March 19, 2011

100 Years A Vagrant: Grounding The Rootless Rule Of Reason for Horizontal Antitrust Restraints Under Section 1

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ABSTRACT

100 Years A Vagrant:
Grounding The Rootless Rule Of Reason for Horizontal
Antitrust Restraints Under Section 1

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Competitive restraints challenged under Section 1 of the Sherman Act are evaluated under either the rule of reason or, for a small and diminishing group of restraints, under per se rules. The role for per se rules has diminished in recent years as courts have retreated from them out of concern that their rigid application can condemn desirable competitive conduct. Now, the rule of reason is the default mode of analysis applicable to nearly all categories of alleged competitive restraints. During the same period in which the Supreme Court expanded the reach of the rule of reason, it also rendered it devoid of the little guiding content that it previously had. Thus, one hundred years after the rule of reason was first announced in Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911), the rule has been rendered essentially devoid of any meaningful content.

This article traces the disintegration of the rule of reason and argues for a restoration of categorical modes of analysis for claims brought under Section 1. From its inception, the rule of reason has called for a dangerously open-ended inquiry. However, in an earlier era, certain specific and familiar categories of conduct were condemned per se, which gave Section 1 a region of clarity. In California Dental Ass’n v. Federal Trade Comm’n, 526 U.S. 756, 781 (1999), the Supreme Court obliterated the line between per se and rule of reason analysis, and abandoned categorical antitrust analysis almost entirely. The overall result is that the rule of reason now governs nearly all Section 1 claims, but its meaning is substantially less clear now than it was 100 years ago. A set of presumptions about the lawfulness of restraints is needed to guide courts and businesses in the evaluation of restraints under Section 1.
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Without further elaboration, reasonableness is too vague a standard to guide the businessman’s actions or the judge’s discretion. Such openness is a mixed blessing. Unbounded by technical limitations, it reaches every evil. But unless disciplined by the purposes of antitrust laws, it is a vagrant standard.

Philip E. Areeda¹

¹ P. Areeda, Antitrust Law, ¶1500, p. 362 (1986).

At the same time, the broadening role for rule of reason analysis has been accompanied by Supreme Court decisions that have obscured the meaning and proper application of the rule, leaving lower courts to trail off in different directions. Indeed, the rule of reason is no rule at all, but rather a set of vague and inconsistent objectives that a court should set for itself in evaluating conduct under antitrust challenge. That is, the “rule” merely directs the court to condemn conduct only where doing so will achieve certain purposes, such as protecting marketplace competition. The various objectives are supposed to be achieved by balancing harms against benefits to competition and weighing such ineffables as the corporate purpose behind the conduct, its history, the marketplace context and the experience of courts with similar restraints. Furthermore, it is now explicit that the rule of reason provides no set boundaries around the depth or rigor of the legal and economic analysis required to conclude an antitrust case. Instead, a court presented with an antitrust claim must decide for itself how much analysis is appropriate for the case before it: “What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” Courts and agencies are frequently overruled for having selected a level of inquiry that the reviewing court later found to be too deep or too shallow. The reasons offered for these reversals in many cases offer little guidance for future cases.

The rule of reason evolved away from its former dichotomy with per se rules as courts became persuaded that economics should entirely supplant other values, such as marketplace fairness, wealth distribution, political concerns and individual freedom, and at the same time grew concerned that the certainty and predictability of the per se rules are often outweighed by their potential to condemn legitimate competitive conduct. Inherently, the rule of reason invites a more nuanced analysis than the more rigid per se rules, but there is a cost associated with expanding the rule of reason’s scope. Certainty and predictability, and perhaps even deterrence to some extent give way to case-specific evaluations; and the cost of those evaluations increases.

The result has been an abandonment of categorical antitrust analysis, which was once its mainstay. In an earlier time, the analysis of a Section 1 case began, and frequently ended, with the characterization of the alleged restraint. If the restraint was in the nature of an exclusive dealer territory assignment agreed to between a manufacturer and a favored dealer, it was so characterized as a vertical territorial allocation and condemned per se. The process of characterization was thus the focus of the litigation of claims under Section 1. These categories began to blur along with the courts’ emerging concern that antitrust law may condemn and thus deter efficient marketplace conduct. Thus in Broadcast Music, Inc. v. Columbia Broadcasting

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3 See, e.g., M. Stucke, “Does the Rule of Reason Violate the Rule of Law,” 42 U.C. Davis L. Rev. 1375 (2009) (Arguing that the rule of reason has so little content as to violate basic rule of law norms).
System, Inc., an agreement that was price fixing “in the literal sense” was not characterized as price fixing in recognition of the potential that the efficiencies of musical composition rights clearing houses might more than offset the limitations they represented to free and open competition among their members. As discussed below, a few observers believe Section 1 analysis remains too rooted in categorization, but the Supreme Court has clearly moved away from categorical analysis and has openly disparaged its propensity to yield “false positive errors,” condemning conduct that ought to be allowed.

Cut loose from categorical analysis, the rule of reason is truly a “vagrant standard.” The rule has always had an unbounded character, as has been observed many times in the past. As a leading antitrust law scholar observed in his antitrust law treatise:

Without further elaboration, reasonableness is too vague a standard to guide the businessman’s actions or the judge’s discretion. Such openness is a mixed blessing. Unbounded by technical limitations, it reaches every evil. But unless disciplined by the purposes of antitrust laws, it is a vagrant standard. Uninstructed by knowledge of the economy generally or by experience with the particular market under scrutiny, the judge or jury may respond to the parties’ relative worthiness rather than concentrate on competitive effects.

However, the current problems with the rule of reason have little to do with judges or juries failing to discipline their evaluation of conduct with reference to the purposes of antitrust law. Instead, the rule is inherently confusing, unadministrable, unpredictable and its many details have been poorly fleshed out by the Supreme Court. Many of the most basic questions about the rule of reason remain needlessly unanswered. As discussed later on, after 100 years the courts have not even established whether market power is a necessary element of a rule of reason case (and in fact have articulated inconsistent answers to that basic question. Another unsettled matter is just when a full-blown rule of reason analysis is “meet for the case.” There is no clear articulation of a standard by which parties and courts can predict how much analysis a case will entail. Also unclear is whether actual anticompetitive effects or theoretical ones govern in any particular case, since in at least the Cali decision Justice Souter seemed to place a heavy burden on plaintiffs once the court constructed what amounted to purely speculative efficiency justifications. These seemingly basis elements of rule of reason analysis remain unsettled after

7 Lemley and Leslie, supra.
8 Cal. Dental, supra, at 780-781 (“[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”)
all this time. Thus, as the rule of reason has come to dominate antitrust law it has, at the same
time, produced a discordant body of case law.

It was understandable why the rule of reason in earlier years might have gone without much in
the way of development through the process of stare decisis. Plaintiffs had more reason to
pursue per se cases through trial, and so the many obstacles in the way of rule of reason plaintiffs
may have resulted in a paucity of judicial decisions to give more content to the rule of reason.
However, the Supreme Court cases that gave the rule of reason its dominant role in Section 1
litigation date back at least as far as the landmark decision in Continental T.V., Inc. v. GTE
Sylvania in 1977, when the Court overturned its then-recent decision that had declared vertical
territorial restraints to be per se unlawful.\textsuperscript{11} For more than three decades now the rule of reason
has continued its steady ascent, and now it controls most antitrust litigation.

One commentator noted as long ago as 1994 that the rule of reason “has no substantive
content.”\textsuperscript{12} More recently, another scholar has argued that current standards under Section 1 do
not even live up to the requirements of the rule of law, mainly by imposing sanctions on citizens
who have no way of predicting if their conduct is unlawful.\textsuperscript{13} That the rule of reason continues
to lack substantive content is an ever-enlarging problem as the rule of reason has displaced per se
analysis considerably more since Mr. Piraino’s thoughtful article.

It is of course desirable, indeed unavoidable, that the rule of reason invites some degree of
flexibility. Commerce, in a sense, is like a flowing river. As Heraclitus noted 2500 years ago,
“No man ever steps in the same river twice, for it’s not the same river and he’s not the same
man.” No two restraints are identical, and no two restraints are imposed within identical
marketplace contexts. Still, flexibility is not the same as abject indeterminateness. Various
critiques of the rule of reason that predate the Court’s shift away from categorical analysis raised
concerns about the rule’s unbounded character. The boundaries that categories established have
now eroded to the point that the rule of reason knows no boundaries that are meaningful. The
administration of antitrust litigation, business planning, and the efficacy of the law are all
adversely affected by this. If the particular categories that informed an earlier antitrust
jurisprudence are wanting, the solution is not to abandon all content and leave judges and juries
to make unguided decisions. Instead, the categories need to be refined.

This article presents a critique of the rule of reason and offers an approach to restoring some of
its content. It begins by reviewing the historical development and expanding role of the rule of
reason as applied to horizontal restraints\textsuperscript{14} through the Supreme Court’s most recent

\textsuperscript{12} ThomasA. Piraino, Jr., “Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act,”
\textsuperscript{13} Maurice E. Stucke, “Does the Rule of Reason Violate the Rule of Law?,” 42 U.C. Davis L. Rev. 1375 (2009).
\textsuperscript{14} The Supreme Court has over the past three decades relegated all vertical restraints to rule of reason analysis. See,
comprehensive explication of the rule in California Dental Association v. Federal Trade Commission.\textsuperscript{15} The article then offers a critique or the modern approach to rule of reason analysis and explains how it is analytically incoherent. The courts’ diverse and inconsistent applications of the rule of reason are then explored to demonstrate how poorly the rule of reason standard has been working, and to identify specific areas that are remain in doubt. Since the Federal Trade Commission has attempted to reformulate the rule of reason within the constraints of Board of Trade and Cal. Dental, its so-called “inherently suspect” approach is considered as a possible repair.\textsuperscript{16} Finally, the article concludes by proposing a complete reversal and repudiation of current rule of reason doctrine and substituting in its place a categorical approach that will allow the business community, victims of antitrust violations, government enforcers and the courts a measure of transparency and predictability.

II. The Evolution and Expansion Of The Rule Of Reason

The history of the rule of reason, in fact of Section 1 doctrine as a whole, can be seen as a trial-and-error evolution. It began with the Court’s unqualified view of the prohibition against all restraints of trade in Trans-Missouri Freight, which the Court tempered in Standard Oil. Section 1 doctrine then developed into categorical modes of analysis with the introduction of per se illegal categories of conduct. For an extended period, the crux of antitrust analysis was a process of categorizing conduct, placing it either into or outside of certain categories that were deemed illegal per se. Since per se rules admitted of no justifications for the conduct, categorization eventually became more complex as the Court came to find value in evaluating the economic context for conduct that literally qualified for per se illegality but where rigid prohibition seemed potentially overbroad. Thus NCAA, Professional Engineers and other cases established a third hybrid “quick look” mode of analysis. The process of categorization in antitrust cases remained essential. However, this introduction of truncated rule of reason analysis significantly blurred the categories of conduct, and the Court began to question whether the categorical approach really worked. Eventually in Cal. Dental, the Court abandoned categories altogether and introduced a truly case-specific and more deeply contextual regime for Section 1 analysis. The rule of reason now calls for an “enquiry meet for the case.”

\textsuperscript{15} 526 U.S. 756 (1999).
Coinciding with the trend toward blurring and then eliminating categorical antitrust analysis the Court also shifted away from most vestiges of the *per se* rules, leaving only hard-core cartel activity subject to them. The Court’s increasing skepticism about the economic consequences of rigid *per se* rules led to the overturning of previously long-standing *per se* prohibitions against vertical market allocations and resale price maintenance. Aside from horizontal cartels, all conduct is now subject to some degree of rule of reason analysis. The end result is that the rule of reason has became considerably more important, and at the same time much less clear and predictable in its application.

### A. Early Development of the Rule of Reason

The rule of reason’s history has been traced too often to require much attention to it here. However, it is worth pausing to consider why the rule was adopted in the first place and how it evolved into such an unworkable standard that governs the analysis of nearly all alleged antitrust offenses.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be unlawful.¹⁷

Initially, the Supreme Court took the view that the Sherman Act said what it meant and that all agreements in restraint of trade or commerce were declared by Section 1 to be unlawful – an approach that had more appeal as a matter of strict statutory construction than as a matter of public policy.¹⁸ As the Court observed many years later, “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”¹⁹ The *Trans-Missouri Freight* decision thus portended to outlaw common commercial arrangements even if, on balance, they were efficient and procompetitive.

Thus, 14 years after *Trans-Missouri Freight*, the Court took another approach to interpreting the statute, finding its language sufficiently unclear as to justify judicial interpretation, and calling on the common law to support the imposition of a rule of reason to clarify the statute’s purportedly vague and undefined terms, specifically the terms “restraint of trade or commerce among the several States, or with foreign nations.”

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¹⁸ *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 312 (1897). “The language of the act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act prohibited…. If such an agreement restrains trade or commerce, it is prohibited by the statute…. See also, *United States v. Joint Traffic Association*, 171 U.S. 505, 569 (1898)(“ Has not Congress, with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.”)

