Does the Rule of Reason Violate the Rule of Law?

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INTRODUCTION

The rule of law underlies all the mechanisms that the World Bank identified as central in supporting a market economy. A “key feature” of all industrial market systems, found the World Bank, “is a strong state that can support a formal legal system that complements existing norms and a state that itself respects the law and refrains from arbitrary actions.” With clear standards, market participants can channel behavior in welfare-enhancing directions and better predict their rivals’ behavior. Clear standards can reduce transaction costs, rent-seeking behavior by market participants, and decision errors by the antitrust agencies and courts. The rule of law is part of our “ubiquitous drive to make [our] environment more predictable,” is a pre-condition for effective antitrust policy, and remains integral to our democracy.

A disturbing trend is that antitrust standards are straying further from rule-of-law principles. This is consistent “with a growing tendency on

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3 The rule of law, based on logical persuasion, displaced the Furies, and a form of justice based on fear, anger and an orgy of reprisal life for life. But Athena warned of polluting the rule of law, “foul a clear well and you will suffer thirst . . . The stronger your fear, your reverence for the just, the stronger your country’s wall and city’s safety.” Aeschylus, The Eumenides, in THE ORESTEIA 262 (Robert Fagles trans. 1979). As Aeschylus recognized, the response to fear is to reaffirm the rule of law. Torture, on the other hand, is one sign of a “political order that has rejected the standards and practices of democracy’s revered institutions, notably in the realm of law.” Karen J. Greenberg, Scars & Stripes: How Has The World’s Leading Democracy Become The Place Where Torture Is Debated Rather Than Outlawed?, FIN. TIMES, May 31/June 1, 2008, at 19 (Life & Arts).
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the part of the [U.S. Supreme] Court to avoid issuing a clear, general, and subsequently usable statement of the Court’s reasoning or the Court’s view of the implications of its decision. In the past few years, the Court restricted antitrust plaintiffs’ access to (or increased their cost in accessing) the courts. Its justification is antitrust’s infirmities under rule-of-law principles. The Court decry’s antitrust’s “inevitably costly and protracted discovery phase,” which is hopelessly beyond effective judicial supervision. The Court complains that antitrust’s per se illegal standard might increase litigation costs by promoting “frivolous” suits. It fears the “unusually” high risk of inconsistent results by antitrust courts. But who created this predicament? The Supreme Court.

Over the past 90 years, the Court supplied antitrust’s legal standards. In shedding its earlier standards of per se illegality, the Court has not offered clear objective rules. Instead, the Court retreated to its rule-of-reason standard. Not everyone is complaining.

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5 Bell Atlantic v. Twombly, 127 S.Ct. 1955, 1966 & 1967 n.6 (2007) (quoting Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation); Minutes Civil Rules Advisory Committee 32 (Nov. 8-9, 2007), http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf (Court “spent some time decrying the enormous burdens that could be imposed by [antitrust] discovery, and in doubting the possibility that effective management of staged and focused discovery can be used to enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information exclusively available to the defendants can be used to supply a better preliminary fact showing that will justify full-scale discovery and litigation”).
8 Under the Court’s per se illegal rule, certain agreements to restrain trade are deemed illegal without consideration of any defenses. The per se rule is “the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score.” United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362–63 (5th Cir. 1980). Besides horizontal price-fixing and allocation agreements, all other antitrust claims involve “rambl[ing] through the wilds of economic theory” under the rule of reason. United States v. Topco Assoc., 405 U.S. 596, 609 n.10 (1972). Group boycotts and tying claims, although subject to a per se standard, are more expansive on issues of market power and defenses. The rule of reason governs most monopolization claims under Section 2 of the Sherman Act. United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001).
9 Opting for its rule of reason, the Court overturned its per se rule for vertical, non-price restraints in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57-59 (1977), for maximum resale price maintenance in State Oil Co. v. Khan, 522 U.S. 3 (1997), and for minimum resale price maintenance in Leegin, 127 S.Ct. at 2712.
10 Leegin, 127 S.Ct. at 2712-13; Khan, 522 U.S. at 10; Sylvania, 433 U.S. at 49 n.15. Despite its label, the rule of reason is not a directive defined ex ante (such as a speeding limit). Lawrence A. Cunningham, A Prescription to Retire the Rhetoric of “Principles-
economic-circumstances standard has drawn heavy criticism over the past 97 years, including, for many years, by the Court itself. The Court’s reasoning has a twist. It now states that its rule of reason is the “prevailing,” “usual” and “accepted standard” for evaluating conduct under the Sherman Act. But the Court uses the infirmities of its rule of reason (such as high discovery costs and inconsistent outcomes) to restrict antitrust plaintiffs’ access to the courts. It is “hard to

Based System” in Corporate Law, Securities Regulation, & Accounting, 60 VAND. L. REV. 1409, 1418 (2007). Instead, the term embraces antitrust’s most vague and open-ended principles.

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


Sylvania, 433 U.S. at 49.

Leegin, 127 S.Ct. at 2711.

Id., 127 S.Ct. at 2713.
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see how the judiciary can wash its hands of a problem it created.” The rule of reason’s acceptance did not arise independently from the Court. The Court created the rule of reason, determined the scope of its application, and could create a new standard. When rule-of-reason analysis is equated with per se legality (for the antitrust plaintiff’s bar) or uncertainty (for the defense bar), then it signals the standard’s deficiencies under the rule of law. It suggests that antitrust law, rather than developing, is regressing to its infancy.

The Robert’s Court has been more active in deciding business legal issues generally, and antitrust issues specifically. While addressing the risk of false positives under its per se rule, the Court never assesses the deficiencies of its rule of reason under rule-of-law principles. This assessment is critical. Its legal standard’s deficiencies have significant implications on antitrust enforcement and competition policy generally. The Court’s choice of standards will affect future market behavior and the incentives for market participants to engage in productive activity.

The “flexible” rule of reason provides little predictability to market participants. It subjects litigants and trial courts to the purgatory of “sprawling, costly, and hugely time-consuming” discovery. With competing expert economists opining on neo-classical economic theory, the litigants’ theories may be divorced from marketplace realities. Over the next decade, these infirmities likely will worsen. The courts will weigh not only conflicting testimony by Industrial Organization economists but conflicting economic theories, with the rise of behavioral, evolutionary, and New Institutional Economics. Because a rule-of-reason case is so costly to try, fewer antitrust violations will be challenged. This is disturbing under an evolutionary economic perspective, if entrants with innovative technologies are foreclosed from markets. An independent judiciary and the rule of law may be the only protections left for consumers and these smaller competitors.

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18 Arthur, supra note 12, at 337 (“The traditional rule of reason was uniformly viewed as ‘a euphemism for an endless economic inquiry resulting in a defense verdict.’”) (quoting Maxwell M. Blecher, The Schwinn Case—An Example of a Genuine Commitment to Antitrust Law, 44 ANTITRUST L.J. 550, 553 (1975)).
19 ABA Monograph, supra note 12, at 102 (“rule of reason—and its application in particular cases—has remained imprecise and unpredictable”).
20 Twombly, 127 S.Ct. at 1967 n.6.
Part I of this Article examines the conventional wisdom that the Court saved the unworkable Sherman Act “from stifling literalness [i.e., condemning all restraints of trade] by ‘the rule of reason.’”\(^{22}\) In reality, the Court’s rule of reason was highly contentious, and its critics accurately predicted its many shortcomings. The Court later sought to bring its Sherman Act standards closer to rule-of-law principles. But after *Sylvania*, the Court dismantled many of its per se rules. Part II identifies seven deficiencies of the Court’s rule of reason under rule-of-law principles. But as Part III addresses, conformity with a rigid rule of law may be suboptimal with respect to competition policy. Perfect compliance with rule-of-law ideals may be unobtainable and undesirable, so Part IV recommends several improvements to reorient the rule of reason closer to rule-of-law ideals.

I. DEVELOPMENT OF THE RULE-OF-REASON STANDARD

A. Sherman Act

Unlike most traditional criminal statutes, the Sherman Act “does not, in clear and categorical terms, precisely identify the conduct which it proscribes.”\(^{23}\) Senator Sherman admitted that defining in legal language the precise line between lawful and unlawful combinations was difficult, and must be left for the courts: “All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . .”\(^{24}\) Thus, the Sherman Act

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\(^{22}\) Associated Press v. United States, 326 U.S. 1, 27 (1945).

\(^{23}\) United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978). Section 1 of the Sherman Act, 15 U.S.C. § 1, states that “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.” Section 2, 15 U.S.C. § 2, makes it unlawful for “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty.” Nor does the Sherman Act delineate which conduct should be criminally or civilly prosecuted; this is left to the DOJ’s discretion. Over the past fifty years, Congress increased the maximum criminal fines and term of incarceration for Sherman Act violations. From a misdemeanor, the criminal penalties now stand as a felony with up to ten years imprisonment and a fine up to $100 million for corporations and $1 million for individuals. For statistics on criminal enforcement, see Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement 1955-1997: An Empirical Study*, 17 REV. OF INDUS. ORGAN. 75, 95-96 (2000). For the DOJ’s policies on antitrust cases it prosecutes criminally see U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. III, § C.5 (3d ed. 1998), http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm#c5.

\(^{24}\) 21 Cong. Rec. 2460 (1890); see also Hans B. Thorelli, *The Federal Antitrust Policy* 228 (1954) (citing references in the legislative debates to the courts as
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provides the courts some discretion as to the means for furthering the law’s objectives.25 But contrary to the Court’s current position,26 this discretion is not abdication. The Court, for example, cannot opine, consistent with the statute’s general principles,27 that trusts or monopolies are important to our free-market economy.28

B. The Introduction and Criticism of the Rule of Reason

instrumentalities for the Sherman Act’s clarification).

25 See THORELLI, supra note 24, at 181, 182-3; WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 3 (1914) (“great lawyers” drafted the Sherman Act; they presumably used the terms restraint of trade, monopoly, combination and conspiracy “with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our federal Constitution are to be so construed.”); see also 21 CONG. REC. 2456 (1890) (“It does not announce a new principle of law but applies old and well-recognized principles of the common law to the of our State and Federal Government.”); 21 CONG. REC. 3146 (Sen. Vest) (“We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States Courts with authority to enforce that doctrine by injunction.”); 36 CONG. REC. 522 (1903) (Senator Hoar) (“We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase ‘in restraint of trade’ had a technical and well-understood meaning in the law”). The cohesiveness of the common law in 1890 is unclear. THORELLI, supra note 24, at 50-53, 228; ABA Monograph, supra note 12, at 16-17; Herbert Pope, The Reason for the Continued Uncertainty of the Sherman Act, 7 U. ILL. L. REV. 201 (1912).

