[506] *Id.* at 2709.