¹⁹ *Chicago Board of Trade v. United States*, 246 U.S. 231, 239 (1918).
commerce.”\textsuperscript{20} The \textit{Standard Oil} decision gave no clear indication of what was meant by a “rule of reason” but evaluated various aspects of the Standard Oil trust by reference to its “intent and purpose to exclude others” from competition, the character of the defendants’ conduct, and the resulting extension of power over the petroleum industry.\textsuperscript{21}

During the same term, the Supreme Court described \textit{Standard Oil} to have held “that as the words ‘restraint of trade’ at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have a like significance.”\textsuperscript{22} Thus in its earliest formulation, the rule of reason took its direction from the common law, and evaluated whether the intended or actual effect of a challenged restraint unduly contravened the public’s interest in “the free movement” of trade in the channels of interstate commerce.\textsuperscript{23} The common law had long recognized the validity of contracts that restrained trade provided they were “reasonable… in reference to the interests of the parties concerned and reasonable in reference to the interests of the public….\textsuperscript{24}

One important early gloss on the rule of reason was provided by Judge Taft in \textit{United States v. Addyston Pipe & Steel Co.},\textsuperscript{25} where he articulated what eventually became known as the ancillary restraints doctrine. After tracing the common law rules applicable to agreements not to practice one’s trade and not to compete with a business in a contract for its sale, Judge Taft observed that to be lawful and contract that imposed some restraint on trade or competition:

\begin{quote}
must be one in which there is a main purpose, to which the covenant in restraint is merely ancillary. The covenant is inserted only to protect one of the parties from injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the
\end{quote}

\textsuperscript{20} \textit{Standard Oil Co. v. United States}, 221 U.S. 1, 60 (1911). “And as the contracts or acts embraced in the provision were not expressly defined… it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.”

\textsuperscript{21} 221 U.S. at 75-6.

\textsuperscript{22} \textit{United States v. American Tobacco Company}, 221 U.S. 106, 179 (1911).

\textsuperscript{23} \textit{Id.}, at 180.

\textsuperscript{24} \textit{Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.}, [1894] A.C. 535, 565; see also, \textit{Mitchell v. Reynolds}, 1 P. Wms. 181 (K.B. 1711)(upholding a baker’s covenant not to compete with the bakery he sold to the plaintiff for a period of five years in a limited vicinity surrounding the business sold); \textit{Rogers v Parry}, (1613), 2 Bulstr 136(upholding as reasonable a joiner’s promise not to practice his trade from his house for 21 years)

\textsuperscript{25} 85 F. 271 (6th Cir. 1898).
unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract… is merely to restrain competition, and enhance or maintain prices, it would seem that there is nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void… There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.26

Under the ancillary restraints doctrine, the initial step involves asking whether there is some legitimate agreement to which the restraint is ancillary, and, if so, whether the restraint is reasonable in relationship to the legitimate objectives of the parties. A restraint is unreasonable under this approach either if it is “naked” and unconnected with any legitimate transaction, or if the restraint is connected to something legitimate but excessive for its purposes. This ancillary restraint doctrine falls neatly out of common law cases that approved of a seller’s covenants not to compete with the business being transferred provided that the restraint was reasonably limited in time and geographic scope to permit the buyer to fully exploit the business without interference from the seller.27

The ancillary restraint doctrine does not entirely encompass the rule of reason, but provides a useful starting point for antitrust analysis of many arrangements that are removed from the reach of per se rules. However, even if a restraint that forms part of a legitimate transaction fails to meet the ancillary restraint test, such as by being unduly restrictive for the purpose intended, it may nevertheless be lawful, such as where the parties obviously lack sufficient market power to affect marketplace competition. [Conversely, restraints that the common law would have tolerated under the ancillary restraints approach have been condemned under the Sherman Act.] cite?

B. Board of Trade
The most enduring explication of the rule of reason is found in Justice Brandeis’ landmark opinion in Board of Trade of the City of Chicago v. United States:

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

26 Id. At 282-283.
27 Mitchell v. Reynolds, (1711) 1 P Wms 181; Dier’s Case.
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 the restraint is 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.28

This statement of the rule of reason has guided the courts for nearly 100 years,29 as recently as this past term providing the basis for the Supreme Court’s ruling that professional sport league restraints should be treated under the rule of reason on the ground that some cooperation is necessary to make the end product available.30

*Board of Trade* marked an important departure from the ancillary restraint approach in the *Addyston Pipe* decision, which had tied the Sherman Act to the common law rule against restraints on trade. Justice Brandeis in *Board of Trade* considered relevant a variety of questions going to the nature of the marketplace, the business involved in the restraint, its history and most importantly the actual or probable effects of the restraint, none of which had relevance under common law. The common law ancillary restraint rule was limited to an examination of the parties’ intent and the relationship between their legitimate business transaction and the restraint. *Board of Trade* shifted the analysis toward a more modern economics approach that weighs the actual or probable effect of a restraint by examining the relevant economic market in order to assess the market power of the parties and thus their ability to have an impact on consumer welfare. Analysis of the market “condition before and after the restraint is imposed” takes the court far more deeply into economic analysis of effects than was ever contemplated by the ancillary restraint doctrine.

One can compare the approach in *Bd. Of Trade* with the common law by considering such cases as *Mitchell v. Reynolds*. That case involved the sale of a bakery under a covenant by the seller not to compete with the buyer for a period of time in the same locale. This covenant not to compete in that historic case was lawful under the common law rule regardless of whether the parties had intended to assure the bakery’s buyer of a local monopoly for a period of years, which may very well have been the case. That decision says nothing about the condition of the relevant market for the baking trade in the locale because the only issue was whether the restriction on the seller was minimally broad enough to assure the buyer of the fruits of the acquisition transaction. The rule of reason in *Board of Trade* might have yielded a different outcome if the parties not only sought to protect the buyer’s legitimate interests but also to assure

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28 246 U.S. 231, 283 (1918).
29 This language has been quoted by courts more than 240 times.
it of a continuing monopoly; if the history of the baking trade in the relevant market made clear that the seller was the buyer’s only likely rival; if the buyer had previously started to enter the bakery market to compete with the seller and was induced instead to purchase the seller’s business at a price that shared the monopoly profits that flowed from eliminating rivalry, and so on.

C. The Development of Per Se Categories
The cases that announced the rule of reason contained in them the seeds of the *per se* rules. *Standard Oil* attempted to reconcile the newly announced rule of reason with its earlier more rigid denunciation of the railroad cartels in *Trans-Missouri Freight*, where it found the restraints to be ones as to which “resort to reason was not permissible,”

considering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts….  

A dichotomy between rule of reason analysis and *per se* rules emerged more clearly in *United States v. Trenton Potteries* where the Court held that price-fixing agreements could not be defended on the ground that the price as fixed was asserted to have been a reasonable one. In so holding, the Court signaled an irrebuttable presumption of unreasonableness in price-fixing cases:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.

By 1947, the Court was able to articulate unambiguously that price fixing was *per se* unlawful: “Whatever justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.” This led to a categorical approach to Section 1 analysis.

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are “illegal per se.” In the second category are agreements whose competitive effect can only be

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31 221 U.S. at 65.
evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.\textsuperscript{34}

An essential step in any Section 1 case thus involved categorizing the conduct under challenge. Is \textit{this challenged conduct} price fixing, or is it something that looks like price fixing but is instead more complex and perhaps worthy of deeper analysis? Did the defendants’ concerted refusal to deal with a supplier constitute group boycott conduct, or was it properly categorized differently so as to require evaluation under a rule less rigid? These sorts of categorization questions came to predominate.

D. The “Quick Look” Rule Of Reason And The Court’s Emerging Dissatisfaction With Categorical Analysis

The dichotomy between the rule of reason and the \textit{per se} categories of analysis was always blurred by the problems of characterizing challenged conduct as fitting, or not fitting, into one of the \textit{per se} forbidden categories.\textsuperscript{35} Cases began to come to the Court that challenged the categories of antitrust modes of analysis. Thus the establishment of common pricing for all copyrighted musical compositions made available for licensing through ASCAP and BMI was rather obviously “price fixing” among the owners of the copyrights, but was evaluated under the rule of reason after the Court refused to so characterize it.\textsuperscript{36} The problem, the Court noted, was that the conduct involved price fixing only in a literal sense, but that the context was a collaboration that provided a different product than any of the collaborating participants could have marketed independently. Since this new product needed a price, \textit{someone} had to set it and doing so should not be condemned as anticompetitive without any analysis of the economic context in which the conduct took place – even though the conduct was literally price fixing. The Second Circuit had condemned the arrangement, which indicated that the categorical approach was leading to undesirable results. It was also obvious that the Supreme Court was stretching to exclude the blanket licenses from the “price fixing” category.

Eventually, the very notion of the categorical dichotomy began to unravel in \textit{National Society of Professional Engineers v. United States},\textsuperscript{37} where the Court applied rule of reason analysis to strike down a professional association rule that discouraged competitive bidding on the basis of price. Although the conduct was essentially a form of price fixing, the court did not apply the \textit{per se} rule, nor did it explain why not. The \textit{BMI} problem was not present in \textit{Professional Engineers} where the price restraint applied to the separate services provided by each independent professional rather than to the pricing of the distinct output of a joint venture among rival sellers.

\textsuperscript{35} See, Mark A. Lemley & Christopher R. Leslie, “Categorical Analysis in Antitrust Jurisprudence,” 93 Iowa L. Rev 1207, 1225 (2008)(“One of the problems with categorical analysis is that the boundaries of categories shift without logic or warning.”) (hereinafter, “Lemley and Lelie”).
\textsuperscript{36} \textit{Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.}, 441 U.S. 1, 8 (1979)(“ easy labels do not always supply ready answers.”)
\textsuperscript{37} 435 U.S. 679 (1978).
Nevertheless, the Court declined to apply either the *per se* rule or a full-blown rule of reason analysis. Instead, the Court stated that although “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement,” it was necessary to evaluate the Association’s proffered justifications for its rule before concluding that the restraint on price competition was a direct affront to the Sherman Act. The analysis appeared to proceed without reference to the usual categories of antitrust analysis.

Then in 1979 the court seemed to hold to categorical analysis, but began to recognize explicitly a third category of “truncated” rule of reason analysis when it struck down the NCAA’s rules restricting the number of football game television broadcast rights that any member team could sell and limiting price competition in bidding for television contract arrangements. The Court struck down the rule as an unlawful restraint on price and output, but declined to apply a straightforward *per se* analysis noting that the industry of college football is one “in which horizontal restraints on competition are essential if the product is to be made available at all.” Nor did Justice Stevens delve into anything resembling a fulsome rule of reason analysis, which would have involved weighing the *Bd. Of Trade* elements: evidence concerning any peculiar facts about the industry; market conditions before and after the restraint; the nature of the restraint and its probable and actual effects; and the purpose behind the restraint and the problem it was purportedly imposed in order to solve. Instead, the Court entertained only the last of these factors by considering rather briefly the various justifications offered by the NCAA. In adopting this approach and deviating from *Bd. Of Trade*, the Court observed in a famous footnote:

> Indeed, there is often no bright line separating *per se* from rule of reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.

After NCAA, even categorizing conduct as a “naked restraint” did not resolve how much of an inquiry was called for.

**E. Cal. Dental And Final The Disintegration Of The Categorical Modes of Rule of Reason Analysis**

In *Cal. Dental*, the Supreme Court finally repudiated altogether the notion that the rule of reason embodies a single unified substantive standard and shifted it to an undefined process by which courts are to proceed in evaluating alleged antitrust violations. At the same time, the Court repudiated categorical modes of analysis that had governed Section 1 at least since *Trenton Potteries*. *Cal. Dental* made clear that the categorical approach was fully repudiated:

39 Id. At 101.
40 Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
41 Id., at 103, fn. 25.
The truth is that our 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. We have recognized, for example, that “there is 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.

“Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition.” Indeed, the scholar who enriched antitrust law with the metaphor of “the twinkling of an eye” for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a ‘spectrum’ of adequate reasonableness analysis for passing upon antitrust claims: “There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . . Nevertheless, the quality of proof required should vary with the circumstances.” P. Areeda, Antitrust Law ¶1507, p. 402 (1986).

F. Expansion Of The Rule Of Reason

During this same period in which the categorical approach gave way to a less definite one, the Court retreated from per se analysis except as to the residual price fixing and market allocation offenses. The Supreme Court’s recent decisions express a decided ambivalence about the relative benefits of per se rules as opposed to rule of reason analysis. On the one hand, the Court has noted certain obvious benefits of per se rules:

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.

The Court also has made clear that administrative efficiency is not the sole foundation for per se rules, observing that they are at the same time substantive rules having statutory force:

The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen…

42 Cal. Dental, 526 U.S. at 781 (case citations omitted).
In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still. So it is with boycotts and price fixing… Every such horizontal arrangement among competitors poses some threat to the free market.\textsuperscript{44}

Some earlier cases offered additional benefits of \textit{per se} rules. \textit{Topco} in particular lauded the rules as necessary both for the business community and to avoid immersing courts into matters beyond their competency:

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. 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 in order to maintain a flexible approach.\textsuperscript{45}

Notwithstanding these administrative and other benefits of per se rules, the Court has overturned all per se rules that previously applied to vertical price and non-price restraints, weakened the per se rule applicable to tying by requiring proof of market power,\textsuperscript{46} and has created no new per se rule in at least a half century.\textsuperscript{47} In \textit{Leegin} the Court acknowledged its “reluctance to adopt per se rules.”\textsuperscript{48} In the trade-off between efficient and predictable per se rules and the reduced error potential of more thorough rule of reason analysis, the federal courts have discernibly shifted to favor the latter. Reluctance to apply a rule that might generate “false positive” antitrust condemnation has repeatedly surfaced in recent opinions under both Sections 1 and 2 of the Sherman Act.\textsuperscript{49} On balance, the battle between the per se rules and the rule of reason has

\textsuperscript{44} FTC \textit{v. Superior Court Trial Lawyers Ass'n}, 493 U.S. 411, 433-434 (1990).

\textsuperscript{45} \textit{United States v. Topco Assocs.}, 405 U.S. 596, 610 (U.S. 1972).