26 Leegin, 127 S.Ct at 2724.

27 See, e.g., John J. Flynn & James F. Ponsoldt, Legal Reasoning And The Jurisprudence Of Vertical Restraints: The Limitations Of Neoclassical Economic Analysis In The Resolution Of Antitrust Disputes, 62 N.Y.U. L. REV. 1125 (1987); Eleanor Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1182 (1981) (Act’s four major historical goals are (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor); R. Hofstadter, What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS 188, 199-200 (1965) (antitrust goals were economic (competition maximizes economic efficiency); political (antitrust principles intended to block private accumulations of power and protect democratic government); and social and moral (the competitive process was a disciplinary machinery for character development)).

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Contrary to its current assertion, the Court after 1890 did interpret the Sherman Act literally ("every" contract, combination or conspiracy that restrains trade is unlawful). The Court rejected the defendant railroads’ and dissenting Justice (later Chief Justice) White’s rule-of-reason approach (despite its terms, Sherman Act prohibited only “unreasonable” restraints of trade).

In 1910, President Taft rejected amending the Sherman Act to prohibit only “unreasonable” restraints of trade. Leaving it to the courts to decide a reasonable restraint, suppression of competition, or monopolistic act is contrary to rule-of-law principles:

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

29 Leegin, 127 S.Ct. at 2712 (Court “has never taken a literal approach to [its] language”); National Soc. of Prof’l Engineers v. United States, 435 U.S. 679, 687 (1978) (“problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says”).

30 United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 329 (1897) (“plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress”). Still rejecting the rule-of-reason approach, the Court distinguished between restraints with a direct, immediate and necessary effect and those with an indirect or incidental effect upon trade or commerce. See, e.g., United States v. Joint Traffic Ass’n, 171 U.S. 505, 577 (1898); Hopkins v. United States, 171 U.S. 578, 600 (1898) (Sherman Act “must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it”); United States v. Addyston Pipe & Steel Co., 175 U.S. 211, 234, 238 (1899); Milton Handler, The Judicial Architects of the Rule of Reason, 10 ABA ANTITRUST SECTION 21, 21-28 (1957). Arguably the Court loosely followed a version of Taft’s ancillary restraint analysis in Addyson Pipe & Steel, 85 F. 271 (6th Cir. 1898). A restraint entered into for the purpose of promoting the legitimate business was lawful, even though the agreement may indirectly affect commerce. Joint Traffic, 171 U.S. at 568. Thus, the direct/indirect distinction represents a retreat from condemning every restraint on commerce; whether it confers the courts greater discretion than rule-of-reason analysis is less clear.

31 Trans-Missouri Freight, 166 U.S. at 351-52; Joint Traffic, 171 U.S. at 575-76.

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Congress never supplied the courts “the power to say what are the good trusts and what are the bad trusts, according to [their] economic and political views.”  Moreover, “[i]t would be unwise to intrust this power to the courts. It would be legislative power, not judicial power.”

So too Congress rejected the amendment. Leaving it to the courts to decide what anticompetitive restraints are reasonable or unreasonable, said Senator Nelson on the Senate Judiciary Committee’s behalf, would “lead to the greatest variableness and uncertainty in the enforcement of the law. . . . there would be as many different rules of reasonableness as cases, courts, and juries.” Any statute premised on the restraint’s reasonableness would “entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute.”

Congress never amended the Sherman Act to condemn only unreasonable restraints of trade. Instead, the Court did so with a change in its composition. Chief Justice White’s rule of reason prevailed in the 1911 Standard Oil and American Tobacco cases, and engendered strong disapproval. Justice Harlan attacked the majority’s “judicial legislation” as an “invasion by the judiciary of the constitutional domain of Congress.” The Court “has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department.” Justice Harlan predicted the later criticisms of the rule of reason:

. . . I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for

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33 TAFT, supra note 25, at 114.
34 TAFT, supra note 25, at 114.
35 Standard Oil Co. v. United States, 221 U.S. 1, 97 (1911) (Harlan, J., concurring & dissenting in part) (quoting Senator Nelson’s comments in 1909 regarding a bill which proposed to amend the antitrust act in various particulars).
36 Id.
38 Herbert H. Naujoks, Monopoly and Restraint of Trade Under the Sherman Act, 5 WIS. L. REV. 129, 133 (1929).
39 Standard Oil, 221 U.S. at 99 (concurring & dissenting in part).
40 Id. at 104.
41 Id. at 104-5.
many years to come. When Congress prohibited every contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry-difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an ‘unreasonable’ or ‘undue’ restraint of trade. Congress, in effect, said that there should be no restraint of trade, in any form, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it could not add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraint of interstate commerce as are shown not to be unreasonable or undue.  

Justice Harlan did not necessarily agree with the soundness of this legislative policy. Instead, if a literal interpretation proved embarrassing, Congress should fix the Sherman Act.

In response to the criticism, early defenders of the rule of reason noted that its purpose was to broaden and enlarge the force of the Sherman Act. The fear was that businesses would escape prosecution by engaging in conduct not specifically anticompetitive under the common law. Interestingly, President Taft began his Third Annual Message to Congress defending the Court’s rule-of-reason analysis. The standard, if narrowly construed, would not emasculate the Sherman Act. Even under the rule of reason, courts lacked the power to say that certain restraints might be lawful if the parties moderated their use of market power and did not exact from the public too great and exorbitant prices. Taft assured Congress that nothing in

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42 Id. at 103.


44 Levy, supra note 43, at 203 (“in view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason renders it impossible to escape by any indirection the prohibition of the statute.”).

45 Taft, Third Annual Message, supra note 32.
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Standard Oil and American Tobacco suggested “such a dangerous theory of judicial discretion.”\textsuperscript{46} Nor did the rule of reason commit to the courts the “undefined and unlimited discretion to determine whether a case of restraint of trade is within the terms of the statute.”\textsuperscript{47} Instead, a reasonable restraint of trade at common law “is well understood and is clearly defined” under Taft’s ancillary restraint doctrine.\textsuperscript{48} Thus, the Supreme Court had not usurped legislative power to formulate its own social or economic policies.\textsuperscript{49} But Taft recognized the “need and wisdom of additional or supplemental legislation to make it easier for the entire business community to square with the rule of action and legality thus finally established and to preserve the benefit, freedom, and spur of reasonable competition without loss of real efficiency or progress.”\textsuperscript{50} Such specificity orients rule of reason toward rule-of-law ideals:

I see no objection—and indeed I can see decided advantages—in the enactment of a law which shall describe and denounce methods of competition which are unfair and are badges of the unlawful purpose denounced in the anti-trust law. The attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business, or the making of exclusive contracts with customers under which they are required to give up association with other manufacturers, and numerous kindred methods for stifling competition and effecting monopoly, should be described with sufficient accuracy in a criminal statute on the one hand to enable the Government to shorten its task by prosecuting single misdemeanors instead of an entire conspiracy, and, on the other hand, to serve the purpose of pointing out more in detail to the business community what must be avoided.\textsuperscript{51}

Debate over the Court’s rule of reason, and the state of antitrust enforcement generally, continued into the presidential election. The Democratic Party’s national platform in 1912 regretted “that the Sherman Anti-Trust Act has received judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} “It must be limited to accomplish the purpose of a lawful main contract to which, in order that it shall be enforceable at all, it must be incidental. If it exceed the needs of that contract, it is void.” \textit{Id.}
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
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the statute the strength of which it has been deprived by such interpretation.“52 The Republicans defended the Court’s rule of reason, and its Administration’s antitrust enforcement, but supported supplemental antitrust legislation to “define as criminal offences those specific acts that uniformly mark attempts to restrain and to monopolize trade;” this clarity would benefit “those who honestly intend to obey the law may have a guide for their action and those who aim to violate the law may the more surely be punished.”53 The Republicans also supported “placing in the hands of an administrative board many of the functions now necessarily exercised by the courts.”54 Creating a federal trade commission “will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure.”55

In January 20, 1914, the Democratic President Woodrow Wilson in addressing a Joint Session of Congress on Trusts and Monopolies, sought to conform the rule of reason to rule-of-law principles:

The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the

52 The 1912 Democratic Party platform devoted a 217-word section favoring “the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand[ing] the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.” Democratic Party Platform of 1912 (June 25, 1912), at John T. Woolley & Gerhard Peters, The American Presidency Project [online], http://www.presidency.ucsb.edu/ws/index.php?pid=29590.

53 The Republican Party platform had a 246-word section committed to antitrust enforcement and supplemental legislation that provides “same certainty should be given to the law prohibiting combinations and monopolies that characterize other provisions of commercial law; in order that no part of the field of business opportunity may be restricted by monopoly or combination, that business success honorably achieved may not be converted into crime, and that the right of every man to acquire commodities, and particularly the necessities of life, in an open market uninfluenced by the manipulation of trust or combination, may be preserved.” http://www.presidency.ucsb.edu/ws/index.php?pid=29633. Independent candidate Theodore Roosevelt attacked both Wilson (noting that 80 percent of trusts were incorporated in New Jersey, where the Democratic candidate was governor) and the Republicans (under the control of special interests), and promised a commission to better effectuate antitrust policy. The Leader and the Cause, Milwaukee, WI (Oct. 14, 1912), http://www.theodore-roosevelt.com/trmilwspeech.html.


existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain. And the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.\footnote{Woodrow Wilson, Address to a Joint Session of Congress on Trusts & Monopolies, Jan. 20, 1914, in John T. Woolley & Gerhard Peters, The American Presidency Project [online], http://www.presidency.ucsb.edu/ws/?pid=65374.}

With such criticisms of the rule of reason, Congress in 1914 passed the Clayton Act and Federal Trade Commission Act.\footnote{ROBERT PITKOFF ET AL., TRADE REGULATION: CASES AND MATERIALS 73-74 (5th ed. 2003) (1914 statutes constituted a response to rule of reason: “Advocates of a vigorous antitrust policy felt that this flexible approach gave undesirable and unreviewable power over the nation’s economic development to the judiciary. On the other hand, businessmen worried about how to stay within the confines of this vague standard.”).} The effort at this time was to promote clearer standards of liability. The FTC Act created an administrative tribunal, largely with a view of regulating competition.\footnote{FTC v. Gratz, 253 U.S. 421, 433-34 (1920) (Brandeis, J., dissenting); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION 21, 48 (1924). After the FTC Act, the Chamber of Commerce members overwhelmingly recommended to Congress to reconsider the antitrust laws and formulate standards of general business conduct to be administered by a supervisory body. Special to The N.Y. Times, \textit{Seeks Revision Of Anti-Trust Laws: Referendum By Commerce Chamber Of U.S. Shows Overwhelming Majority For It.}, N.Y. TIMES, Apr. 5, 1919, at 22.}

This endeavor to promote clarity, however, suffered a setback in 1918. Not every restraint of trade was unlawful, explained Justice Brandeis in Board of Trade of City of Chicago v. United States--only the unreasonable restraints, determined under the following rule-of-reason factors:

\begin{itemize}
  \item The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or
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whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.\(^5\)

The rule of reason pre-dated the Sherman Act. The Court generally identifies Mitchel v. Reynolds\(^6\) as outlining the standard.\(^6\) But CBOT’s open-ended rule of reason differed from the Mitchel standard. Unlike Mitchel, CBOT’s rule of reason neither identifies categories of conduct presumptively anti-competitive or socially undesirable nor contains any other presumption of illegality.\(^6\) The Court’s rule of reason instead resembles a cause of action at its infancy, namely the prima facie intentional tort. An antitrust defendant, like a tortfeasor, is liable if its conduct causes injury to another, is generally culpable (anticompetitive), and is not justifiable under the circumstances.\(^6\) Even if another court found a similar practice in a different industry anticompetitive, CBOT’s rule-of-reason factors treat each challenged restraint as novel. The factors embrace facts peculiar to the business to which, and during the period when, the restraint was applied.