\textsuperscript{46} \textit{Jefferson Parish Hosp. Dist. No. 2 v. Hyde}, 466 U.S. 2, 18 (1984)(“[A]ny inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold…”).

\textsuperscript{47} The per se rule against price fixing seems to have been established at least by 1927. See, \textit{United States v. Trenton Potteries Co.}, 273 U.S. 392 (1927). In \textit{U.S. v. Topco Associates}, Justice Marshall cites Judge Taft’s1899 decision in \textit{Addyston Pipe} among other cases for the proposition that horizontal territorial allocations are per se offenses. \textit{United States v. Topco Assocs.}, 405 U.S. 596, 608 (U.S. 1972). However, the concept of per se illegality in antitrust law did not crystallize till much later than that. Indeed, contrary to Justice Marshall’s view, Justice burger actually dissented in \textit{Topco} on the ground that the Court was creating a new per se rule.


\textsuperscript{49} See, e.g., \textit{Bell Atl. Corp. v. Twombly}, 550 U.S. 544, 554 (2007) (Referring to “false positives” and “false inferences” as concerns supporting a relaxation of standards for motions to dismiss antitrust claims); \textit{Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP}, 540 U.S. 398, 414 (2004)(limiting Section 2 liability to avoid potential “false positive” mistaken inferences that chill the very conduct the antitrust laws are designed to
resulted in a “triumph” of the latter.\textsuperscript{50} Thus, aside from cases involving hard-core cartel activity, all Section 1 cases are relegated to Cal. Dental’s “continuum” rule of reason.

Doubts about the wisdom of per se rules are not new on the Court. In Topco, Justice Blackmun concurred in the decision to condemn the association’s market allocation rule, but only because he felt constrained by stare decisis. Blackmun stated that the consequences of striking down Topco’s rule would be harmful to the public interest, but conceded: “The per se rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.”\textsuperscript{51} The majority opinion in Topco also noted in passing that there was considerable debate about the wisdom of per se rules, although most of the references were addressed to the application of per se prohibitions to vertical restraints – which the Court later dropped.\textsuperscript{52}

III. An Analytical Critique Of The Rule Of Reason

A. Board of Trade And Its Critics

The Board of Trade opinion and its rule of reason have been the target of a steady stream of scholarly criticism from left, right and center perspectives. Indeed, it is hard to find a kind word about Justice Brandeis’ rule of reason. Robert Bork, whose Antitrust Paradox helped usher in the current restrained view of antitrust, argued that Brandeis had fashioned a “deviant” rule of reason.\textsuperscript{53} His primary objection was that the open-endedness of Brandeis’ rule allowed courts to condemn conduct on the basis of any number of factors that, in his view, had no connection with the narrow economic efficiency objective of antitrust. Bork argued that Brandeis was animated by a view of antitrust that not only protected consumers from private restraints, but also protected smaller and less efficient rivals. Thus, Bork analyzed the famous passage from Board of Trade as distinguishing “regulation” of trade from its “suppression” as reflecting an antitrust philosophy that permitted private restraints that protected the small and weak from the dominant. “A strong underlying policy orientation for Brandeis’ rule seems to have been sympathy for small, perhaps inefficient, traders who might go under in fully competitive markets. His rule thus spoke for the tempering of competition by private agreement.”\textsuperscript{54} Thus one longstanding objection to Board of Trade has been that it reinforces the power of individual judges to impose their own philosophies on competitive markets.

Judge Taft’s objection to at least one version of a rule of reason is perhaps echoed in Bork’s later critique of Board of Trade. In Addyston Pipe Taft rejected arguments that sought to invoke English case law for the proposition that some naked restraints on competition were permissible.

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\textsuperscript{50} Piraino, supra, 47 Vand. L. Rev. at 1757.
\textsuperscript{52} Topco, supra 405 U.S. at 609, n. 10.
\textsuperscript{54} Id., at 815.
In fashioning his ancillary restraints doctrine, Taft rejected these arguments on the ground that judges should not be deciding how much competition is a good thing. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not. The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.55

Others have expressed concerns about administrability of a rule that sets almost no meaningful boundaries around what antitrust courts can consider. Professor Herbert Hovenkamp observed in his indictment of the rule: “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.”56 Richard Posner has similarly argued that Board of Trade fails to provide meaningful guidance, and thus can be interpreted to prohibit conduct that is on balance efficient. Referring to Brandeis’ formulation of the rule of reason, Posner observes: “This is not a helpful formulation. To be told to look to the history, circumstances, purposes and effects of a challenged restriction is not to be provided with usable criteria of illegality.”57

Most recently, Professor Maurice Stucke presented a thoughtful analysis of the rule of reason and concluded that it does not even comport with internationally-recognized rule-of-law standards. A primary concern in this regard is vagueness. Even prior to Board of Trade, the rule of reason announced in Standard Oil had precipitated a policy battle between those who argued for clearer rules and those, including Justice White, who believed the legal standard should allow courts discretion to permit certain private arrangements. Board of Trade, Stucke argues, set back President Wilson’s legislative efforts to bring clarity to antitrust law through the enactments of the Clayton Act and the Federal Trade Commission Act.58 “Even if another court found a similar practice in a different industry anticompetitive, [Board of Trade’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.” Years later, after the rule of reason came to predominate in antitrust law, little has been achieved to give it clarity. Stucke posed the question: “So how does the rule of reason, the Court’s ‘prevailing,’ ‘usual’ and ‘accepted standard’ for evaluating conduct under the Sherman Act, fare under these rule-of-law principles? Poorly.”59 Specifically, he points out that those who are subject to the law cannot effectively plan their affairs to conform to the demands of the coercive power of government; and that the rule is so obscure as to allow the power of government to be exercised arbitrarily.

59 Stucke, supra, 42 U.C. Davis L. Rev. at 1421.
That there is a plausible argument that a rule of this vintage is so devoid of predictable content as to violate rule-of-law precepts is a rather stunning indictment, (although Stucke goes on to argue only for rather modest improvements at the margins of rule of reason doctrine).

Others have described the Board of Trade standard as “hardly illuminating,” as having “‘legitimized the ‘big case’ in antitrust.” It would be a challenge to find a legal standard that has endured as long as Board of Trade’s rule of reason against so much scholarly objection from so many different points of view. A full catalogue of Board of Trade’s detractors would be difficult to assemble. The reader is invited to locate commentary championing the Brandeis standard. It works for no one.

B. A Critique Of Cal. Dental
The Cal. Dental decision ought to have drawn at least as much scholarly criticism as Board of Trade. It drains rule of reason analysis of content, aggravates the already excessive costs of antitrust litigation and compliance, relies on the improbable force of stare decisis for future clarification of its empty standard, and bizarrely disregards established law and policy against defending restraints on the ground that competition does not work in a particular industrial context.

i. Cal. Dental’s “Competition Doesn’t Work” Analysis
A troubling aspect of the analysis in Cal. Dental is that the Court strained to accept an argument that flies in the face of sound policy and previously unyielding precedent. The defense in Cal. Dental was that unfettered price competition by dentists, given the peculiarities of their business, would not work to consumers’ benefit and might actually harm them. The Court indulged this defense at length, ultimately agreeing with the dentists that price competition in their industry might not work. Noting the asymmetry of information between consumers and suppliers in the market for dental services, and leaning heavily on the “professional context,” the Court concluded that a horizontal agreement to restrict price advertising might, in the mind of the conspirators (i.e., the California Dental Association) spur consumers to consume more rather than fewer dental services. Justice Souter reasoned that the Association’s self-imposed prohibition of discount advertising “appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators).” Thus, at least the conspirators’ purpose might have been a benign one (although there was no evidence to that effect), but many industries honestly believe competition for them is rueful. Proof that competition is a bad idea for this or that particular industry has never been admissible in antitrust cases. Still, Justice Souter chastised the Ninth circuit for ignoring “the possibility that the particular restrictions on

professional advertising could have different effects from those ‘normally’ found in the commercial world…”"62 thus accepting the possibility that dentistry is an industry where price competition does not work.

This is precisely the defense based on a frontal assault on competition itself which the case law has roundly and soundly rejected. Society of Professional Engineers involved a similar, and more compelling such defense.63 That case involved a challenge to a professional society’s ethical rule “prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services.”64 Civil engineers “study, design, and construction of all types of improvements to real property -- bridges, office buildings, airports, and factories are examples.”65 In defense of that price advertising ban, it was argued that public safety was imperiled by free and unfettered price competition; i.e., that “competition among professional engineers was contrary to the public interest.”66 Civil engineers, if allowed to compete on price, might submit low-ball bids to obtain contracts and then be forced to oversee public works projects that were inadequately budgeted. There defendants mounted a nearly identical argument to that of the California Dental Association: that price competition in that particular industry would not work because competition would lead to unethical deceptive practices and because “engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project.”67 Justice Stevens’ opinion laid bare that defense: “The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.”68 The Society’s defense “on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.”69 In other words, “competition does not work” is not a defense. This same defense was rejected again unambiguously in FTC v. Indiana Federation of Dentists. There, a dentists’ professional association argued that quality of care would be compromised if dentists were free to compete as to what information they would supply to payment plans in support of authorization requests. Again the Court said: “The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to ‘nothing less than a frontal assault on the basic policy of

62 Id., at 773.
64 Id., at 683.
65 Id., at 682.
66 Id., at 684.
67 Id. At 651-2.
68 Id., at 689.
69 Id. At 695.
the Sherman Act.’” These “competition does not work” arguments are indistinguishable from the one the Court accepted in Cal. Dental.

If dentistry cannot be practiced ethically in a competitive marketplace, an industry antitrust exemption could be sought from Congress. It was inappropriate for the Court to overrule the Sherman Act itself as applied to a particular industry practice. The Court has done that only once, for professional baseball, with questionable wisdom and Congress eventually reacted to undo much of the damage. With the exception of professional baseball, whose antitrust exemption traces back to an earlier era of commerce clause doctrine coupled with perceived congressional acquiescence over time, no industry has ever been singled out by the Court for specialized antitrust immunity. As Justice Stevens pointed out in Professional Engineers, “this Court has never accepted such an argument.”

Furthermore, by opening the door to industry-specific arguments against the desirability of price competition, the Court opened a Pandora’s box, further contributing to the uncertainty and unpredictability of the rule of reason. If dentistry is a bad industry for price competition, what about the practice of law (where there is asymmetry of information between buyers and sellers coupled with the complexity of services that dwarfs anything in dentistry); or funeral services; health care generally; and so on? One sound reason for the holding in Professional Engineers is that the courts re ill-suited to become public utility commissions deciding the proper organization of every industry in the American and global economies. Cal. Dental took an ill-advised step toward remaking antitrust rules on an industry-specific basis, and indeed forging exemptions in response to industry complaints that competition is a bad idea for them.

ii. Expanded Litigation Burdens And Social Costs

By demanding “an enquiry meet for the case” Cal Dental reflects the court’s continuing trend toward imposing ever greater burdens on antitrust plaintiffs in the interest of avoiding “false positives” so that case outcomes can better align with the economic objectives of antitrust. The per se rules and abbreviated “look” rules can theoretically yield the wrong result in particular cases, possibly discouraging or penalizing procompetitive conduct — although the extent to which per se rules have ever actually discouraged desirable conduct is a matter of pure speculation. By expanding the contexts in which antitrust defendants may advance evidence of economic efficiency justifications, the Court invites a potentially extensive economics-based inquiry to test whether a particular restraint, in its market context, might on balance benefit

72 Professional Engineers, supra at 694.
73 Twombly
consumers. This is why the Court has abandoned per se rules that previously condemned vertical price fixing and vertical territorial restraints. As the Court noted in overturning the per se rule against maximum resale price fixing, “we have expressed reluctance to adopt per se rules with regard to ‘restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.’” 74

However, there are considerable economic costs that result from the shift from categorical per se rules to more elaborate and less definite rule of reason analysis. This is especially true because Cal. Dental abandoned any clear categorical approach and opened wide the rule of reason to an infinite range of standards. Business planning, public and private enforcement and judicial decisions all have become more complex and costly.

Cal. Dental’s negative impact on antitrust compliance cannot be overstated. It is a truism that antitrust compliance efforts benefit consumers at considerably less social cost than antitrust litigation – a stitch in time saves nine. Businesses attempting to conform their conduct to the law need to know what the rules are – in advance. Risk-averse companies tend to avoid conduct if legal counsel cannot assure its lawfulness. Antitrust rules that are unclear, unpredictable and uncertain thus tend to discourage desirable conduct as well as undesirable conduct. A risk-averse and well-counseled company, having no basis for predicting how much or what sort of analysis a court might someday apply to evaluate the lawfulness of its conduct, will tend to steer clear of conduct that has anticompetitive elements but which a court might or might not find to produce net competitive benefits. Under the uncertainty created by Cal. Dental, predicting the outcome of an antitrust case that might be filed at some the future point would often require advance knowledge of such things as the relevant market definition that a court would ultimately accept for the case. Corporate legal counsel cannot engage in detailed relevant market analysis ex ante, at least not the way litigants do it in litigation with the aid of economics expertise and at enormous expense. Viewed from an economics perspective, the cost of making accurate predictions about conduct that is lawful but close to the line of legality – conduct that should not be discouraged – exceeds the expected returns.

Consequently, the “false positives” that the Supreme Court has so assiduously sought to prevent have to some degree merely shifted from the court room to the board room. The very leniency of modern antitrust law is buried in the obscurity and unpredictability of a rule of reason. Perversely, only the less risk averse firm will fail to be deterred from beneficial conduct, the very firms that will feel equally at liberty to indulge in harmful conduct.