As a commentator at the time noted, President Wilson’s ambitious program to give “further and more explicit legislative definition of the policy and meaning” of the Sherman Antitrust so as to “practically eliminate

\(?5\) 246 U.S. 231, 244 (1918) [hereinafter CBOT].
\(?61\) Snepp v. United States, 444 U.S. 507, 519 (1980) (Stevens, J., dissenting); Prof’l Engineers, 435 U.S. at 689 (“Rule of Reason suggested by Mitchel v. Reynolds has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business.”).
\(?62\) Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711) (“All contracts where there is a bare restraint of trade and no more, must be void; where special matter appears so as to make it a reasonable and useful contract, the presumption is excluded.”).
\(?63\) See Flynn, supra note 12, at 635 (“essence of a rule of reason violation is proof that joint conduct has been used to displace the competitive process without justification or excuse”).
uncertainty was never accomplished.”

In so far the proponents of the supplemental 1914 antitrust legislation “had hoped to clarify the law of restraints and monopolies by substituting specific rules of conduct, for general principles, they largely failed.”

C. Rise of the Per Se Rule

While unleashing antitrust’s rule of reason, the Court in 1911 also recognized a per se illegal offense. Its delivery was not by a plaintiff bringing a Sherman Act claim. Instead, a defendant in a tortious interference of contract action challenged the contractual restraints of price as invalid.

Before and after CBOT, the Court bounded its discretion under the Sherman Act in rejecting certain defenses, notably the reasonableness of the price fixed. Nonetheless, one underlying concern, realized in 1933, was that the Court under its vague rule of reason could sanction anticompetitive restraints it viewed as fostering “fair competitive opportunities.”

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64 Naujoks, supra note 38, at 134.
65 HENDERSON, supra note 58, at 48.
66 Dr. Miles Medical Co. v. John D. Parke & Sons Co., 220 U.S. 373 (1911). It will be interesting after Leegin whether manufacturers, no longer facing the threat of per se liability, pursue more tortious interference claims against discounters and seek to prevent unlicensed distribution of their authentic branded products over the Internet. See EU Competition Authorities Ponder Case Barring Sales of LVMH Products on eBay, ANTITRUST & TRADE REG. DAILY, July 18, 2008 (Paris Commercial Court ordering eBay to prevent users on any of its sites worldwide from selling or buying counterfeit or authentic LMVH perfumes and cosmetics).
67 “In the first price-fixing case arising under the Sherman Act, the Court . . . rejected the defense as a matter of law.” Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 350 n.22 (1982) (citing United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897)); see also United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (in rejecting defense that prices were reasonable, the Court recognized its limitations: “in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable-a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.”); Gilbert H. Montague, “Per Se Illegality” and the Rule of Reason, 12 A.B.A. ANTITRUST SECTION 69, 76 (1958).
68 Appalachian Coals v. United States, 288 U.S. 344 (1933). With the oversupply of coal, and “destructive” trade practices of buyers dumping “distressed” coal (due in part to lack of storage facilities), 137 coal producers formed the defendant as its exclusive selling agent. Before commencing operations, defendant approached the DOJ for approval. Instead, the United States challenged the horizontal price restraint. Using the CBOT rule-of-reason factors, the Court held that the competitors’ proposed concerted action did not violate the Sherman Act. Some of the Court’s findings, if valid, are uncontroversial: the “virtually inexhaustible sources of supply” by alternative producers in the affected market, the “organized buying power of large consumers,” defendant did not intend to decrease
In 1940, faced with another distressed industry, the Court imposed greater restraint on its and the lower courts’ discretion and sought to discipline itself from further adventures under the rule of reason: “Whatever economic justification particular price-fixing may be thought to have, the law does not permit an inquiry into their reasonableness.” In more fully articulating its per se prohibition on horizontal price-fixing, the Court expanded the scope of liability while rejecting many justifications for price-fixing, including lack of market power, “ruinous competition,” “fairest competitive prices,” “financial disaster,” “evils of price cutting,” reasonableness of price, defendants’ good intentions, evidence of government approval of the scheme, or that the particular industry was distressed. In response to Socony-Vacuum, the National Association of Manufacturers advocated legislation that would subject all Sherman Act claims to the rule of reason.

Over the next 37 years, the Court did not embrace the per se rule in every instance. But the Court recognized its rule of reason’s shortcomings. In 1956, the Court admitted, “it is fair to say that the Rule is imprecise,” but output, low entry barriers, excess capacity, and customer testimony in favor of the defendant organization. On the other hand, several defense witnesses admitted the tendency to raise price. Id. at 371. One controversial aspect, however, was the Court’s injecting its ideologies under the rule of reason, namely the Sherman Act permits horizontal restraints that stabilize prices if not detrimental to “fair competition.” Id. at 374.

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

70 Combinations that “tamper” with price structure are per se illegal. Thus, the Sherman Act reaches combinations formed for the purpose, and with the effect, of raising, depressing, fixing, pegging, or stabilizing prices. Antitrust plaintiffs need not prove that defendants fixed prices directly or controlled a substantial part of the commodity, no competition remained, or prices as a result were uniform, inflexible, or unreasonable.


72 For example, a district court rejected the government’s contention that the challenged group boycott was per se illegal. Instead, it found it illegal under the rule of reason. On appeal by the defendant, the Court summarily affirmed per curium. United States v. New Orleans Ins. Exch., 148 F. Supp. 915, 918-19 (1957), aff’d, 355 U.S. 22 (1957). In 1963, the Court needed to know more about vertical non-price restraints’ actual impact to decide whether they have a pernicious effect on competition and lack any redeeming virtue. White Motor Co. v. United States, 372 U.S. 291 (1963). Four years later, the Court condemned certain vertical non-price restraints. Given the opaqueness of the Schwinn decision, whether the Court’s learning improved in the intervening years is questionable. United States v. Arnold, Schwinn & Co., 388 U.S. 363 (1967).
adhered to Chief Justice White’s belief that “its application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation.” Two years later, the Court was more critical of its rule of reason: “This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken.” In developing its per se rule, the Court sought several things.

First, with a few exceptions, the Court sought a rule that was administrable for generalist judges. Its philosophy was that “in any case in which it is possible, without doing violence to the congressional objective embodied in [the statute] to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.” The Court, for example, did not condemn all mergers with high market shares. Instead, it created a presumption of illegality when the merging parties’ share exceeded 30%. By creating an administrable rule, the Court also restricted the lower courts’ ramblings under the rule of reason.

Second, the Court sought rules to enhance predictability. For example, in devising the 30% presumption for mergers, the Court sought to foster business autonomy: unless business executives “can assess the legal consequences of a merger with some confidence, sound business planning is retarded.” The Court’s role was providing clearer rules on what was civilly (and criminally) illegal under the Sherman Act. “Should Congress

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74 Northern Pac. Ry., 356 U.S. at 5.
75 See, e.g., Schwinn, 388 U.S. at 382 (“cannot understand how that marketing system becomes per se unreasonable and illegal in those instances where it is effectuated through sales to wholesalers and dealers”) (Stewart, J., dissenting).
77 Philadelphia National Bank, 374 U.S. at 363 (“a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects”).
78 Philadelphia National Bank, 374 U.S. at 362 (“we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation”).
79 Id.
80 Topco, 405 U.S. at 609 n.10 (“Without the per se rules, businessmen would be left
ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory . . . to maintain a flexible approach.”

Third, the Court did not share the confidence of Chief Justice Burger in the judiciary’s ability to examine “difficult economic problems.” The *Topco* Court recognized its limitations. Neither the Court nor defendant can weigh the reduction of competition in one area (e.g., intra-brand competition among Topco retailers) versus greater competition in another area (e.g., inter-brand competition against major retailers’ private label).

Fourth, not only was this weighing beyond its competence, the Court recognized that the political process, while subject to rent-seeking, is more politically accountable than the judiciary, and must make these normative trade-offs:

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

with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.”

81 *Id.*. The Court repeated this argument in *Maricopa*, 457 U.S. at 354-55:

Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. [citing *Topco*] Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute.

82 *Topco*, 405 U.S. at 622 (Burger, C.J., dissenting).

83 *Id.* at 609-10 (“Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.”).
myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.  

Fifth, with some notable exceptions, the Court turned to the Sherman Act’s legislative history or common law precedent as a basis for its rule.

By the 1950s, some called for a return to the rule of reason. Many of the Court’s antitrust decisions between the 1950s and early 1970s became a popular piñata for the Chicago School adherents. Some criticism is deserved. But the hyperbole at times is empirically deficient. For example, some Chicago School adherents criticized Topco, which they saw as a pro-

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84 Id. at 611-12. Philadelphia Nat’l Bank, 374 U.S. at 370-71, rejected as a policy matter two tradeoffs: (i) increasing the resulting bank’s lending limit will enable it to compete with large out-of-state banks (particularly New York banks) for very large loans, and (ii) Philadelphia needs a larger bank to bring business in the area and stimulate economic development. These defenses require a court to offset anticompetitive effects in one market for procompetitive benefits in another: A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress, when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. Id. at 371.

85 Schwinn, 388 U.S. at 388 (Stewart, J., dissenting) (no “previous antitrust decision of this Court justifies” the adoption of a per se rule and the government requested only a presumption of illegality); Albrecht v. Herald Co., 390 U.S. 145, 168-9 (1968) (contrary to Court’s holding, protecting households from monopoly overcharges furthered antitrust principles) (Stewart, J., dissenting).

86 For example, to bring some transparency and predictability in merger review, the Court aimed for a presumption consistent with the Congressional concerns in the 1950 Clayton Act amendments of the rising tide of economic concentration in the American economy. Philadelphia Nat’l Bank, 374 U.S. at 365. The tests of illegality under amended § 7 “are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.” 374 U.S. at 365 (quoting H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8). The Court sought a presumptively anticompetitive post-merger market share based on the market share and market concentration figures in its earlier Clayton Act contract-integration cases, and which was consistent with prevailing scholarly opinion. Id. at 365-66.

competitive joint venture to foster inter-brand competition. Chief Justice Burger predicted that unless Congress intervened, “grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains.” Congress never intervened. Thirty-six years later, one still can buy private-label Topco products at local supermarkets. Closer analysis of Topco revealed that the majority got it right. The deficiency was its incomplete analysis, not its outcome. In applying the per se doctrine, the majority never addressed the key issue: whether the challenged restraint (geographic exclusivity of the trademark) was necessary.

D. The Rule of Reason Strikes Back

Since its 1977 Sylvania decision, the Court following its “common law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints.” Expressing concern over the risk of

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88 BORK, supra note 12, at 274-78.
89 Topco, 405 U.S. at 624 (Burger, C.J., dissenting).
90 For an excellent retrospective see Peter C. Carstensen & Harry First, Rambling Through Economic Theory: Topco’s Closer Look, in ANTITRUST STORIES (2007).
91 Justice Burger, and later critics, adopted this view reflexively, arguing that “by definition” labels must be exclusive to attract other small firms. But whatever the risk of free riding, lesser restrictive alternatives than vertical price fixing existed. As Carstensen and First recount, during oral arguments before the Supreme Court, Topco conceded that to give each supermarket member its own private-label cost only $350,000. This amount was small relative to the minimum amount of annual sales (about $250 million by the 1960s) to support an effective private-label program. Given this modest cost, instead of one Topco brand, inquired the Court, “the private Seven-Eleven label would be competing with the private Giant label.” Little free-riding occurred before or after the decree, as supermarkets did not invest in promoting their private-label brands. Instead, Topco’s under-developed record suggested that the restraints were intended to hinder efficient mid-sized retailers from expanding into another member’s territory. Since these lesser restrictive alternatives eliminated any free-riding problem (and the need for territorial restraints), the Court concluded in oral argument, as Topco’s expert previously testified, that “the effect of exclusivity in this arrangement is simply to limit competition in private label territories.” Carstensen & First, supra note 90, at 174, 175. On remand, the district court permitted “primary responsibility” clauses defeating exclusivity but providing incentives for firms to concentrate in assigned areas. Topco survived and prospered. Absent the restraints, its members freely entered each other’s territories. Topco increased the number of available brands, so that members could have their unique private label (like Food City brand). Today Topco has more than 50 members and combined sales second only to Wal-Mart. Id. at 174-201.
92 Leegin, 127 S.Ct. at 2721; see also AMC Report, supra note 11, at 36 (“The Court’s decision in Sylvania marked a major turning point in antitrust law. After this decision, ‘the Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to
false positives under its per se rule,\textsuperscript{93} the \textit{Leegin} Court further limited the rule’s application.\textsuperscript{94} Formerly per se illegal conduct is now subject to the rule of reason.\textsuperscript{95}

A shift from per se rules is unsurprising if the Court has greater confidence in its\textsuperscript{96} or the lower courts’ capacity in adjudicating complex economic issues, like antitrust. But the Court’s skepticism about the judiciary’s competency has increased.\textsuperscript{97} Moreover, the majority in \textit{Sylvania} and \textit{Leegin} never considered an intermediary standard consistent with rule-of-law ideals and its experience with antitrust issues.\textsuperscript{98} Instead, without inform its interpretation and application of the Sherman Act.”” (quoting GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002)).

\textsuperscript{93} \textit{Leegin}, 127 S.Ct. at 2718. The Court has also expressed concern over false positives under its rule of reason. \textit{Trinko}, 540 U.S. at 414 ("cost of false positives counsels against undue expansion of § 2 liability"). The Court’s concern over false positives itself may be a false positive. Stucke, \textit{Monopolies}, supra note 28.

\textsuperscript{94} \textit{Id}. at 2713 (To justify a \textit{per se} prohibition, antitrust plaintiff must show the alleged restraints have "manifestly anticompetitive" effects and "lack . . . any redeeming virtue.") (internal citations omitted).

\textsuperscript{95} \textit{Sylvania}, 433 U.S. at 57-59 (vertical, non-price restraints), \textit{Khan}, 522 U.S. 3 (1997) (maximum RPM); \textit{Leegin}, 127 S.Ct. at 2712 (minimum RPM).

\textsuperscript{96} Antitrust issues rarely arose during the recent confirmation hearings, so it is difficult to assess the recent Justices’ familiarity with antitrust. When Justice Alito was asked to explain his thoughts of LaPage’s Inc. v. 3M, 277 F.3d 365 (3d 2002) (where he joined the majority) and 324 F.3d 141 (3d Cir. 2003) (en banc) (where he joined the dissent), he prefaced his comments that “I’m not an antitrust expert, and so I plod my way through these antitrust issues when they come up.” U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court, Jan. 11, 2006, http://www.washingtonpost.com/wpdynd/content/article/2006/01/11/AR2006011101335.html.

\textsuperscript{97} \textit{Billing}, 127 S.Ct. at 2395; \textit{Twombly}, 127 S.Ct. at 1967; \textit{Trinko}, 540 U.S. at 514-5; \textit{cf.} Int’l Competition Network, \textit{Competition & the Judiciary} 9 (Apr. 2006) (two principal findings from survey of 18 competition authorities in 17 countries (both developing and developed nations) were their perception that their countries’ judiciary interpreted the competition rules differently and was not sufficiently familiar with the economic concepts to assess competition claims), http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/CompetitionandtheJudiciary.pdf.

\textsuperscript{98} One interviewee in FIPRA’s recent study commented, If you read [\textit{Leegin}] you are struck by two things: first, the list of potential benefits of RPM as well as a list of potential theories of harm, [. . .] reads like a textbook without much judgment. I expected the Supreme Court to clearly express its priorities. Secondly, what was most striking was the statement that increases in price following RPM may not matter all that much. If prices go up, so be it, we don’t care; what really matters are the efficiency benefits from the use of RPM. This is a significant departure and indicates what you care about at end of day.
assessing the standard’s costs or deficiencies under rule-of-law principles, the Court resurrected its abused CBOT rule-of-reason factors as the “prevailing,” “usual” and “accepted standard for testing whether a practice restrains trade in violation of § 1.”

Even the staunchest critic of Leegin recognizes that resale price maintenance (RPM) occasionally is competitively neutral or pro-competitive. Ideally, in those circumstances, a workable standard efficiently spares RPM from condemnation. The dissatisfaction with Leegin is with the alternative, namely the Court’s rule of reason. If an alternative standard efficiently condemned anticompetitive instances of RPM, while sparing its pro-competitive instances, and enabled the parties to adjudicate quickly and cheaply their claims, then the shift from per se liability would be welcomed, not criticized.

**E. Quick-Look Rule of Reason**

There appeared after NCAA the prospect of a third way—something between the Court’s full-blown rule of reason and per se illegality. Encouraged, the FTC and DOJ articulated quick-look standards, which were debated within antitrust circles.

101 The quick-look relieves plaintiff of its extensive market analysis in its prima facie case when “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.” California Dental Ass’n v. FTC, 526 U.S. 756, 770 (1999). Thus, “the likelihood of anticompetitive effects” of the challenged restraint must be “comparably obvious.” Id. at 771. The burden shifts to defendants to establish the restraint’s pro-competitive benefits.
But the Court’s later articulation of quick-look in *California Dental* impeded the doctrine’s development. Rather than simplify antitrust litigation and provide greater predictability, the Court increased the uncertainty for litigants, district courts, and market participants. No categorical lines separate the per se, quick-look and rule-of-reason standards. Instead, a lower court can choose a standard somewhere along the continuum between rule of reason and per se based on its personal “enquiry” for the antitrust case, and its view of “the circumstances, details, and logic of a restraint.” So instead of clarifying its quick-look doctrine to enhance predictability, the Court added another totality-of-circumstances test. If the quality of proof varies with each case’s particular circumstances, predictability diminishes.

A continuum has benefits. Ideally the courts could efficiently reduce the risks of false positives (characterizing some pro-competitive behavior as anti-competitive) without necessarily subjecting the parties to the cost and time of a full-blown rule-of-reason analysis. A continuum could promote the capacity of further developing the rule of reason. Rather than swinging from one extreme (rule of reason) to another (per se illegality), the standard can evolve incrementally in defining and limiting the elements and defenses.

But the Court never gave guidance where to evaluate specific kinds of restraints along the continuum. Absent such guidance, antitrust plaintiffs face a difficult tactical decision: if they litigate only on a per se or quick-look theory, they may be prevented from further factfinding if the court opts for rule-of-reason analysis. Risk-adverse counsel will prepare ultimately for a full-blown rule of reason, plead their case to include all three standards (per se, quick-look and rule of reason), and hope for something quicker. This defeats the purpose of the quick-look. Similarly, absent guidance on

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*California Dental, 526 U.S. at 781.*

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

*See U.S. v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 344 (S.D.N.Y. 2001) (need not consider whether to decide case on a “quick look”): “As a practical matter, the parties and the court have already undertaken a thorough analysis of the alleged restraints and their*
the standard of proof for particular restraints, the trial courts will opt for rule of reason to lower the risk of reversal. Not surprisingly, in actually resolving cases, the quick-look standard has fallen into disuse. On a few occasions, since California Dental, an antitrust plaintiff (namely the FTC) prevailed under a quick-look. At times, the quick-look is the justification for quickly disposing the antitrust claim. More often, however, the lower courts refuse to apply the quick-look, opting instead for the rule of reason.

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

A. Rule-of-Law Principles
Does the Rule of Reason Violate the Rule of Law?

The rule of law is frequently cited. But the “high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning.”[110] This Article adopts several principles underlying the rule of law. Impartial courts quickly and inexpensively enforce the law,[111] which

- is "prospective, accessible and clear" to constrain the government (both the executive and judiciary) from exercising its power arbitrarily;[112]

- makes "it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances and to plan one’s individual affairs on the basis of this knowledge;"[113]

- applies to all persons equally, offering equal protection without prejudicial discrimination; and

- is "of general application and consistent implementation; it should be capable of being obeyed."[114]

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

First, if the competition laws create the rules of the game, outlining with sufficient clarity what is impermissible, then all can rely on these rules in channeling their behavior in welfare-enhancing directions.[115] Firms have

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112 Chesterman, *supra* note 110, at 342; see also Fallon, *supra* note 110, at 8.