Antitrust enforcement is also hampered by Cal. Dental’s open-endedness. Enforcement agencies and private plaintiffs need to know what is permitted and what is not; which cases to pursue and which ones not to. Evaluating a particular enforcement initiative should not be a matter of

guesswork. Just as vague rules discourage desirable business conduct, uncertainty likewise begets agency reluctance to bring desirable cases.

And, of course, vague antitrust rules impose significant burdens on the courts. Courts expend considerable amounts of scarce resources on rule of reason antitrust litigation. As the Supreme Court noted in *Superior Court Trial Lawyers* among other cases: “The administrative efficiency interests in antitrust regulation are unusually compelling. The per se rules avoid ‘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.’” True, a court *can* apply a truncated rule of reason if it finds that appropriate and thus avoid some of the protracted litigation. However, *Cal. Dental* and cases in its wake have done very little to explain the circumstances that should trigger abbreviated analyses, nor how much abbreviation is appropriate. It is not unusual for trial courts to find their “incredibly complicated and prolonged” antitrust trial results reversed on appeal precisely because the trial engaged in too much or too little rule of reason evaluation of defendants’ conduct. *Cal. Dental* is a good example.

*Cal. Dental’s* case-by-case approach thus relegated Section 1 analysis to the very “shifting, vague and indeterminate” standard that Judge Taft cautioned against more than 100 years ago. The decision trumpets case-specific, individually-tailored, review to help ensure correct outcomes in particular cases at the expense of efficiency, predictability and uniformity in the administration of antitrust law. Trial courts are directed not to fall prey to regarding rule of reason analysis as a “spectrum” of adequate reasonableness analysis, but at the same time admonished to find the right degree of reasonable analysis among the infinite possibilities. Although there rather obviously *is* a spectrum of adequate analyses, the Court’s warning about the term “spectrum” as metaphor is that the term “spectrum,” borrowed as it is from the scientific terminology of optics, suggests *too much* clarity, thereby deceptively suggesting “more precision than we can hope for.” All hope of precision is abandoned.

### iii. The Empty Promise Of Stare Decisis

The Court seemed to acknowledge the need for transparency in the law, but resorted to a peculiar and unlikely mechanism to achieve even a small measure of it. Citing Professor Areeda, the Court acknowledges the “necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future.” To achieve an increasingly predictable standard, Justice Souter thought that transparency in judicial decisions would create a body of case law that would eliminate

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76 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 – 84 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).
77 *Cal. Dental*, supra, 526 U.S. at 780.
ambiguity and doubt over time. Justice Souter’s vision is for a future in which the accumulated experience of courts will eventually bring order as similar cases beget similar results after receiving similar levels of review. The emergence of a body of well-reasoned and fully-articulated decisional law is anticipated to make antitrust decision making easier and easier over time. “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.”

This seems fanciful at best. The rule of reason is now 100 years old and the promise of clarification through judicial application has proven to be empty. The standard it purports to set is devoid of substantive content that could guide judges to apply it consistently so that patterns could emerge. Not only has the Court failed to give content to this legal standard, but it has indulged in shifting the standard around in response to the economic theory du jour. Consider Cal. Dental: The Sherman Act was already more than 100 years old when Court made a major adjustment to the application of the rule of reason.

In fact, stare decisis has not been a particularly strong force of stability in any aspect of antitrust jurisprudence. The most unsettled period of antitrust law has been within the past three decades which have brought outright reversals of at least three longstanding antitrust rules, and a sea change in the policy underpinnings that the Court attributes to the statute. Time-honored conceptions about predatory pricing have been relegated to history, per se rules of equally impressive vintage have been overruled, case law precedents from the hey day of merger enforcement have been roundly repudiated, and even the procedural rules for testing antitrust complaints have been upended.

Even if antitrust rules had more staying power, experience has shown that “similar” cases do not exist when every aspect of context is allowed to be taken into account, so that the promise that similar cases will yield a coherent body of law is unattainable. The vast universe of economic activity takes place in infinitely varying market contexts that may arguably have different likely effects in different sorts of markets at different times. For example, a fully and transparently explained judicial condemnation of an agreement among cast iron pipe producers representing 40% of their relevant markets in 2010 to refuse to produce products responsive to an amendment in the applicable safety code will shed no light on an agreement among 18% of aluminum can producers to do the “same thing” in 2020, let alone an agreement among patent licensors the

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78 Id.
79 See note ___ supra.
80 Cites to dismantling of policies
81 Brooke Group
82 RPM cases
83 Von’s and its judicial critics
84 Twombly
pharmaceutical market for certain blood pressure medications to do the “same thing” in 2050. In fact, it is not clear that any two conspiracies really “do the same thing” if all aspects of their respective contexts are weighed into the mix.

*Cal. Dental* itself is a case in point. There the Court managed to find reason to expect procompetitive net effects from a horizontal agreement among dentists to suppress advertising of discounts, thus requiring a “more sedulous” look than the true “quick look” analysis that had been applied by the Ninth Circuit. Prior to *Cal. Dental*, it seemed clear beyond dispute that an agreement among rival professionals to refrain from price competition by suppressing price information was subject to summary condemnation under a “quick look” analysis; and that an agreement among professionals that went further to coordinate price terms was *per se* unlawful. Yet a bare majority on the Court found the dentist’s agreement not to advertise such things as across-the-board discounts required more analysis. This is indicative of the problem. Cases cannot establish rules if they are all distinguishable on their facts.

Certainly, since *Cal. Dental* there has been no discernible trend in antitrust decisions that gives life to Justice Souter’s notion that an infinitely variable rule of reason would eventually settle into predictable pockets as similar cases begat similar analyses and results.

iv. **Aggravation Of The Board Of Trade Relevancy Problems**

Another problem with *Cal. Dental* is that it managed to further obscure a rule that was already so inclusive of relevant factors as to exclude almost nothing from consideration. *Board of Trade* instructs that the relevant evidence in a rule of reason case includes the history of the industry, its condition before the restraint was imposed and afterwards, facts that are peculiar to the business that might set the restraint on a different footing than in some other industry or business, the nature of the restraint, the purposes behind the imposition of the restraint including the problems it was intended to solve. All of this opens nearly everything to relevance. As one observer has put it: “Justice Brandeis’ statement of the rule of reason in *Chicago Board of Trade*...has been one of the most damaging in the annals of antitrust. The statement has suggested to many lower courts that, if the analysis is under the rule of reason, then nearly everything is relevant.”

v. **Impairment Of Settlements**

Settlement is more difficult under uncertainty about what “enquiry is meet for the case.” Uncertainty impairs, and thus delays, settlement by preventing opposing sides from finding common ground. The substantive law of antitrust should facilitate reasonable settlements because they avoid the high costs of litigation through trial and appeal while vindicating the

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87 246 U.S. 231, 283 (1918).
objectives of antitrust law. Most antitrust cases settle, but that does not mean that they settle as early as they might, or that the terms of settlement are reasonable. Indeed, the Supreme Court has expressed frustration that the huge exposures defendants face in antitrust cases can force them to pay extortionate amounts to settle weak cases just to keep them from heading into the unpredictable waters of a jury trial.89

However, what the Supreme Court has not addressed are the reasons why defendants might regard those waters as riddled with reefs and shoals.90 The unpredictability of antitrust litigation under the rule of reason is at least a contributor to this phenomenon. In rule of reason cases defense counsel has only a weak basis for predicting how elaborate and costly the litigation will be and what outcome is most likely – both of which are much clearer in per se cases. Although plaintiffs may rarely win rule of reason cases, that is cold comfort to a defendant faced with a small but unpredictable risk of enormous liability exposure. So the defendant-friendly rule of reason is in tension with one of its very objectives, leaving defendants with unpredictable outcomes and large exposures and thus actually promoting so-called extortionate settlements and prolonging litigation.

vi. Anti-Plaintiff Bias

Plaintiffs necessarily bear the burden of proof of their case at trial. In the absence of a settlement the variable rule of reason then goes on to create problems for the plaintiff’s presentation of its case. How much “enquiry is meet?” A plaintiff cannot with assurance know what to allege or when to rest, since the amount of evidence that it must present in order to prove the contours of the relevant market, the defendants’ market power, etc., are unknowable. Cal. Dental sets a trap for the unwary, and more or less assures unwitting mistakes. The Court’s bias against private plaintiffs has barely been concealed, exposed by such references as “extortionate” settlements and the like. Even if one accepted the Court’s apparently dim view of private antitrust plaintiffs, the rule of reason applies equally to governmental enforcement.

For example, the FTC lost the Cal Dental case because it failed to prove enough about the relevant market, instead relying on the court to take a “quick look” approach since the challenged conduct involved an agreement not to advertise discounts. Agreements by rivals not to compete via discount advertising seems like a familiar enough context, but the Supreme Court speculated that consumers might consume more dental services with such a restraint in place and on that basis required more proof than the FTC had presented. Yet the Court left no sign posts that could guide future litigants.

89 Twombly, supra.
90 The Supreme Court has also failed to allude to any empirical evidence or the assertion that extortionate settlements are a problem in antitrust cases, or that they are more particularly so in antitrust litigation than in other areas of the law.
The elephant in the room is the fact that plaintiffs rarely pursue, and even more rarely win, rule of reason cases.\(^{91}\) As Posner pointed out “The content of the rule of reason is largely unknown; in practice it is little more than a euphemism for nonliability.”\(^{92}\) Similarly, Lemley and Leslie observe that the “conventional wisdom is that vertical restraints evaluated under the rule of reason are essentially de facto per se legal since rule of reason cases are notoriously difficult for plaintiffs to win.”\(^{93}\) The Court’s shift away from \textit{per se} rules toward an open-ended rule of reason is consistent with its broader pro-business agenda. The Court’s unconcealed view is that Type I errors are generally to be preferred over Type II;\(^{94}\) meaning that it is preferable to give a violator a pass than to condemn a possible innocent. The rule of reason as applied in this policy context is generally unwinnable for plaintiffs.

A scant few cases like \textit{Polygram}\(^{95}\) and \textit{North Texas Specialty Physicians}\(^{96}\) stand as notable exceptions, but these were cases brought by a public enforcement agency and represent stand-out exceptions to Posner’s observation that rule of reason equates generally to nonliability. Private successes under the rule of reason are rare and indeed such cases are rarely pursued. Plaintiffs faced with this burden are likely to forego litigation because they “simply cannot afford” the investment in rule of reason cases.\(^{97}\) The litigation burden of defining relevant markets, establishing market power and proving anticompetitive marketplace effects exceeds the abilities and finances of many litigants.\(^{98}\) The Supreme Court itself has acknowledged that a rule of reason inquiry in litigation imposes “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.”\(^{99}\)

\(^{91}\) “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 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.” Maurice E. Stucke, Does the Rule of Reason Violate the Rule of Law?, 42 U.C. Davis L. Rev. 1375, 1423-24 (2009).

\(^{92}\) Posner, supra.

\(^{93}\) Lemley and Leslie, \textit{supra}, at 1260-1261.

\(^{94}\) Alan Devlin & Michael Jacobs, \textit{Antitrust Error}, 52 Wm. & Mary L. Rev. 75 (2010).

\(^{95}\) \textit{Polygram Holding, Inc. f. FTC}, 416 F.3d 29 (D.C. Cir. 2005).

\(^{96}\) \textit{North Texas Specialty Physicians v. FTC}, 528 F.3d 346 (5th Cir. 2008).

\(^{97}\) \textit{Denny’s Marina, Inc. v. Renfro Productions, Inc.}, 8 F.3d 1217, 1221 (1994).

\(^{98}\) William Kolasky has argued that \textit{Cal. Dental} is “under-appreciated” and (rather optimistically) that the rule of reason works well for plaintiffs, citing the FTC’s victory in \textit{Polygram Holdings, Inc.}, 410 F.3d 29 (D.C. Cir. 2005)

\(^{99}\) See, William Kolasky, “Reinvigorating Antitrust Enforcement in the United States: A Proposal.,” \textit{Antitrust}, Spring 2008, at 85, 87. While Kolasky lays out an interesting model for applying the rule of reason, he neither cites any other rule-of-reason plaintiff victories, nor describes the rule of reason model that courts actually use. Indeed, by his own account, the court in \textit{Polygram} came to the correct conclusion via wrong analytical avenue. \textit{Id.} at 88. In any event, the list of plaintiff successes in rule of reason cases under \textit{Cal. Dental} is quite short.

IV. An Analytical Critique Of The Rule Of Reason – Gaps and Inconsistencies

It should therefore not be surprising that the case law applying the rule of reason and its more abbreviated variants has not only failed to live up to its promise of a transparent body of decisional law, but has instead left wide-open gaps on a number of central issues. A full century after the rule of reason was first announced, courts, scholars and enforcement agencies continue to offer divergent articulations of some of the most fundamental rule of reason issues.

First, it is not even clear when the rule of reason fully applies. Following Cal. Dental is it no longer helpful to say that the rule of reason is the default, because there is no longer a clear delineation between that rule and per se illegality. All that is certain when a per se rule is not applicable is that some level of analysis is then required – but how much? And more importantly, in what cases must a truly full-blown case be made? Second, it is unclear whether and at what stage of the case a plaintiff is required to establish market power. Finally, there is no definitive distinction drawn in the case law between actual and merely theoretical and conjectural effects. It is thus uncertain whether and when a party is put to the burden of proving actual effects rather than theorizing them without evidence of actual marketplace impact.