114 Chesterman, *supra* note 110, at 342. Fairness in administration also minimizes forum shopping and the predilections of particular fact-finders.

115 Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally
Does the Rule of Reason Violate the Rule of Law?

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The rule of law protects a competitor that abides by these rules (and incurs costs thereby), while its rival cheats (and seeks a competitive advantage). Failure to enforce uniformly the rules will invite others to cheat. Absent rules yielding predictable legal outcomes, firms may refrain from welfare-enhancing activity, and opt for less efficient forms of doing business. Alternatively, competitors will engage in socially harmful activity but rely on lawyers and lobbyists to clear them of legal difficulties. The rule of law can reduce the negative welfare effects associated with such rent-seeking activities.

“...the rule enables us to predict other people’s behavior correctly, and this requires that it should apply to all cases—even if in a particular instance we feel it to be unjust.”

Second, although the law “fixes the rules of the game,” and proscribes specific actions deemed socially undesirable, the government is not exogenous to the free market. The dogmatic laissez-fair approach is to exclude the government from the market. But the law, as a positive force, provides the needed framework for facilitating commerce and economic growth. Thus, the rule of law enables political institutions to “provide the necessary underpinnings of public goods essential for a well-functioning economy and at the same time limit the discretion and authority of government and of the individual actors within government.”


As a former DOJ official wrote:

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

Wendell Berge, Can We End Monopoly, N.Y. Times, Sept. 26, 1943, at SM12.

Christiansen & Kerber, supra note 115, at 220 (“The basic idea is that following an appropriate rule without trying to optimize in any specific case might produce on average less wrong decisions. If we also take into account that rule-following requires less information and, therefore, leads to much lower costs than case-by-case maximization, then the application of rules can be a very economical way of dealing with knowledge problems.”).

Christiansen & Kerber, supra note 115, at 220.

HAYEK, supra note 113, at 117.

Kahn, supra note 115, at 30.

Id.


NORTH, supra note 2, at 85.
Does the Rule of Reason Violate the Rule of Law?

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Third, clear rules mitigate the knowledge and information problems that can lead to decision errors.\textsuperscript{124} With a general totality-of-circumstances standard, the current administration may be more sympathetic to one industry or firm than another.\textsuperscript{125} As Hayek warned, a vague standard fosters a centrally-planned economy. As central planning “becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is ‘fair’ or ‘reasonable’; this means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question.”\textsuperscript{126}

Fourth, the rule of law can lower transaction costs by reducing uncertainty. The parties need not incorporate into their contractual dealings a dispute resolution system with all the rules to interpret and enforce the contract, including remedies if breached.\textsuperscript{127}

\textbf{C. Rule of Reason’s Infirmities Under Rule-of-Law Principles}

One “can hardly imagine a prescription more vague” than the Sherman Act’s prohibition of contracts, combinations or conspiracies in restraint of trade; but Justice Scalia noted, “we have not interpreted it to require a totality of circumstances approach in every case.”\textsuperscript{128} Since his 1989 lecture, the Court, with Justice Scalia in the majority, has embraced with greater fervor the totality of circumstances test for federal antitrust claims. Justice Scalia is correct that totality of circumstances tests will remain. Rather than reflexively embrace its rule of reason, the Court should assess the extent its standard contributes to antitrust’s ailments.

The Court’s rule of reason fails all but one of the OECD’s ideal characteristics of a competition standard, which dovetail with rule-of-law principles: it has been criticized for not being accurate (minimizing false positives and negatives), administrable, objective (leaving no subjective input from the decision-makers), and transparent (the standard and its objectives are understandable) and for not yielding predictable results.\textsuperscript{129} Its

\begin{itemize}
  \item\textsuperscript{124} Christiansen & Kerber, \textit{supra} note 115, at 15.
  \item\textsuperscript{125} \textsc{Hayek}, \textit{supra} note 113, at 115 (where “precise effects of government policy on particular people are known, where the government aims directly at such particular effects, it cannot help knowing these effects, and therefore it cannot be impartial”).
  \item\textsuperscript{126} \textsc{Hayek}, \textit{supra} note 113, at 116.
  \item\textsuperscript{127} Simeon Djankov et al., \textit{Courts: the Lex Mundi Project} 37 (March 2002), \url{http://ssrn.com/abstract_id=304453}.
  \item\textsuperscript{129} OECD, \textit{Competition on the Merits}, DAF/COMP(2005)27 at 23 (Mar. 30, 2006)
\end{itemize}
Does the Rule of Reason Violate the Rule of Law?

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only benefit is its broadly applicability. After assessing its standard’s infirmities under rule-of-law principles, the Court would avoid “these modes of analysis . . . where possible.”

1. Under the Rule Of Reason, Market Participants Cannot Foresee With Fair Certainty How the Authority Will Use Its Coercive Power In Given Circumstances & To Plan Their Individual Affairs Based on This Knowledge.

One common criticism is that the CBOT rule-of-reason factors are so open-ended, that liability is hard to determine. Given its flexibility, the standard constrains neither the Supreme Court nor the lower courts. Companies have little guidance in predicting whether courts will later deem their actions as unreasonable restraints of trade. Nor does the rule of reason lend itself to simple norms, which business executives can readily internalize to guide daily behavior, and which foster a culture of competition.

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

antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from

http://www.oecd.org/dataoecd/7/13/35911017.pdf [hereinafter OECD, Merits].

Scalia, supra note 128, at 1187.


As the Court noted before its recent decisions eliminating the per se rules, “businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.” Topco, 405 U.S. at 609 n.10.

the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.\footnote{Billing, 127 S.Ct. at 2395; see also id. (quoting Herbert Hovenkamp, Antitrust Violations in Securities Markets, 28 J. CORP. L. 607, 629 (2003) (\"Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another .\")\)}. 

The Court, however, never reflects to what extent its rule of reason contributes to this \"unusually high risk\" of inconsistent verdicts.\footnote{The majority never responded to Justice Breyer\’s point that \"[o]ne cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs.\" Leegin, 127 S.Ct. at 2739.}

One reason for this uncertainty is the rule of reason\’s focus on the conduct\’s subsequent competitive effects.\footnote{OECD Merits, supra note 129, at 9-10.} For blatantly anticompetitive conduct, its nefarious purpose and effect are either well-known or the companies, once aware of their conduct\’s anticompetitive effects, persist in the behavior. So they cannot complain. But for other conduct, a company is still liable even though it cannot predict its conduct\’s competitive effects. \footnote{Trans-Missouri Freight, 166 U.S. at 342; CBOT, 246 U.S. at 238; NCAA, 468 U.S. at 101 n.23.} Lack of anticompetitive intent is not a defense.\footnote{Indeed, conspirators in hard-core cartels take extraordinary steps to keep their activities secret, such as burning bid files in bonfires and hiding computer files in the caves of one employee\’s grandmother\’s house. Maurice E. Stucke, Morality and Antitrust, 2006 COLUM. BUS. L. REV. 443, 494 (2006). Even if the cartel members do not appreciate their action\’s illegality, the per se rules foster a general moral opprobrium toward these antitrust violations. Id. at 500.} Competition officials and courts, like private actors, suffer informational asymmetries, and may be little better in predicting such conduct\’s future anticompetitive harm (and thus illegality). The per se standard has a different focus: a company (no matter how inconsequential its market power) that \emph{agrees} with its competitors to fix prices, allocate customers or markets, or reduce output can reasonably expect antitrust prosecution, regardless of the competitive outcome.\footnote{Trans-Missouri Freight, 166 U.S. at 342; CBOT, 246 U.S. at 238; NCAA, 468 U.S. at 101 n.23.}

Another cause of the rule of reason\’s unpredictability is that many antitrust plaintiffs seek to establish market power circumstantially through

\footnote{OECD Merits, supra note 129, at 9-10.}
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market share. Liability hinges not on actual anticompetitive effects, but often on how broadly the fact-finder defines the relevant antitrust market. As Professor (and former FTC Chairman) Pitofsky observed, the “measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement.” In investigating various industries over the years, I found few where the business executives and antitrust economists viewed market definition similarly. Debates over market definition needlessly consume litigation resources to such a degree that the litigation’s outcome often hinges on whether the court adopts the plaintiff’s or defendant’s proposed market definition. Aspen Ski is a tribute to faulty market definition.

A third basis for the rule of reason’s unpredictability is that the

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140 *Leegin*, 127 S.Ct. at 2712 (“Whether the businesses involved have market power is a further, significant consideration” under the rule of reason).
142 Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 825 (1987); see also *Leegin*, 127 S.Ct. at 2730 (Breyer, J. dissenting) (“The Court’s invitation to consider the existence of ‘market power,’ for example, . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.”); OECD, Committee on Competition Law & Policy, *Competition Policy Roundtable: Abuse of Dominance & Monopolisation*, OCDE/GD(96)131 8 (1996), [http://www.oecd.org/dataoecd/0/61/2379408.pdf](http://www.oecd.org/dataoecd/0/61/2379408.pdf) [hereinafter OECD, *Monopolisation*] (“Market share seems to be an almost universally applied criterion, although the details of measurement are undoubtedly different.”).
143 The merging parties’ business plans frequently contain SWOT analysis, but rarely studies of own- or cross-elasticity of demand. See, e.g., Franklin M. Fisher, *Economic Analysis and “Bright-Line” Tests*, 4 J. COMP. LAW & ECON. 129, 132 (2007) (business people usually do not use “market,” a term of art in antitrust cases, the same way). With two-sided markets (such as daily newspapers that must optimally price their content to attract readers, and then garner the optimal number of readers to maximize advertising revenue), market definition issues increase in complexity.
144 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). No one seriously contends that the Aspen, Colorado ski resorts exercised market power for destination skiers. Skiers seeking a week-long holiday can consider resorts in Utah, British Columbia, Vermont, New Mexico, the Alps, and elsewhere. Thus, if the geographic market were national or international, then defendant’s market share (and inference of market power) diminishes. Defendant’s trial counsel, however, never specifically objected to the jury instruction on relevant market. Defense counsel objected only that the court should not submit the issue of relevant market to the jury; instead, the court, as a matter of law, should decide the issue. The Tenth Circuit did not find plain error (i.e., the district court’s instructions on the relevant market resulted in a “miscarriage of justice” or were “patently plainly erroneous and prejudicial”). 738 F.2d 1509, 1513-16 (10th Cir. 1984).
economics are framed on “rational” profit-maximizers. Currently, the litigants retain expert economists, typically academics or consulting economists with little, if any, regular interaction or experience in the affected industry. Each party gathers customers favoring (or are neutral toward) or opposing the challenged restraint, and company documents that support or undermine the economic theory. The fact-finder wades through this conflicting evidence and ultimately decides which outcome is more likely under neoclassical economic theory, premised on a profit-maximizer. Not surprisingly, the predicted outcome may be divorced from reality.