These represent enormous shortcomings. The decision to subject a plaintiff’s case to anything like a full-blown rule of reason analysis has decisive implications for many antitrust cases, as does the imposition of a burden to establish the defendants’ collective market power. Conversely, if a defendant must defend by establishing that actual procompetitive virtues of offsetting value have benefitted consumers, that is a very different burden than merely presenting a theoretical case that the conduct under challenge might have a plausible tendency to foster efficiencies and consumer benefits.

These gaps cannot be blamed on Cal. Dental, but instead combine with the open-endedness of the Cal. Dental rule of reason to lend intolerable opacity and unpredictability to antitrust law. No one disputes the enormous difference in cost and complexity between a per se or even quick-look case and a more full-blown rule-of-reason case. Nor ought it be argued that antitrust analysis should be structured to deter the very private enforcement that Section 4 of the Clayton Act was specifically tailored to encourage via the mechanism of trebling damages. Yet a litigant or court heading into a case that does not involve hard-core cartel activity often has no way of predicting the course the case might take, how complex or costly the case will be, nor the likelihood of success. That this state of the law inherently discourages private filings is self-evident. The current doctrine governing the evaluation of restraints is thus not only unruly, but contrary to the clear intent of the law.

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100 Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 2712, 168 L. Ed. 2d 623 (2007)(“ The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”)
A. Under What Circumstances Does the Full-Blown Rule of Reason Apply?

Perhaps the most basic issue that lacks a consistent and comprehensive approach is the determination of what sorts of cases merit fulsome rule of reason analysis and what sorts of cases merit something more cursory. The introduction of Cal. Dental’s sliding scale, with its obliteration of categorical analysis, makes this even more obscure, because the question is no longer simply “Rule of reason or per se?” but rather “Rule of reason, per se or something else?” Where along this infinite continuum does a case belong? This question has vexed the courts, leading them in a variety of directions.

Recently, for example, the Ninth Circuit articulated a standard of review that it dubbed “a per se-plus-or-quick-look-minus” analysis, “somewhere between pure per se and pure quick look.”\(^{101}\) In California v. Safeway the Ninth Circuit wrestled at length with deciding whether an agreement by supermarkets to pool profits was illegal per se or should instead be subjected to more penetrating inquiry.\(^{102}\) Forty years ago the Supreme Court stated without qualification that “[p]ooling of profits pursuant to an inflexible ratio… runs afoul of the Sherman Act,” deeming the practice unlawful without elaboration.\(^{103}\) Every case ever to consider the matter had likewise condemned naked profit sharing arrangements among horizontal rivals.\(^{104}\) The Ninth Circuit distinguished the earlier cases on various grounds, including whether the defendants had market power and whether their arrangement was an enduring one or one of short duration. However, resort to these distinctions found no support in the controlling precedents. A short-lived per se violation is no less a per se violation because the irrebuttable presumption of harm has never been limited to restraints of any particular duration. Moreover, the only purpose of the profit-sharing arrangement in Safeway was to avoid competition during labor strife. The point was to block a divide-and-conquer strategy by the labor union by preventing any of the supermarkets from taking competitive advantage if one of its rivals was struck and it was not. It is impossible to find any consumer benefit that could flow from such a temporary hiatus from price competition.

That the Ninth Circuit felt compelled to create another obscure label for gauging analytical depth under the circumstances of that case points to the problem. There is no real measure anymore. There are no categories with any substance. The problem with the infinite possibilities posited by Cal. Dental is that there is no agreement in any corner about how to decide what standard applies in a given case. “An enquiry meet for the case” is not a legal standard -- it merely begs one.

\(^{102}\) Id.
\(^{103}\) Citizen Publ’g Co. v. United States, 394 U.S. 131, 134-35 (1969).
Thus after 100 years, we are not simply litigating whether a particular case falls under per se rules or the rule of reason, but more fundamentally what sorts of cases should be condemned only after a full-blown inquiry, what sorts only after a quick but more “sedulous” inquiry, what sorts after just a very brief look and what sorts after no look at all once the conspiracy itself is established. Seemingly familiar categories of restraints, including conspiracies to prevent price and discount advertising (in Cal. Dental), profit pooling by rivals (in Safeway), to refrain from price competition (in PolyGram) and others are now open to an expansive array of issues that at one time would have been thought to be foreclosed. Categories of conduct with predictable anticompetitive effects have been blurred, creating the expansive role for indeterminate rule of reason analysis.

i. Full-Blown Rule of Reason in Supreme Court Cases

One reason, among others, that the rule of reason remains so obscure is that the Supreme Court has declined to articulate affirmative criteria for its full-blown application. Instead, it has relied on treating full-blown rule of reason as the default analysis to be applied unless the case presents certain attributes that eliminate or reduce the need to inquire into competitive effects of the alleged restraint. Where certain contextual traits surround the restraint it is removed to some extent from full-blown review. By extension, then, the absence of these traits might require the application of a full-blown analysis.

It might be helpful if the categories of restraint that require truly full-blown analysis could be identified. The per se categories of horizontal price fixing, market allocations, and output limitations are reasonably clear, even if the Court has obscured even these categories in cases like BMI. If the ends of the Cal. Dental spectrum were clarified, that would be an improvement.

However, a review of the traits that can be identified as triggering full-blown rule of reason analysis leaves unclear whether these traits are necessary or even sufficient ones for the removal of a matter from full-blown.

1. Facially Anticompetitive Naked Restraints

One trait that removes a case from full-blown rule of reason analysis is where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” The decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.” In Cal. Dental, supra, 526 U.S. at 770.

Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)(“this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”)
Dental, the court explained that a truncated or “quick look” rule of reason analysis is appropriate in cases presenting restraints with obvious anticompetitive potential. Thus the court referred to its prior cases in which it had applied a truncated rule of reason analysis to condemn certain types of conduct summarily. These included a dentists’ concerted refusal to provide insurance companies with requested x-rays, which was deemed “a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire,”108 an agreement among civil engineers to refuse to discuss price terms with customers;109 and the NCAA’s restriction on the number of football games for which member colleges could sell television rights.110

Thus, one might surmise that a full-blown rule of reason analysis would be appropriate where an observer with a rudimentary understanding of economics cannot conclude with confidence that the conduct is anticompetitive.

This particular attribute has eluded consistent application because in practice observers with more than just a “rudimentary” economics comprehension do not seem to agree. For example, in Cal. Dental itself, the FTC, the Ninth Circuit, Justices Breyer, Kennedy, Stevens and Ginsburg, and the majority opinion signatories all disagreed about whether the agreement was facially invalid and on how much analysis was required to draw a conclusion. Indeed, two of the FTC Commissioners disagreed with the per se analysis of Chairman Pitofsky’s opinion. The Commission (majority) regarded the agreement as per se unlawful on the basis of an unbroken line of cases treating agreements restricting price advertising as equivalent to price fixing.111 As Chairman Pitofsky observed: “This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful per se.”112 The Ninth Circuit retreated from per se analysis on the ground that the restraint was an ethical rule imposed by a professional society.113 Given this context, coupled with the fact that a naked restriction on price advertising was involved, the Ninth Circuit concluded the “quick look” or truncated rule of reason analysis sufficed to support the FTC’s ultimate condemnation of the rule. This approach also found support, since Indiana Federation of Dentists similarly involved a professional group’s imposition of a naked restraint thus prompting quick-look review. A bare majority of the Supreme Court found “quick” was too abbreviated and thus demanded further “more sedulous” inquiry to determine whether the rule might have been competitively justified. However, in so analyzing the problem, the majority appears to have deviated from fundamental antitrust orthodoxy that a restraint cannot be defended on the ground that competition is a bad idea for a

111 Docket No. 9259, op. (1996)
112 Id., at p. 27.
113 128 Fed.3d at 727.
particular industry or business. The justification was that if dentists were left freely to compete with price advertising, consumers would be too unsophisticated to benefit and might on balance be harmed by the practice. Thus unfettered competition might be harmful, and a horizontal restraint to prevent the harm was sufficiently promising to require more than a quick-look review. The dissenting justices disagreed and found that the association’s rule could not pass muster even under a rule of reason analysis.

Thus the Supreme Court’s reliance on “rudimentary” economics understanding is misplaced. Without more guidance, this purported standard fails to yield consistent, predictable outcomes in even the familiar context of price-advertising restraints. This standard for removing a case from full-blown rule of reason analysis is essentially useless in practice.

2. Ancillary Restraints: The Absence of Economic Integration Related to the Challenged Restraint

Another trait that has led the Supreme Court to remove a matter from full-blown rule of reason review is the absence of some measure of economic integration relating to the restraint. This is essentially the ancillary restraints rule that derives from the common law, and was made an enduring part of antitrust jurisprudence by (then) Judge Taft in Addyston Pipe.\textsuperscript{114}

Despite its incomplete coverage, this doctrine is relatively clear and useful in detaching certain collaborations from unduly harsh antitrust scrutiny. While there are always going to be cases that are more difficult than others to resolve, it is often clear whether a restraint is part of some legitimate activity, and, if so, whether it is reasonably tailored to the achievement of legitimate objectives.

Does the presence of some economic integration then yield a meaningful and clear category of restraints that fall within the full-blown rule of reason? The ancillary restraints doctrine has no bearing on how much analysis is required in order to balance the legitimate objectives behind a restraint against its anticompetitive effects. Put somewhat differently, this doctrine says nothing about where on the Cal. Dental continuum to place a particular case. Rather, the doctrine merely dislodges some cases from \textit{per se} analysis.

3. Questionable Economic Self-Interest

\textit{Per se} analysis has in certain cases been reserved for conspiratorial conduct that is in the economic self-interest of the conspirators. This is not a rule that has found much useful

\textsuperscript{114} In its most recent discussion of this approach the Court declined to apply the doctrine to collaborative pricing by Shell Oil and Texaco in connection with the sale of gasoline to service stations out of the joint ventures the two had formed. \textit{Texaco Inc. v. Dagher}, 547 U.S. 1 (2006) The Court introduced the concept that “core activity” of a legitimate collaboration is not subject to the ancillary restraint doctrine. In its brief opinion, the Court offered no guidance for distinguishing core activity from non-core activity. It also left some confusion about why the ancillary restraint doctrine did not apply.
application. In *United States v. Brown University*, the Third Circuit applied a full rule of reason to an agreement among universities setting common financial aid awards for needy students. On its face, the restraint had attributes of price fixing, since the universities were plainly competing for high-quality students in the categories affected by the restraint, and fixing one dimension of their competitive efforts. Agreement on how much to “pay” these students (or discount their tuition) substantially limited the “price” dimension of this competition. The Antitrust Division had thus pursued the case as a *per se* violation akin to price fixing. The Third Circuit declined to apply the *per se* rule, noting that unlike cases such as *National Soc. of Professional Engineers v. United States* and *FTC v. Indiana Federation of Dentists*, the universities had no economic self-interest at stake. That is, in the absence of the agreement each school would have expended the same amount on financial assistance to students, so the agreement was unlike common price fixing which alters the competitors’ economic outcomes.

The Supreme Court endorsed the “self-interested” restraint distinction in *Cal. Dental*, citing *Brown University*. In a similar vein are cases declining to apply *per se* rules in the context of professional services markets. The court has adhered to the view that it “would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.” Thus *per se* rules are inapplicable where the economic incentives of the alleged conspirators cannot be presumed to be self-interested, either because the actors are professionals imbued with a public interest, because the activity has overtones of charity or for some other reason.

This criterion only has narrow application and it also lacks certainty or predictability because there are cases that are flatly inconsistent with it or at least cast doubt on its universal applicability. The presumption in *Cal. Dental* that professionals are not economically self-interested is facially implausible, and runs counter to the application of *per se* rules in *Superior Court Trial Lawyers* and *Maricopa County Medical Society*, among others. If doctors could be presumed to have less interest than average in economic self-interest it would seem unnecessary for the Department of Justice and Federal Trade Commission to promulgate an

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115 5 F.3d 658, 677-678 (CA3 1993).
entire set of antitrust guidelines just for their industry. Self-interested restraint of competition among professionals is hardly aberrational.

Additionally, even if the absence of economic self interest could guide cases away from the per se rules, that still indicates nothing about where on the continuum of rule of reason analysis to place a restraint.

Thus, none of these categories sheds much light on whether, in the context of a particular case, Cal. Dental would support a full-blown rule of reason analysis. The criteria that can be extracted from precedent are sparse, seem to apply inconsistently, and offer little predictive power. The exception is the ancillary restraint doctrine, which has the virtues of being fairly clear and predictable, but it lacks the virtue of resolving very many cases that arise under Section 1.

After 100 years, it therefore remains the case that the courts have provided no reasonably predictable framework for determining just which cases are required to be evaluated fully under the rule of reason. This ought to be regarded as a very important failing.

B. Is Market Power an Essential Element of a Rule of Reason Case?
Possibly the most important turn of events in a rule of reason case is when the judge decides whether plaintiff’s burden includes proof of market power, yet the case law is inconsistent as to whether and when proof of market power is a requisite element of a plaintiff’s antitrust conspiracy case. Also unclear are basic matters about what sort of proof is required, how much market power is relevant and, indeed, the meaning of the term itself. These are critical issues because of the cost, complexity and inherent tilt toward defendants that is implicit in making this an element of a plaintiff’s case.

It is understandable why courts sometimes require plaintiffs to establish defendants’ market power as an element of their case since antitrust is fundamentally concerned with the power of market participants to distort markets and misallocate resources. If the defendants lack the economic power to bring about anticompetitive results, a private damages case is a waste of the parties’ and the public’s resources regardless of the conduct involved. There is no question that market power is in many cases a critical issue that must be resolved by the tribunal.