A fourth basis for the rule’s unpredictability is the steady stream of defenses. A vague test of public welfare, warned Professor Kahn, provides antitrust defendants “with an unlimited supply of legal loopholes.” The Court recently resurrected old defenses once rejected and entertained new ones.

2. Rule Of Reason Is Ill-Suited To A Legal System In Which The Supreme Court Can Review An Insignificant Proportion Of Decided Cases.

Justice Scalia noted the pitfalls of a discretion-conferring approach: The “idyllic notion of ‘the court’ gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly operative facts become

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146 United States v. Sunguard Data Sys., Inc., 172 F. Supp. 2d 172, 190 (D.D.C. 2001) (acknowledging court’s difficulties in defining the relevant market “given the conflicting evidence from the parties’ economists, as well as the conflicting customer statements submitted by the parties”).

147 Kahn, supra note 115, at 41; Arthur, supra note 12, at 340 (an overly broad standard can tempt “courts to create ways to avoid needless overregulation, especially of sympathetic defendants, leading to formalistic distinctions that detract from the very certainty that the standard was designed to promote”).

148 Despite a clearly worded savings clause, after Billing, the defendant can allege that the securities law (or some other statute) impliedly pre-empts the Sherman Act’s application. Although a vertical restraint may lead to higher retail prices, a defendant after Leegin can offer the prospect of more services (or curbing free-riding).
apparent—that notion simply cannot be applied to a court that will revisit the area in question with great infrequency."  

Such is the case with antitrust. To articulate an objective rule of reason that accurately predicts competitive effects, the Court continually needs to assess various restraints’ effects in different industries. The Roberts Court is hearing on average more antitrust cases annually than the Rehnquist Court.  

But the Court overall has decided relatively few antitrust cases. Since 1890, the Court decided fewer than 500 antitrust cases. In contrast, over 1,000 antitrust cases were filed in 2007 alone in federal district court. Part of this reflects a general trend in the Court’s hearing fewer appeals. A change in the Expediting Act, which governs appeals in the government’s civil antitrust cases, also limited somewhat the number of Supreme Court opinions.

Because the Court decides so few antitrust cases annually, it is unrealistic its totality-of-circumstances test will provide guidance to the lower courts. Moreover, the Court never developed over the past 90 years

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149 Scalia, supra note 128, at 1178.
150 Between September 1986 and 2005, the Rehnquist Court handed down approximately 27 antitrust decisions. Since 2006, the Roberts Court handed down 7 antitrust decisions (all in defendants’ favor).
151 A Westlaw search found 427 Supreme Court decisions that cite the key antitrust statutes, 15 U.S.C. §§ 1, 2, 13, 14, 18, or 45. Only 312 cases have antitrust as a topic.
153 http://www.scotusblog.com/wp/wp-content/uploads/2008/04/opinionchart.pdf; Schauer, supra note 4, at 205 (“One of the remarkable features of the Supreme Court's declining workload is that during the period when the Court's own decisional output has dropped to less than half of what it had been in the not-so-distant past, the caseloads of the state and lower federal courts have been increasing substantially.”).
154 As one DOJ official observed, until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act, 15 U.S.C. § 29. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of “general public importance in the administration of justice.” Even then, the Court retains discretion to remand the case to the court of appeals. District courts certified for direct appeal three cases, including Microsoft, which the Court declined to hear and remanded to the court of appeals. R. Hewitt Pate, Assistant Attorney Gen., U.S. Dep’t of Justice, Antitrust Div., Speech at British Institute of International and Comparative Law Conference: Antitrust Law In The U.S. Supreme Court (May 11, 2004), http://www.usdoj.gov/atr/public/speeches/204136.htm#N_23..
155 Scalia, supra note 128, at 1179 (“it is not we who will be ‘closing in on the law’ in the foreseeable future, but rather thirteen different courts of appeals . . . To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.”). Moreover, the Court is unlikely to review whether a trial or appellate court achieved the proper balance in particular cases.
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its rule of reason. It simply repeats the CBOT factors. As a result, “[t]he content of the Rule of Reason is largely unknown,” wrote Judge Posner, “in practice, it is little more than a euphemism for nonliability.” The Court in Sylvania “was deceived if it thought it was subjecting those restrictions to scrutiny under a well-understood legal standard.” 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.

The law, as Hayek maintained for culture, is “the transmission in

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156 Leegin, 127 S.Ct. at 2712-13; Khan, 522 U.S. at 10; Sylvania, 433 U.S. at 49 n.15. Indeed the Court, one year after Sylvania, recognized its standard’s short-comings: “Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the ‘rule of reason’ have been applied to broad classes of conduct falling within the purview of the Act’s general provisions.” U.S. Gypsum, 438 U.S. at 428; see also ABA Monograph, supra note 12, at 101 (Supreme Court decisions since Sylvania “have not greatly clarified the muddy waters of rule of reason jurisprudence”).

157 Posner, Rule of Reason, supra note 12, at 14; see also Stephen Calkins, California Dental Association: Not a Quick Look But Not the Full Monty, 67 ANTITRUST L.J. 495, 521 (2000) (“beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win”).

158 Posner, Rule of Reason, supra note 12, at 14; Robert Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 COLUM. L. REV. 1, 34 (1978); Sylvania, 537 F.2d 980, 1024, 1026-27 (9th Cir. 1976) (en banc) (Browning, J., dissenting) (“If the courts were required to review such issues under a ‘rule of reason,’ unpredictable ad hoc determinations as to what is or is not illegal under the Sherman Act would result. . . . A judge or jury should not be expected to determine whether Sylvania's locations practice contributed to Sylvania's success in interbrand competition when Sylvania's expert witness was unable to do so. Because the interbrand effects of Sylvania's location practice cannot be measured, a decision . . . whether the net effect of the practice was procompetitive would be sheer guesswork.”), aff'd, 433 U.S. 36 (1977). Two antitrust counsel similarly observed that left unanswered after Leegin is “how the Rule of Reason will be applied in vertically imposed minimum [RPM] agreements and what factors would allow a jury to find a specific practice illegal. What is clear is that challenges to minimum [RPM] agreements will be expensive and unpredictable except in the circumstance where the justification for the minimum price is obvious and undisputed or when there is no justification for a minimum price.” Conrad M. Shumadine & Michael R. Katchmark, Antitrust And The Media, 917 PLI/Pat 393 (Nov. 2007); see also Schauer, supra note 4, at 230 (outcome will be “good news for the Leegin Creative Leather Products Company, for some economists, and for some lawyers,” but bad news for those desiring from the Court or from antitrust doctrine a clear statement as to those practices permissible and impermissible under the Act); Mark D. Bauer, Whither Dr. Miles?, 20 LOY. CONSUMER L. REV. 1, 12 n.64 (2007).

159 Posner, Rule of Reason, supra note 12, at 15; see also Posner, Next Step, supra note 131, at 8 (“Rule of Reason standard lacks content and so does not provide guidance to judges, juries, or the Federal Trade Commission”).
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Grounded in case-specific facts, rule-of-reason analysis does not transmit our accumulated stock of knowledge. Lawyers labor to satisfy the standard, but no rule emerges at the end to provide greater certainty or guidance about a practice’s legality in a different context. Each restraint in a particular industry and time-period is treated independently.

Lower courts, at times, achieve uniformity on objective rules. Indeed, the lower courts, with their four-step rule-of-reason analyses, have provided contours to CBOT’s open-ended factors. Although the four-step analyses improved considerably the Court’s CBOT factors, many of the rule of reason’s fundamental deficiencies remain.


Under the rule of law, the Court’s role is to interpret the Sherman Act based on (i) the original law, and (ii) precedent that is true to the original law; not what it believes to be the latest economic thinking on what competition policy should be. By declaring general principles, Congress,

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161 Maricopa, 457 U.S. at 343 (“Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context.”) (citation omitted).

162 First, antitrust plaintiffs (including the government) must demonstrate that within a properly defined relevant market, the defendants’ actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. Absent direct evidence of anticompetitive effects, plaintiffs can demonstrate that the defendants have “market power” in a properly defined antitrust market for goods or services. Second, after plaintiffs meet their initial burden, the burden of production shifts to defendants to provide a pro-competitive justification for the challenged restraint. Third, if the defendants do so, plaintiffs must prove either that the challenged restraint is not reasonably necessary to achieve defendants’ pro-competitive justifications, or that defendants may achieve those objectives in a manner less restrictive of free competition. Lastly, the fact-finder engages in a “careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.”

Geneva Pharm. Tech. Corp. v. Barr Lab. Inc., 386 F.3d 485, 507 (2d Cir. 2004); see also United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2nd Cir. 2003); Worldwide Basketball & Sport Tours, 388 F.3d at 959; Plymouth Whalers Hockey Club, 325 F.3d at 718; Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998); Tanaka v. University of S. California, 252 F.3d 1059, 1063 (9th Cir. 2001).

can be assured that the courts will construe the Sherman Act to further those principles, and circumscribe the courts’ arbitrarily reaching standards (or results) inconsistent with those principles. The Court cannot announce any general rule: “when one does not have a solid textual anchor or an essential social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.”

Under today’s conventional wisdom, the Court between the 1940s and early 1970s ran amok with per se liability rules. But the Court at least sought administrable rules in furtherance of the Sherman Act’s principles. To give content to the Sherman Act, said the Court, “it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed.” One could argue that the Court adopted the wrong mechanism to further those principles (or that its per se rules hindered, rather than furthered, such principles).

Today’s Court is unshackled. No longer anchored by the Sherman Act’s principles, the Court now holds that its “antitrust doctrines evolve with new circumstances and new wisdom.” The Court’s justification is that Congress incorporated into the Sherman Act the common law’s evolving standards, and by doing so, delegated to the courts the duty of fixing the standard for each case. By citing the common-law nature of the Sherman Act, the Court argues that, unlike other federal criminal or civil statutes, principles of stare decisis are less significant.