However, as a practical matter, proof of market power is often the single most complex and expensive part of an antitrust case. It is also rife with potholes for plaintiffs, and with opportunities for guilty defendants to evade liability because of the plaintiffs’ burden of persuasion on the murky and contestable issues involved. Proof of market power will frequently

123 The same does not hold true in criminal prosecutions. A conspiracy, once formed, violates the Sherman Act, and it is not a defense that the unlawful conspiracy would not have achieved its objectives. Moreover, the types of cases brought under the rule of reason are not prosecuted criminally.
involve detailed analysis of the proper definition of the relevant product and geographic markets; the defendant’s market share; the identities and market shares of other existing market participants; entry conditions and trends; the identity, proximity and relative strength of potential entrants; consumer substitution and cross-elasticities of demand; supply-side substitution; as well as inferences from subjective sources such as from the internal documents of market participants and observers. Economics experts are easily (if expensively) hired to disagree on nearly every aspect of this jigsaw puzzle of issues. Drawing a conclusion about the ability of defendants collectively to alter market conditions to the detriment of consumers often involves a vast theoretical and empirical undertaking if it can be accomplished at all. “Identifying market power in the markets encountered in litigation is often difficult, and quantifying market power with anything approaching precision is frequently impossible.”

Aside from practical concerns, the conceptual difficulties associated with proof of market power in litigation are truly legion. First, the various definitions of the term “market power” can present problems because there is no single definition that courts employ. “Market power” and “monopoly power” are often conflated in the case law. The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." Controlling prices and excluding competition are two different things, and especially the latter has received little attention in the case law and it is unclear if the concept applies in a Section 1 case.

One variant of the definition based on the power to control prices was offered by leading antitrust law and economics scholars Landes and Posner in their influential 1981 article, “Market Power in Antitrust Cases.” Landes and Posner defined market power as a firm’s power to raise and maintain prices above competitive levels without losing so many sales that it must rescind the increase. Their definition proved influential and has often been used by the courts. Nevertheless, that definition has well-recognized holes in it. A rival that introduces a new and better product often may profitably charge prices “above the competitive levels” for existing products, but that does not normally equate to any sort of market power that antitrust ought to be concerned with. For another example, even a perfect cartel (or monopolist) faces upper limits on its ability to raise prices – the sky is never the limit. Put somewhat differently, a monopolist can appear to face competition from products that would not be regarded as substitutes at competitive prices, but those products might nevertheless draw consumer substitution simply because of the monopoly pricing: thus the monopolist appears not to be a monopolist precisely because it is

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127 See, e.g., "Craftsmen Limousine, Inc. v. Ford Motor Co.," 491 F.3d 380, 388 (8th Cir. 2007); "R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!," 462 F.3d 690, 695 (7th Cir. 2006);
Thus the definition yields both false positives, treating a new entrant with an innovative product’s price advantage as having its market power, and false negatives, such as where a monopolist cannot raise prices simply because they are already at the monopolist’s profit-maximizing levels. More often, though, the problem with the Landes/Posner definition is a more basic practical one: just what is the competitive price for a widget? The plaintiff’s case presumes that actual prices have been inflated by collusion, but proving the “but for” competitive price that would have existed in the absence of collusion is likely to be theoretical and mostly conjectural.

As an alternative to power over price, market share thresholds have often been used as a marker for market power, and courts frequently treat high market shares as equating to market power. However, even if there were consensus about what percentage constitutes market power, market shares are simply a historic measure of past sales and not necessarily accurate in predicting the power of sellers to collude and control prices on current or future transactions. Even a 100% market share is not decisive: presumably the last umbrella repair shop in Waterbury, Connecticut had a 100% market share until it too finally went out of business, but it probably had no dangerous power over consumers just before it died. Yet courts often rely heavily on market shares as determinative of market power, and the federal agencies’ various articulations of antitrust law also emphasize market share calculations as supporting prima facie or preliminary assessments of market power, although courts and agencies explicitly also take other factors into account. Market share as a marker for market power sometimes presents no practical problems, but in other cases it does. For example, a market during its research and development stage has by definition no sales from which to make such a calculation.

As another alternative, some have advocated that a “definition keyed to elasticity of demand is more accurate and comprehensive than any alternative.” Economic theory indicates that firms in competitive markets will price at levels where demand is elastic. Elasticity of demand takes into account the willingness of consumers to switch away from the seller’s products in response to price increases. However, even adherents of this approach as a matter of theory concede that it is often not a practical measure in the context of litigation, which drives the matter back to

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128 This is commonly referred to as the “Cellophane Fallacy” based on Supreme Court’s erroneous analysis in *U.S. v. E.I. DuPont de Nemours*, 351 U.S. 377 (1956).
129 See, e.g. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992) (“Because market power is often inferred from market share, market definition generally determines the result of the case.”); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (“Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.”).
more observable measures that are less theoretically sound. Because “direct measurement of elasticity will often not be possible, surrogates are used and are important. The most widely used surrogate measure of market power is to… examine market shares, entry barriers and potential competition.” Furthermore, to avoid the problem of the Cellophane fallacy, cross-elasticities need to be measured against a theoretical “competitive market price,” which is a speculative matter at best.

There are other ways as well in which market power can be established, most notably by direct evidence. The point here is not to debate the most practical and theoretically sound definition of market power for purposes of Section 1 litigation, but merely to indicate that if proof on this issue is required for a particular plaintiff’s case, it is far from clear just what the plaintiff is supposed to prove or how he is supposed to prove it. In some cases this will not matter, such as where the defendants obviously have exerted control over the market through collusion. In many other cases it will be decisive and yet elusive.

It seems a simple enough question: Does a rule-of-reason plaintiff need to prove market power? 100 years of jurisprudence has failed to deliver a coherent answer. Although there are for and against such a requirement, leaving the matter unsettled undermines antitrust as a legal regime by deterring meritorious claims whose litigation costs cannot be predicted with reasonable certainty and by undermining the rule of law.

The Supreme Court’s most recent statement about the issue was in Leegin:

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. 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. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration.

Does this mean that a plaintiff in a vertical restraints case is required to prove that the defendants had market power, or not? Market power is a “significant consideration” among other “factors,” which suggests that proof is not required, but may be merely useful. Given the cost and

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132 Id.
133 Additional litigation burdens for cases requiring proof of market power are also well-known. Defining product and geographic dimensions of competition is, again, a complex theoretical and evidentiary matter on which paid experts will disagree.
complexity of introducing this issue into all vertical restraints cases, this is not the clearest or most desirable way to leave the matter.

In *Cal. Dental*, the Court’s most expansive recent application of the rule of reason, neither the majority nor Justice Breyer’s dissent sheds any light on this issue. In his dissent, Justice Breyer analyzed the dental association’s ban on price and quality advertising under “a rule of reason” and identified as one of the four “classical, subsidiary antitrust questions” whether the parties have enough market power to make a difference. However, when he approached that issue, he expressed some uncertainty about whether market power is really an element of a rule of reason case, instead stating: “I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace.” He cites a solitary authority in support of this assumption. The cited authority does not support the notion that proof of market power is a requisite element of a rule of reason case, but instead observes that proof of actual anticompetitive marketplace effects from an alleged restraint is often impossible because of the difficulty of isolating the effects of the restraint. Thus this cite was presumably in support of Justice Breyer’s own doubts about whether market power is indeed a requisite element of proof in a rule of reason case, and thus the assumption for rhetorical purposes. Proceeding from this assumption, Justice Breyer found market power easily, citing from the record evidence that the association had a market share exceeding 90% in one region, and generally over 75% throughout the state of California and that there are high entry barriers.

In contrast to Justice Breyer’s dissent, the majority paid almost no attention to the issue of market power. The opinion recites the ALJ’s determination that market power was not shown at the trial but did not need to be, the Commission’s contrary finding that market power was established, a dissenting Commissioner’s finding that market power was not shown, and the Ninth Circuit’s conclusion that substantial evidence supported the Commission’s finding of market power. The majority opinion made no selection among these diverse views as to whether market power had in fact been established by the FTC, or, more importantly, whether it needed to be established.

The very fact of this disagreement among so many in the *Cal. Dental* litigation is not surprising when one considers that the Supreme Court has never unequivocally established whether market power is or is not an essential element of a rule of reason case. (It is of interest, of course, that so many disagreed not only as to whether the issue needed resolution, but also on how it came out.)

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135 *Cal. Dental*, 526 U.S. at 782 and 788.
136 ¶1503
137 Id.
138 Id.
Lower courts and the federal agencies have thus taken disparate views. Some courts have seized on market power as a surrogate for proof of actual anticompetitive effects, citing language to that effect in *FTC v. Indiana Federation of Dentists.*\(^{139}\) There, the Supreme Court was adjudicating a concerted refusal by dentists to provide certain services, which the Court found to be a “naked” restraint but subject to some degree of rule of reason analysis in light of the professional context. The extent of rule of reason analysis, however, was slight, or as the Court put it, “not a matter of any great difficulty.”\(^{140}\) In that particular context, the Court stated:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, “proof of actual detrimental effects, such as a reduction of output,” can obviate the need for an inquiry into market power, which is but a “surrogate for detrimental effects.”\(^{141}\)

The lower courts are confused by this. Some, but not all, lower courts have taken this to mean that in any case in which anticompetitive effects must be shown, proof of market power is an alternative method of proof rather than an independently required element of plaintiff’s case. For example, in *United States v. Brown University,\(^{142}\)* the Third Circuit took the view that once plaintiff has established either anticompetitive effects or market power, the burden then shifts to the defendant “to show that the challenged conduct promotes a sufficiently pro-competitive objective.”\(^{143}\) The market power alternative is likely to dominate in courts that follow this rule. Courts have recognized that the inability to prove actual anticompetitive effects is not uncommon. As Professor Areeda observed, “Even an elaborate trial will seldom enable the tribunal to reach confident judgments about the past or future. We cannot realistically hope to know and to weigh confidently all that bears on competitive impact.” However, the alternative mode of proof at least allows for the possibility of avoiding the complex theoretical and evidentiary issues involved in proof of the contours of relevant markets and the defendant’s power.

The Second Circuit has devised a different approach that defers the market power issue until (at least) after the defendants have countered plaintiff’s proof of anticompetitive effects with their own evidence of procompetitive offsetting benefits. At that point: “the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition. Typically, the starting point is to define the relevant market... and to determine whether the defendants possess market power in the relevant market.”\(^{144}\) However,

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\(^{139}\) 476 U.S. 447, 460-61 (1986).

\(^{140}\) Id., at 459.

\(^{141}\) Id., at 460.

\(^{142}\) 5 F.3d 568, (1993).

\(^{143}\) Id.


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even then the Second Circuit acknowledges that “the precise role that market power plays in the rule of reason analysis is unclear.”

Indeed, another Second Circuit case endorsed an entirely different analysis that puts proof of market power at the very beginning of rule of reason proof: “For the government to prevail in a rule of reason case under Section 1, the district court concluded, and the parties do not argue otherwise, that the following must be shown: As an initial matter, the government must demonstrate that the defendant conspirators have ‘market power’ in a particular market for goods or services. Next, the government must demonstrate that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. Once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint.” Thus the Second Circuit, which did not take issue with the trial court’s approach in Visa, appears not to have resolved the matter.

Still other Circuits take additional and diverse approaches. The Seventh Circuit has established a rigid “rule that substantial market power is a threshold requirement of all rule of reason (as well as some per se) cases.” The D.C. Circuit also appears to follow this approach. In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., Judge Bork wrote: “We might well rest, therefore, upon the absence of market power as demonstrated both by Atlas' 6% national market share and by the structure of the market. If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself.” Bork’s analysis in Rothery Storage has been taken to establish a “safe harbor” rule under which a defendant’s conduct will under no circumstances be condemned in the absence of proof of market power, a position advocated by a few commentators.

The Seventh Circuit approach finds support from the American Bar Association Section of Antitrust law, whose Sample Jury Instructions require all plaintiffs to prove the relevant market, and also provide: “In determining if the restraint here substantially harmed competition you should consider defendant’s market power and how much of the relevant market was affected by

145 Id. at 238 n.4; see also, Capitol Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 546 (2d Cir. 1993).
146 U.S. v. Visa USA, Inc. 344 F.3d 229, 238 (2d Cir. 2003). See also, State of New York by Abrams v. Anheuser-Busch, Inc., 811 F. Supp. 848, 871 (E.D.N.Y. 1993)(indicating that the purpose of condemning a restraint is only served where it has the potential to bring about adverse market-wide harm to consumers.)
147 Hardy v. City Optical Inc., 39 F.3d 765, 767 (7th Cir. 1994), citing Chicago Professional Sports Limited Partnership v. National Basketball Ass'n, 961 F.2d 667, 673 (7th Cir.1992); and Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1435 (7th Cir.1986); General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984) (plaintiff’s showing of defendants’ market power is a prerequisite to recovery).
defendant’s restraint.” By requiring the jury to find that plaintiff proved a relevant market, and also requiring it to consider the defendant’s market power, the Instructions essentially import a market power requirement for rule of reason cases. Notably, other elements of proof are non-mandatory, such as that the jury “may consider defendant’s purpose in imposing the restraint.”

The result: Courts and commentators have, after 100 years, failed to coalesce around any single view, and some Circuits appear to have expressed no view at all.

C. Theoretical or Actual Effects as a Business Justification Defense?
Another missing piece is whether, and at what point, a rule of reason analysis turns on actual marketplace effects rather than merely plausible or conjectural ones. Proof of actual effects should play a very different role than theoretical conjecture about possible or plausible ones. Rule of reason analysis proceeds step-wise, and an early step is to determine how much analysis is useful. This determination must be made on the basis of theory coupled with common sense but without much evidence, because the whole point of this inquiry is to determine how much evidence the parties will eventually need to bring forward. These threshold issues include whether there are plausible anticompetitive effects that could flow from the restraint and also whether there might be offsetting efficiency justifications.

The ultimate and separate issue under any antitrust review is the restraint’s actual net effects – does the restraint actually impair competition and harm consumers. Actual effects and plausible ones ought to be kept separate but they have become muddled in antitrust decisions. The theoretically plausible effects arguments ought to be front-loaded in the litigation, and merely to serve the court as it establishes how much inquiry is required to resolve the case. Proof of actual anticompetitive and procompetitive effects should be reserved for later on because it makes no sense to require the parties to prove the ultimate issue in the case merely to determine how much they must prove.

Here, again, Cal. Dental contributes to the confusion by blurring the distinction between theoretical effects and actual ones.

Before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis

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150 Sample Jury Instructions in Civil Antitrust Cases (1999 ed.) American Bar Association, p. A-6. A footnote to this instruction notes that “The meaning of market power” in rule of reason cases has not been clearly explained or defined by the Supreme Court.” Id., at A-7, n. 2. The authors do not, however, question whether proof of market power, on some definition or other, is required.

151 Id., at A-7.

152 Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 546 (2d Cir.1993)( The proper role of market power in the § 1 rule of reason analysis has been characterized differently by the various circuits. Some courts require that a plaintiff always show the defendant's market power in order to state a § 1 claim... This court has not made a showing of market power a prerequisite for recovery in all § 1 cases”).

153 The only exception is that per se rules allow for the possibility that conduct without anticompetitive effects will at times be condemned. Superior Court Trial Lawyers Ass’n. [cite]
in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. \(^{154}\)

Whether a case can proceed as a quick-look review ought to be decided early on and without requiring empirical evidence from either party. It is pointless to put the court and the parties to the trouble and expense of a full-blown rule of reason trial to determine if a quick look review would have sufficed. Yet \textit{Cal. Dental} forces a Section 1 plaintiff at the very outset of the case to establish “whether the effects are actually anticompetitive” in order to counter purely theoretical economic justifications offered by a defendant. A plaintiff’s failure to produce such evidence on actual effects renders a quick-look analysis inappropriate and relieves the defendant of a “burden to show empirical evidence of procompetitive effects.”

All that the defendant provided in \textit{Cal. Dental} was purely theoretical support for its position that restricting price advertising in that particular context might increase, rather than diminish, output. The Court explored these speculative justifications in considerable depth (and without any apparent skepticism) to conclude that the lower court had prematurely shifted the burden to the defendant. Based on academic abstract explorations of some unusual demand attributes that might pertain in some markets for professional services, the Court held that plaintiff had not met its burden to submit the case to a quick look evaluation. The result in \textit{Cal. Dental} was that once the defendant submitted a purely theoretical basis to support the case for an in-depth rule of reason analysis, the trial court was supposed to have reverted to the plaintiff to establish actual anticompetitive effects as an empirical matter with more than just a theoretical case; to establish both “the theoretical basis for the anticompetitive effects and… whether the effects actually are anticompetitive.”\(^{155}\)

This moves plaintiff’s proof of actual anticompetitive effects to the fore, placing that burden on the plaintiff before the trial court has even established the level of rule of reason review for the case. Because the FTC had not produced evidence to establish actual anticompetitive effects in the market for dental services, the decision does not indicate what would happen if it had done so, but presumably defendant would then be required to rebut with offsetting procompetitive actual effects. All of this was supposed to have taken place in the context of a determination of what sort of antitrust review should have been required.

As thus structured in \textit{Cal. Dental}, to determine whether a quick look is “meet for the case,” plaintiff presents a theory of competitive harm, defendant may counter with a theory of competitive justification or offsetting efficiencies, and then plaintiff must proceed with an evidentiary presentation to establish actual anticompetitive effects, possibly followed by

\(^{154}\) 526 U.S. at 775, fn. 12.  
\(^{155}\) \textit{Id.}
defendants’ factual rebuttal. The parties are thus drawn into a potentially full-blown rule of reason case that is triggered by a purely theoretical, abstract and conjectural defense.

That this strategy worked for the dental association in the context of an agreement among competitors with market power not to advertise prices indicates just how likely the invited strategy will be to succeed in the run of antitrust cases.

V. The FTC’s Attempt At Reform – The “Inherently Suspect” Framework

The FTC has devised a model for the rule of reason that begins by categorizing the challenged restraint, and then proceeds according to a decision tree based upon that categorization. The analysis derives from cases dating as far back as 1988, and finds its first full exposition in Polygram Holdings.

Under Polygram Holdings, the first step in the analysis involves the determination of whether the alleged restraint is one that is “inherently suspect.” This determination is focused on proof of the agreement itself rather than its effects, which are presumed based upon the nature of the restraint. A restraint is categorized as inherently suspect if, “based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition.” Unlike per se offenses, inherently suspect conduct is subject to a rebuttable presumption of illegality. Thus, the categories of conduct that may be deemed to be inherently suspect are not limited to the narrow categories of price fixing, market allocations and group boycotts. However, courts that have followed the FTC’s framework have described the classes of “inherently suspect” conduct as bearing a “close family resemblance” to per se offenses. Thus, the particular conduct that has fallen under this approach has included an agreement between joint venturers not to price compete on related products outside the joint venture for a period leading up to the venture’s own product launch; coordination of bidding to payment plans by independent physicians; and a multiple listing service rule restricting the listing of limited-service options and excluding discount listings from default search results.

If the restraint is so characterized, the next step requires the defendant to rebut the presumption of illegality by establishing a plausible and legally permissible justification. This requires proof either that the context of the particular market in question deflects the presumption that would normally apply, or that there are offsetting competitive benefits flowing from the restraint. If defendants offer such a rebuttal, the court (or FTC) can either reject it on its face if “it can

157 See, 416 F.3d 29 (D.C. Cir. 2005)
158 Id., at 36.
159 Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005); aff’g Polygram Holding, Inc., FTC Docket No. 9298 (2003).
160 North Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008), aff’g in part In re North Texas Specialty Physicians, 140 F.T.C. 715 (2005).
confidently conclude, without adducing evidence, that the restraint very likely harmed consumers.” Alternatively, the plaintiff can provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. Finally, the defendants can produce evidence that consumers are not harmed at all or that the restraint’s net effects are competitively virtuous.

What is useful in the FTC’s “inherently suspect” mode of analysis is that it provides for certain rule of reason cases an avenue to resolve claims without resort to litigation over market effects, which is often speculative, indeed generally inherently so. The proof of marketplace impact is tested with so-called “but-for” analysis, which requires the fact-finder to weigh the prognostications of competing hired experts about the world as it would have been absent the alleged restraint. This aspect of antitrust litigation is high-cost, low-return. Where a claim falls short of suitable application of a *per se* rule, the “inherently suspect” model allows the court to weigh the defendants’ proffered justifications against the inherent anticompetitive effects.

This benefit follows from the return by the FTC to a categorical approach to at least the most inherently suspect sorts of restraints. Rather than leaving these restraints to the literal terms of *Cal. Dental*, the “inherently suspect” model starts by characterizing the restraint and then applying its rebuttable presumption. Under *Cal. Dental*’s directive, every restraint is entitled to its own mode of analysis crafted as “meet for the case.” The “inherently suspect” analysis plants a generalized mode of analysis for cases falling within the category. This approach is unlikely to condemn desirable marketplace conduct because it is limited to conduct that is closely related to *per se* offenses. It is also of value in streamlining litigation and lending a measure of predictability to the law.

There are frailties, however, with the FTC’s “inherently suspect” framework. First, it is limited to restraints that are so obviously offensive as to be arguably *per se* violations. The agreement in *PolyGram* not to discount or advertise competing products that were not part of the joint venture was the sort of joint venture spillover collusion that the D.C. Circuit observed “looks suspiciously like a naked price fixing agreement between competitors.” The agreement in *Realcomp II* had no apparent purpose other than to impair innovative competition from discount providers of real estate brokerage services. One element of the FTC’s case, for example, was that the Realcom members’ rule imposed a “minimum service requirement” which directly eliminated competition along an important dimension of consumer choice with the obvious potential for forcing more services on them at higher cost (which was not surprisingly found to have been the intent). Thus, “inherently suspect” as a category has in its quite limited experience applied a truncated analysis only to conduct that might plausibly be condemned without any analysis at all.

162 Id.
163 Id.
164 *PolyGram*, 416 F.3d at 37.
Another frailty is that the “inherently suspect” framework has failed to gel into an unambiguous mode of analysis. This is partly because the framework has only been applied in a small number of recent cases. However, those applications have generated considerable confusion. *Realcomp II* in particular undermines the potential value of the model because the opinion of the Commission in that case purported to apply “inherently suspect” framework but at the same time engaged in elaborate fact-finding on the very complex issues that the model purports to avoid: market power and actual anticompetitive effects. For no apparent reason, the FTC’s opinion lays out and then applies three different modes of analysis, including “inherently suspect,” actual anticompetitive effects and market power analysis, and then proceeds to apply all three.

Here, for completeness, we address all three of these modes of analysis. Moreover, and perhaps more significantly, although it is convenient to treat each of these modes of analysis separately, the Court’s decisions, particularly *California Dental*, also make clear that all of these forms of analysis are simply different means to pursue the same "essential inquiry… - whether or not the challenged restraint enhances competition."\(^{165}\)

There is not much value in a truncated mode of analysis if its application invites excursions into the same difficult areas as a full-blown analysis. *Realcomp II* can be seen as a highly defensive application of the “inherently suspect” framework, or even a retreat from it. If the whole point of truncated analysis is to avoid the costly, time-consuming and potentially confusing excursions into complex issues, it makes little sense to indulge in those very excursions in a case that calls for truncated analysis. The FTC’s opinion undermines the value of truncated categorical analysis in the interest of “completeness,” when completeness is the very thing that truncated analysis seeks to avoid. If completeness were always a virtue, then categorical framework to permit truncated analysis would necessarily always be a vice.

The FTC’s truncated analysis for restraints that are categorized as “inherently suspect” could be harnessed to alleviate some of the confusion left in the wake of *Cal. Dental* by returning to a categorical framework the *Cal. Dental* essentially dismissed. However, it is a nascent framework with little decisional law development, and it has been obscured by the FTC’s defensive application of the doctrine.

### VI. A Proposal for Reform

There are three steps that the Supreme Court (or Congress) could take to alleviate the problems that have been identified with the rule of reason. First, *Board of Trade* should be abandoned. Its articulation of the rule of reason standard is too open-ended to guide courts through the maze of issues it includes as relevant to antitrust conspiracy analysis. Second, *Cal. Dental* should also be overruled as setting an unworkable standard, indeed as having abandoned standards altogether. Finally, the Court should return Section 1 to categorical analysis. If the categories of

\(^{165}\) *RealComp II*, supra, at p. 20.
“per se,” “truncated or quick look,” and “full-blown” are deemed too likely to generate false outcomes, then the solution is not necessarily to abandon all hope of predictability and transparency in antitrust law. Instead, the courts should begin the task of generating categories that work.

A. Abandoning Board of Trade

There is a commanding scholarly consensus that the oft-repeated rule of reason standard enunciated in Board of Trade has done more harm than good. It ought to be jettisoned. Board of Trade’s most famous and enduring statement of the rule of reason is fairly regarded by careful students of antitrust law as “among the most damaging language in the history of Sherman Act jurisprudence.” A first important step that the Supreme Court could take to eliminate some of the problems with rule of reason antitrust litigation would be to overrule that case, and in particular to repudiate its language.

There is no particular reason why the articulation of the rule of reason in this one case should be left in place. The Court has not hesitated to repudiate what it comes to regard as ill-advised articulations of legal standards, however well-worn they may be. In Bell Atlantic Corp. v. Twombly,166 the Court repudiated the time-honored language that had summarized the notice pleading standard from Conley v. Gibson.167 The language from the Conley decision that drew the Twombly Court’s particular consternation was its most frequently quoted standard for evaluating a complaint under Rule 8: “In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”168 That “no set of facts” language had been relied in the vast majority of published rulings on motions to dismiss federal complaints.169 The Court in Twombly not only adjusted the standards for notice pleading, but explicitly denounced and “interred” its language: “Conley’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough…”

Any legal standard should at a minimum be articulated with sufficient clarity to guide the conduct of those who are subject to its requirements. Board of Trade does no such thing. It invites judicial inquiry into a nearly limitless array of obscure factors, it offers no prescription for how any of those ought to be weighed, and it has failed after more than ninety years to yield consistent answers to some of the most basic questions presented in Section 1 litigation, and it has no discernible scholarly support. To the contrary, the Court has ignored a steady drumbeat of criticism of this precedent. It has been “questioned and criticized” long enough.

168 Conley, supra, 355 U.S. at 45-46 (emphasis added).
169 A LEXIS search of Conley’s “no set of facts” language yields in excess of 3,000 cases.
B. Overruling *Cal. Dental*

If scholars agree that *Board of Trade*'s articulation of the rule of reason is confusing, there ought to be at least an equal consensus that *Cal. Dental* only made matters worse. It too should be discarded insofar as it lays out an ill-conceived burden shifting process, and also as to the empty standard it prescribes for determining how much of an inquiry is appropriate in antitrust cases under Section 1. Flexibility in antitrust analysis has its value, but that value is not limitless and nor should the flexibility of substantive standards be limitless. An “enquiry meet for the case” goes too far in the direction of devoiing the rule of reason of any standard whatsoever. Along with “no set of facts” and the liturgy from *Board of Trade*, “an enquiry meet for the case” should be interred.