The current Court articulates a new objective of the antitrust laws

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164 Scalia, supra note 128, at 1185.
165 Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).
166 Leegin, 127 S.Ct. at 2724.
167 Id. at 2720-21; Khan, 522 U.S. at 20 (“general presumption that legislative changes should be left to Congress has less force . . . to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition”).
168 For over 90 years, the Court viewed RPM as per se illegal. The Court’s aim in Leegin was not to reconcile its abrupt departure with stare decisis principles, but to show why these principles did not burden the Court. One of the few businesses submitting an amicus brief in Leegin noted the importance of stare decisis given the essential part of the regulatory background against which many discount retailers financed, structured, and operated their businesses. Br. of Burlington Coat Factory Warehouse Corp. as Amicus Curiae in Supp. of Resp’t, Leegin, 2007 WL 621854 (No. 06-480) (Feb. 26, 2007). Although the dissent observed, “whole sectors of the economy have come to rely upon the per se rule,” the majority never responded to Burlington’s or Justice Breyer’s arguments.
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(based on its conception of “modern” economic theory), and then a rule to promote that new objective.\(^{169}\) For example, in Leegin, the Court justified sacrificing intra-brand competition by opining that antitrust law’s primary concern is inter-brand competition.\(^{170}\) This policy statement never came from the Sherman Act or its legislative history. It originated in a footnote in Sylvania.\(^{171}\) The Court’s economic theory is sound for generic products,\(^{172}\) but flawed for branded differentiated products. It ignores what every business executive knows: “the most direct and effective competition for a branded product, especially one that is highly advertised, is a firm selling the

\(^{169}\) Likewise, to reorient rule-of-reason analysis to its ideology, the Chicago School first recharacterized the antitrust laws’ objectives. Judge Bork argued that contrary to early thinking, the Sherman Act’s legislative history “displays the clear and exclusive policy intention of promoting consumer welfare,” a term which Bork gave a different meaning than others. BORK, supra note 12, at 61. His interpretation was so roundly discredited that some have called for a halt of its bashing. Daniel R. Ernst, The New Antitrust History, 35 N.Y.L. SCH. L. REV. 879, 282 n.72 (1990); see also Robert H. Lande, Wealth Transfers As The Original And Primary Concern Of Antitrust: The Efficiency Interpretation Challenged, 50 HASTINGS L.J. 871 (1999). But it is instructive, as the Chicago School recognized, that defining the goal of antitrust is paramount. “Everything else follows from the answer we give.” BORK, supra note 12, at 50. After characterizing the Sherman Act’s goal as their conception of efficiency, the Chicago School standards naturally followed. Thus to make the Rule of Reason “more manageable,” they adopted the position “that the essential spirit of the Rule is to condemn only those practices that are, on balance, inefficient in the economic sense.” Posner, Rule of Reason, supra note 12, at 16. With their goal in place, the Chicago School adherents could “exclude some of the factors listed in the standard formulation of the Rule of Reason.” Id.

\(^{170}\) Leegin, 127 S.Ct. at 2715, quoting Khan, 522 U.S. at 15.

\(^{171}\) Sylvania, 433 U.S. at 51-52 n. 19. The Court viewed inter-brand competition as competition among the manufacturers of the same “generic” product—television sets in that case. It is not apparent, however, that television sets are generic. Television sets range in size, type (plasma or LCD), features, and price. A recent search of one national electronics retailer found a wide dispersion in prices for a 42” 1080p flat-panel LCD HDTV among the 11 brands sold: Pioneer ($2699); Sony ($2299); Philips ($1999); HP ($1899); Panasonic ($1799); Sharp ($1799); Toshiba ($1699); JVC ($1299); LG ($1299); Insignia ($996); Westinghouse ($996). Television sets were among the differentiated products fair-traded when RPM was legal under certain states’ “Fair Trade” laws. S. Rep. No. 94-466, at 2 (1975) (“The principle products fair traded are stereo components, television sets, major appliances, mattresses, toiletries, kitchenware, watches, jewelry, glassware, wallpapers, bicycles, some types of clothing, liquor, and prescription drugs”). Moreover, a DOJ study estimated a price discrepancy of 18 to 27% between states that did and did not enact Fair Trade laws: “For example, a set of golf clubs that lists for $220 can be purchased in non-fair trade areas for $136; a $49 electric shaver for $32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483.” Id. at 6.

\(^{172}\) If Farmer Smith seeks to impose RPM for her carrots sold at the local supermarket, consumers would switch to other farmers’ carrots. Thus, intra-brand competition is of little consequence for fungible products where producers are price-takers.
Antitrust standards, under the Court’s muddled conception of economics, will stray further from rule-of-law principles. Evolving (and disputed) economic theory cannot provide the requisite rules for civil and criminal illegality. “Legal requirements are prescribed by legislatures and courts, not by economic science.” Each new “wisdom” can affect criminal liability under the Sherman Act. Neo-classical economics cannot predict

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173 Pitofsky, Next 100 Years, supra note 142, at 826. For example, with the advent of our fourth child, I recently haggled with Toyota and Honda dealers for the best price of comparable minivans. The sales representatives were uninterested in the price of their rival’s minivan. Only when presented with a price for the same vehicle from a rival dealer did the haggling commence in earnest. The EU found in Grundig the importance of intra-brand competition. Without intra-brand competition, consumers for differentiated goods were forced to buy branded products at an excessive mark-up because no competition existed in the distribution of the product: “competition between producers generally loses its effectiveness as producers become more successful in their efforts to clearly differentiate their brands from other brands.” Consten & Grundig v. Comm’n, Comm. Comm.Mkt.Rep. (CCH) ¶ 8046 (ECCJ 1966). The EC found that wholesale prices for Grundig products in France ranged between 23 and 44% higher than those in Germany, net of customs duties and taxes and after taking discounts into consideration. A tougher issue is if after RPM, output for the branded differentiated good increases. Suppose, for example, Toyota authorized fewer dealers per geographic region, and each dealer sold Toyotas at a fixed retail price. Output for Toyotas thereafter increases nationally. Some will argue that the vertical restraint had the effect of increasing services for, or reputation of, Toyota autos, thereby making them more attractive to consumers. Besides the correlation/causation issue, the output test, while a good indicator for undifferentiated goods, is unsatisfactory for highly differentiated goods (like minivans or TV sets). If the Toyota Sienna remains cheaper than the Honda Odyssey, the marginal consumer may purchase the Toyota (thus output increases), but cannot extract that last bit of consumer surplus though intra-brand competition. See also Br. for Comanor & Scherer as Amici Curiae Supporting Neither Party at 4-5, Leegin, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 173679 (consumer welfare can decline despite increase in output).

174 Arthur, supra note 12, at 338 (“[c]larity in antitrust law is not possible under the current conception of the Sherman Act as a standardless delegation to the federal courts to engage in microeconomic regulation, especially in view of the ‘explosive expansion of Sherman Act coverage’ beyond the subjects that dominated antitrust for its first half century.”).

175 THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955); see also Leegin, 127 S.Ct. at 2729 (“antitrust law cannot, and should not, precisely replicate economists’ (sometimes conflicting) views”).

176 Aware that the government prosecutes Sherman Act violations criminally or civilly, Justice O’Connor argued that the Act does not authorize courts to develop standards for the imposition of criminal punishment. To the contrary, this Court determined that the objective standard to be used in deciding whether conduct violates the Sherman Act—the rule of reason—was evinced by the language and the legislative history of the Act. [Standard Oil] It is one thing to recognize that some degree of uncertainty exists whenever judges and juries
myriad behavior across markets today. Given many markets’ dynamic nature, courts cannot expect to optimize allocative efficiency through its rule of reason. Despite claims of being normative free, any economics-based competition policy ultimately is judgmental. Subjective value judgments underlie “objective” economic standards, and the objectives vary. Although the courts recently described the ultimate goal of the antitrust laws as protecting consumers or enhancing consumer welfare, no consensus exists on the meaning of “consumer welfare.” Legal standards premised are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis. United States v. Kozinski, 487 U.S. 931, 951 (1988).

177 Stucke, Advocacy, supra note 122, at 1001-7; Kahn, supra note 115, at 39 (Fair competition “indissolubly linked with the non-economic values of free enterprise—equality of opportunity, the channeling of the profit motive into socially constructive channels, and the diffusion of economic power.”); Wolfgang Kerber, Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law, in ECONOMIC THEORY AND COMPETITION LAW 24 (Josef Drexl et al., eds. 2008) (normative economic foundations of competition law remain undeveloped).

178 As the OECD recognized, an “objective” standard reflects the antitrust enforcers’ objectives. OECD, Monopolisation, supra note 142.


181 Although 30 of 33 ICN respondents identified this objective, most “do not specifically define consumer welfare and appear to have different economic understandings of the term.” UNILATERAL CONDUCT WORKING GROUP, INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 9 (2007), http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%202007.pdf. Although its 449-page report addresses how “antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today,” the AMC, after spending three years and nearly $4 million, never reached unanimity on the definition of “consumer welfare.” AMC Report, supra note 11, at 1, 26 n.22. The twelve Commissioners, all with backgrounds in competition policy, disagreed over a relatively straightforward question: “should efficiencies that benefit only the [merging] parties, with no prospect of being passed along to consumers, be counted in favor of a merger?” Commissioner Carlton, a University of Chicago professor, argued yes. Total surplus is “used routinely in cost-benefit analysis, a tool of widespread use in public policy.” Id. at 401. Commissioner Jacobson disagreed: “any doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in
on the Court’s assessment of the latest economic thinking simply afford too much discretion to the judiciary.

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

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

The Court between the 1940s and 70s articulated rules that disciplined against attempts to weigh increases in competition in one sector versus losses in another. That under Justice Scalia’s logic, displays more judicial restraint than to announce that “‘on balance,’ we think the law was violated here—leaving ourselves free to say in the next case that, ‘on balance,’ it was not.” Ultimately, it is difficult, the OECD noted, “to have confidence that balancing tests can be applied accurately, objectively, and consistently.”

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

First, weighing competing societal interests may be appropriate
when the cause of action is in its infancy (such as a prima facie tort) or for
novel cases. It is suboptimal for the majority of adjudications over the long-
term.  

Second, competition policy should not arise from judicial weighing. Under the rule of reason, the “factfinder weighs all of the circumstances of a
case in deciding whether a restrictive practice should be prohibited as
imposing an unreasonable restraint on competition.” Weighing a
particular restraint’s competitive benefits and harms is often beyond the
litigants’ and judiciary’s capacity. Weighing non-commensurable societal
interests in determining antitrust liability exceeds judicial competence; thus
non-economic societal interests are often, but not always, excluded
from antitrust analysis.