Predictability and transparency are particularly desirable qualities for antitrust conspiracy law. Most business collaboration is more nuanced than the sort of criminal price fixing and market allocation that draws unequivocal antitrust condemnation. This vast region of economic cooperation is of enormous importance to global economic well-being, and includes conduct ranging from standard setting (without which the modern technology economy could not exist) to more old-fashioned product distribution arrangements. The failure of antitrust law to provide reasonably clear guidance in this region of activity cannot help but impose pointless costs. Business managers planning their company’s affairs can only respond to undecipherable antitrust rules in one of two ways: either by resolving doubt in favor of their proposed conduct, or alternatively resolving doubts the other way. Optimists will tend to impair competition by violating the standards that *ought to be in place*; pessimists will tend to compete too cautiously (and thus contributing to the “false positive” problem that seems to have animated much of the judicial drift toward blunting antitrust rules). Courts are equally confounded, as the above discussion explores. It ought to be regarded as unacceptable that the rule of reason after 100 years has failed even to resolve such basic matters as whether market power is a requisite element of proof and how a court should decide whether a full-blown analysis is even required.

As Professor Stucke has argued, the rule of reason does not even comply with rule of law standards and *Cal. Dental* actually aggravated matters. As Stucke points out, the rule of reason undermines the rule of law in the context of antitrust by providing market participants with inadequate advance assurance about how the power of government will be exerted upon them. *Cal. Dental* moves the rule of reason further from rule of law norms by obscuring until after the fact the legal standard that will apply to conduct. Conduct that might be found to be permissible under one level of review can easily be condemned under a more stringent one, as the tortured path of the litigation in *Cal. Dental* itself make clear. An “enquiry meet for the case” amounts to *ex post facto* regulation because what is “meet” is indeterminate until the conduct has already been engaged in; until it is gets evaluated by a tribunal. Thus the substantive standard of review announced in *Cal. Dental* ought to be repudiated.
The procedural structuring of civil antitrust litigation should also achieve predictability, administrability and fairness in the resolution of cases and *Cal. Dental* achieves none of these. Its shifting of an unspecified evidentiary burden to the plaintiff in response to defendants’ purely theoretical articulation of a plausible and conjectural justification makes no sense as part of a litigation process for determining what the evidentiary burdens of the parties should be. For one thing, it is far too easy for defendants to articulate some sort of efficiency justification that *might have* had something to do with their collusive conduct. For that alone to put the plaintiff to the burden of adducing evidence – possibly before pre-trial discovery has proceeded - sufficient to show “actual anticompetitive effects” skews the litigation process unjustifiably.

*Cal. Dental* and the Court’s recent aversion to “false positives” has made perfection the enemy of the good. Recall Areeda’s admonition that “[e]ven an elaborate trial will seldom enable the tribunal to reach confident judgments about the past or future. We cannot realistically hope to know and to weigh confidently all that bears on competitive impact.” Moreover, from the court’s perspective, the whole point of limiting rule of reason evidence is to advance the efficient use of judicial resources. That is not the result of *Cal. Dental*’s process. Thus from a procedural vantage point, as well as the substantive one, this decision causes mischief and should be overruled.

C. **Restructuring the Rule of Reason**

The rule of reason should be reinvigorated in the interest of both predictability and the underlying social value of antitrust enforcement. The ultimate substantive law standards of conduct are not in doubt: Section 1 prohibits private non-immune conduct that restrains competition more than it promotes it. This substantive standard should equate to, or at least conform quite closely to, the results of litigation under the rule of reason. That is, conduct that on balance promotes competition should be adjudicated as lawful, and conduct that on balance harms competition should be adjudicated as unlawful. That the current rule of reason is widely regarded as “euphemism for nonliability” indicates just how poorly the rule performs in promoting the value of antitrust. At a time that has witnessed an historic explosion of global adoption of antitrust as a legal paradigm, the United States has managed to undermine its own framework by eroding any content that the rule of reason ever had, while subjecting nearly all concerted activity to this unguided evaluation. That a reasoned argument has been made that the rule of reason does not even live up to the modest demands of the rule of law indicates just how little predictability the rule of reason provides.

There needs to be a simplified, consistent and predictable substantive legal framework for Section 1 that is capable of sorting good or neutral conduct from bad in an administrable manner. The demise of categorical analysis under Section 1 has made this impossible.  It thus stands to

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170 Posner, supra.
reason that categorical analysis needs to be restored. It is no answer to say that the “rigid”
categories of yesterday yielded false positives. Not only is there no empirical evidence to
support that contention, but every rule of law is capable of some mischief – which is not to say
laws should be abandoned.

Instead of abandoning categorical analysis in the interest of perfection, the categories should be
developed along more refined lines. As a starting point, there ought at least to be four
identifiable categories of antitrust review under Section 1:

1. **The Per Se Illegal Category (Irrebuttable Presumption Anticompetitive).** Per se
category includes naked horizontal restraints on price, output, innovation and market access.
   a. These require no inquiry into market context or effects, and are irrebuttable presumed to be illegal.
   b. Defendants should be able to challenge the characterization of their conduct as falling into one of these *per se* forbidden categories in an orderly, predictable fashion. For example, the wisdom of the *BMI* decision could be accommodated by allowing defendants to articulate (as was done in that case) how the restraint benefits consumers in a way that cannot be achieved via other less restrictive alternatives. Sufficient proof on this point should divert the case to the “inherently suspect” category below.

2. **The Inherently Suspect Category (Rebuttable Presumption of Illegality).** Inherently suspect horizontal restraints include conduct similar to *per se* offenses in joint venture, league sports, and professional contexts.
   a. This category should follow the framework set out in *PolyGram* without the unnecessary and duplicative resort to more complex modes of analysis applied in *Realcomp II*. These restraints are rebuttably presumed to be anticompetitive, subject to defendants’ proffering sufficient, non-pretextual justifications to show net procompetitive effects.
   b. Market definition, market power and anticompetitive effects are irrelevant to this mode of analysis.

3. **Presumptively Lawful Category (Rebuttable Presumption of Legality).** In the modern economic context, it is likely that most interaction among rivals has no potential to adversely affect marketplace, and much collaboration is essential for competition to exist. Standard setting (including safety, interoperability and other standards established with horizontal collaboration), patent licensing, collaborative research and development are just a few examples.
   a. Conduct falling into this category should be presumed lawful, and the burden should thus shift to the plaintiff to establish that the agreement is anticompetitive.
   b. Courts should clarify that proof of anticompetitive effects can be established alternatively by proof of market power (and thus relevant market definition) or
direct proof so that not all cases will be weighed down with the complexities of cross-elasticity analysis implicit in market power evidence.

4. **Per Se Lawful Category.** Commentators have toyed with the idea that courts should develop a category for conduct that is irrebuttably presumed to be lawful, although the argument has been limited to vertical restraints.\(^{171}\)

It is of course true that categorizing conduct as, say, “a horizontal output restraint in a professional context,” may in some cases lead to condemnation of conduct that in a perfect world might be tolerated. It bears consideration, though, whether the Republic could not have endured the absence of the California Dental Association’s rule against across-the-board discounts. Categorically speaking, the Association’s rule should not have admitted a nearly full-blown rule of reason excursion into the speculative and highly unlikely possibility that dental patients actually consume more services as a consequence of the restraint alleged in that case. Instead, it should have been characterized as a preliminary matter for what it was: a price restraint in a market for professional services. The defendants should then have borne the burden of establishing that which Justice Souter conjured up in his opinion, although one has reason to doubt that the association would then have prevailed.

**D. A Partial Response to Lemley and Leslie**

Lemley and Leslie have argued that categories are ill-suited to antitrust analysis and should be largely abandoned altogether; that “enthusiasm for taxonomy has run amok in antitrust law, with pernicious consequences.”\(^{172}\) The premises of their argument are consistent with the thrust here, yet they come to a seemingly opposite conclusion. Their argument is that categories continue to dominate in antitrust notwithstanding *Cal. Dental*;\(^ {173}\) and that categorical analysis in antitrust has become so muddled that it should be more thoroughly abandoned.

One of the problems with categorical analysis is that the boundaries of categories shift without logic or warning. The Supreme Court recently asserted in Leegin, “the boundaries of the doctrine of per se illegality should not be immovable.” This is true, but, as scholars noted even before the development of quick look, “the line between application of the per se rule and the rule of reason has become blurred to the point that these analytical tools are often indecipherable.” The evolution of quick look analysis has made matters worse, as confusion over whether a challenged restraint falls within the


\(^{172}\) Lemley and Leslie, *supra*, 93 Iowa L. Rev at 1210.

\(^{173}\) Id., at 1217 (“The Court’s attempt to recharacterize its decades-old approach to antitrust analysis should not be understood as an abandonment of categorical decision-making”)

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“quick look” or requires “full-blown rule of reason analysis” introduces significant uncertainty into antitrust litigation.\textsuperscript{174}

Lemley and Leslie then argue that antitrust law should operate much like tort negligence law, relying on broad standards rather than categories. The standard that they argue should apply is whether competition is harmed by the alleged conduct.

Proper application of the rule of reason need not - and generally should not - involve categorical analysis. The most important components of a thorough rule of reason analysis do not require reliance on categories but on particular evidence about the nature and effects of a particular restraint in a particular market context. Assuming that the challenged restraint does not fall within a per se category - and is not so facially anticompetitive that it warrants condemnation under the quick look - the court should inquire into the defendants' market power. Firms without market power are unlikely to reduce output or increase price in a consequential way. Thus, in the absence of any meaningful market power the court can dispose of the case without additional categorical analysis being performed by doing a rule of reason application.\textsuperscript{175}

One issue is whether Lemley and Leslie are correct that the Court did not intend to dispense with the categorical approach to the appropriate standard of analysis in antitrust cases. The Court in \textit{Cal. Dental} seems rather explicitly to have gone other way: “The truth is that our 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.” More than one observer has concluded that \textit{Cal. Dental} moved this aspect of antitrust law from categorical to standards analysis. Prof. Hovenkamp, for example, concludes that “In its California Dental Association… decision the Supreme Court observed that there is no bright line between per se and rule of reason analysis, but rather a continuum.”\textsuperscript{176} The lower courts have also understood the Supreme Court to have shifted rule of reason analysis to a continuum. In \textit{PolyGram}, for example, the court stated:

\begin{quote}
It would be somewhat misleading, however, to say the "quick look" is just a new category of analysis intermediate in complexity between "per se" condemnation and full-blown "rule of reason" treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum.\textsuperscript{177}
\end{quote}

\begin{footnotes}
\textsuperscript{174} \textit{Id.}, at 1225.
\textsuperscript{175} \textit{Id.}, at 1269 (footnote omitted).
\textsuperscript{176} Herbert Hovenkamp, Antitrust Enterprise: Principle and Execution, 116 (2005).
\textsuperscript{177} \textit{Polygram Holding, Inc. v. FTC}, 416 F.3d 29, 35 (D.C. Cir. 2005). \textit{See also, Cont'l Airlines, Inc. v. United Airlines, Inc.}, 277 F.3d 499, 509 (4th Cir. 2002) (Stating that rule of reason and \textit{per se} modes of analysis are “best viewed as a continuum, on which the ‘amount and range of information needed’ to evaluate a restraint varies depending on how ‘highly suspicious’ and how ‘unique’ the restraint is.”)
\end{footnotes}
More importantly, Lemley and Leslie seem to understate the problems of moving antitrust to a broad standards approach like negligence law. Virtually every problem they identify as stemming from the inartful judicial application of categories in antitrust law becomes aggravated by shifting to a standards approach. Conversely, every benefit they articulate in favor of some resort to categories is lost. Under their approach, every case that falls outside the *per se* rules (which they argue should be limited to minimum horizontal price fixing, bid-rigging and agreements to limit output, but apparently not including market allocations) would fall subject to some vague standard akin to those applied in negligence cases. It seems unlikely that courts will strike just the right balance in evaluating restraints under such amorphous standards.

Negligence law, unlike antitrust law, is state common law and is deliberately tailored to local customs and norms of behavior. Antitrust law seeks to impose a national, even global, legal framework that has no particular reference to local norms or customs. Thus the less confining standards of tort law serve the valid public purpose of permitting juries to evaluate the reasonableness of conduct by resorting to values of the local community. There is no valid reason to submit the national economy to such a mosaic of differing value schemes that may be found in different regions. Lemley and Leslie’s comfort with tort law standards as a model for antitrust seems misplaced given the divergent purposes to be served by these two bodies of law.

VII. CONCLUSION

The rule of reason never worked terribly well, and has been subject to nearly uniform criticism by scholarly observers. Justice Brandeis’ articulation of the rule of reason in *Board of Trade* has long been regarded by scholars as inviting an unguided and open-ended inquiry by the courts. Courts nevertheless continue to follow its directive unquestioningly. The recent expansion of the rule of reason via reversals of *per se* rules, coupled with the abandonment of categorical analysis heralded by *Cal. Dental*, have only made matters worse. The courts should adopt a scheme of presumptions such as the one outlined here to bring some degree of order to antitrust litigation and analysis. Cases that fall under a particular presumption could then be categorized as “irrebuttable presumed unlawful,” “rebuttable presumed lawful,” etc. Over time, conduct types should emerge as falling within these categories, which could simplify antitrust analysis both for purposes of litigation and business planning. Most importantly, a failure to reintroduce some sort of categorical analysis would leave the broad terrain of business activity that is subject to rule of reason analysis unguided by any meaningful standard.