It “is now conventional wisdom for antitrust lawyers to observe that
courts . . . almost never explicitly balance the pro-competitive and
anticompetitive effects of an alleged restraint.” This is because the

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187 Leegin, 127 S.Ct. at 2712.

188 The Court “has not provided practical guidance on how to perform the required balancing, the weight to be given various factors, or the analytical rigor with which the balancing must be done.” ABA Monograph, supra note 12, at 125. Moreover, courts are ill-suited to decide the optimal competitive outcome out of the spectrum of possibilities. F. SCHERER & D. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 336-7 (3d ed. 1990).

189 See, e.g., Prof'l Engineers, 435 U.S. at 688 (rule of reason “does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”); FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 424 (1990).


191 William Kolasky, Reinvigorating Antitrust Enforcement in the United States: A Proposal SPG ANTITRUST 87 (2008); see also ABA Monograph, supra note 12, at 126 (balancing rarely undertaken); 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1912, at 302 (1998) (“set of rough judgments we make in antitrust litigation does not even come close to this ‘balancing’ metaphor. Indeed, most courts do not define a unit of measurement in which the quantities to be balanced can be measured . . . . To the best of our knowledge, this
balancing “occurs at each preceding step of the analysis, rather than at the end.” Consequently, the greater danger under the rule of law is when the Court makes policy trade-offs along the way.

Competition policy has many unsettled trade-offs. Antitrust policymakers have long disagreed whether to evaluate mergers (or other restraints) under a total-welfare or consumer-welfare standard. Nor is there consensus what either standard encompasses. Much depends on what is measured (and is actually measurable), over what period. Economists (much less judicial fact-finders) are ill-equipped to quantify the value of different forms of competition, such as inter- and intra-brand competition, or static versus dynamic efficiency, and the restraint’s impact on that competition. Even if such weighing were feasible, no consensus exists on the relative weights for each factor. In certain industries, society may seek to promote innovation (dynamic efficiency) more than lower prices (static efficiency). Moreover, the weighing ignores the distributional effects of the challenged restraint. The fact-finder in balancing pro- and anti-competitive effects does not consider whether one group bears the brunt of anticompetitive effects over time.

The Leegin Court resurrected two trade-offs. Unlike its predecessors, the five justices never assessed their competency to make these

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192 Kolasky, supra note 191, at 87.
193 The deadweight welfare loss, for example, represents the social costs arising from supra-competitive pricing. It misses anticompetitive practices’ other social costs. Professor Williamson’s trade-off calculus for weighing the effects on total welfare, included, to the extent quantifiable: (i) the cost from slower (or the lack of) technological progress once a monopolist or cartel lays claims to a national market, and (ii) the other social costs the monopolist or cartel imposes (or incurs), such as the political implications of control over wealth, a matter for “serious” concern. Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). Chicago School adherents, however, exclude these social costs from their equation.
194 Even if one could determine whether conduct enhances or reduces total or consumer welfare, “it can be quite challenging, if not impossible, to measure the magnitude of those changes.” OECD Merits, supra note 129, at 11.
196 Evans, supra note 98, at 17 (noting “Kaldor compensation principle works as a one off shot, but fails in situations where multiple detriments occur to the same group of people”); Kerber, *Efficiency*, supra note 177, at 9-13 (discussing criticisms of Kaldor-Hicks as the normative criterion for economic analysis of legal rules when gains and losses are distributed unevenly among the population).
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normative trade-offs, their authority under the Sherman Act to do so, and the implications under the rule of law. First, the Court traded off the reduction of intra-brand competition on the prospect of an increase in inter-brand competition. Although price surveys show that RPM often increased the products’ retail prices, the Court reasoned, “prices can be increased in the course of promoting procompetitive effects.” While waiting for these pro-competitive benefits, consumers pay more. The Topco Court found it beyond its competency and authority under the Sherman Act “to determine the respective values of competition in various sectors of the economy;” the politically accountable Congress must make this tradeoff.

197 The Court cited its objective for the antitrust laws (namely, to promote inter-brand competition), and then some summaries of the economic literature that RPM at times may promote inter-brand competition. Leegin, 127 S.Ct. at 2714-15.

198 Id. at 2727-28; Comanor & Scherer, supra note 173, at 4 (generally accepted that RPM and other vertical restraints lead to higher consumer prices, and these increases can be substantial).


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

201 The Leegin Court lacked a rich empirical record to confidently trade-off intra- for inter-brand competition. The empirical evidence, it admitted, was “limited.” Leegin, 127 S.Ct. at 2717; see also Bauer, supra note 158, at 9 (few scholars have performed empirical research on RPM). Congress can solicit the views of various constituencies and independently gather facts; the Court is limited to the facts and views presented. Leegin, 127 S. Ct. at 2737 (Breyer, J., dissenting) (“But both Congress and the FTC, unlike courts, are well-equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the per se rule will outweigh the costs.”). One supposed villain in Leegin were profit-maximizing consumers; they shamelessly free-ride off some retailers’ services and then patronize the discounters. Actual consumers neither were a party in Leegin nor had the opportunity to defend themselves against this empirically-suspect allegation. Leegin, 127 S.Ct. at 2727 (Breyer, J., dissenting). Rational choice theory predicts individuals will free ride when confronted with a public good. But in behavioral experiments, many individuals do not free ride at all (or not to the extent predicted under rational choice theory). In these public good experiments, “people have a tendency to cooperate until experience shows that those with whom they’re interacting are taking advantage of them.” Richard H. Thaler, The Winner’s Curse: Paradoxes and Anomalies of Economic Life 14, 9-20 (1992); see also Robert A. Prentice, Chicago Man, K-T Man, and the Future of Behavioral Law
Second, the *Leegin* Court accepted curtailing one facet of competition (intra-brand price competition) on the belief it might promote another facet of competition, namely encouraging “retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer’s position as against rival manufacturers.” Thus with “price competition decreased, the manufacturer’s retailers compete among themselves over services.” In *Catalano*, the Court refused trading-off one facet of competition for a possible increase in another. One distinction, however, is that *Catalano* involved a horizontal restraint (thus price competition is eliminated across the defendants’ competing products) whereas *Leegin* involved a vertical restraint (price competition is eliminated only for one manufacturer’s brand). But even for this one brand, the Court never articulates how consumers will benefit in the long-run from this trade-off. Moreover, the more differentiated the brands, the less significant the

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202 *Leegin*, 127 S.Ct. at 2715.

203 *Id.* at 2716.

204 In *Catalano*, defendant beer wholesalers allegedly agreed to eliminate interest-free credit to the retailers. Before their secret agreement, defendants extended interest-free credit up to the 30- and 42-day limits permitted by state law. Before the alleged agreement, defendants competed with respect to trade credit; the credit terms for individual retailers varied substantially. After entering into the agreement, defendants uniformly refused to extend any credit at all. The Ninth Circuit believed the credit-fixing agreement might enhance competition: (1) “by removing a barrier perceived by some sellers to market entry,” and (2) “by the increased visibility of price made possible by the agreement to eliminate credit.” The Supreme Court rejected both claims. *Catalano*, Inc. v. Target Sales, Inc., 446 U.S. 643, 644-45 (1980). As a matter of neo-classical economic theory, the defendants’ agreement on one facet of competition will encourage competition in other facets where cheating is less detectable. See Posner, *Next Step*, supra note 131, at 20 (“One should not conclude from this that a cartelized market is as competitive as a noncartelized, though in different ways.”). When rates are regulated, the regulated companies (such as airlines and railroads) often compete on non-price dimensions, like quality and service. As the Court found in the regulated transportation industry, “there is frequently no real rate competition at all and such effective competition takes other forms.” *Northern Pac. Ry.*, 356 U.S. at 12. Nonetheless the Court rejected this tradeoff that “the informing function of the agreement, the increased price visibility,” justifies “its restraint on the individual wholesaler’s freedom to select his own prices and terms of sale.” *Catalano*, 446 U.S. at 645, 649.
These trade-offs increase the rule of reason’s unpredictability. The Court, for example, never answers by how much manufacturers can raise the minimum retail price for their goods to deter free-riding. The assumption is that the manufacturer’s and consumers’ interests are aligned: the manufacturer will not raise prices beyond levels to effectuate the requisite services. The Court lacked empirical evidence of the extent to which manufacturers’ and consumers’ incentives are aligned. It is perfectly rational for manufacturers to avoid competition by differentiating their branded products. Moreover, a manufacturer can use RPM to avoid a price war among its retailers, which ultimately squeezes the manufacturer’s profit margins. How then can the fact-finder quantify the incremental value of services to assure that the manufacturer, under pressure from its dealers, does not exceed it? The Court never explained the justifications for RPM “with sufficient clarity for a generalist judge to understand.”

205 Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, Harv. Bus. Rev., Jan. 2008, at 86. Such differentiation can enhance consumer welfare by offering a greater variety of products and services. At other times, image advertising leads to greater corporate profits, without significant product or services improvements. Although “rational” consumers opt for the generic, less expensive alternative, others fall spell to the marketing campaign.


207 *Leegin*, 127 S.Ct. at 2733 (Breyer, J., dissenting).

Legal standards of inadequate clarity or precision are criticized “as undemocratic—and, in the extreme, unconstitutional—because they leave too much to be decided by persons other than the people’s representatives.” One concern is that if governments have a wide discretionary scope, their policies are prone to distortion by rent-seeking behavior. The vague rule of reason creates opportunities for competitors to lobby the agencies to punish their competitors, or to prevent being punished themselves. One observation in Washington, D.C. was that Microsoft, before its antitrust headaches, devoted little energy in lobbying officials, which left it exposed to the government’s antitrust prosecution. As the Washington Post commented, “For a couple of embarrassing years in the mid-1990s, Microsoft’s primary lobbying presence was ‘Jack and his Jeep’—Jack Krumholz, the software giant’s lone in-house lobbyist, who drove a Jeep Grand Cherokee to lobbying visits.” After the DOJ filed the antitrust lawsuit in 1998, Microsoft “began what was then considered the largest government-affairs makeover in corporate history” and now has “one of the most dominating, multifaceted, and sophisticated influence machines around—one that spends tens of millions a year.” Of the twenty-three people working out of Microsoft’s government affairs office in Washington, sixteen are lobbyists.

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208 Scalia, supra note 128, at 1176.
209 The vaguer the standard, the more criteria one can consider (and weigh), the greater the danger of both political pressure and/or the parties’ direct interventions can influence the competition authorities’ decisions and produce decision errors. Christiansen & Kerber, supra note 115, at 16.
211 Id.
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Companies can manage increasingly their risks, such as currency rate fluctuations, through an array of financial instruments. But to hedge against antitrust risks, companies cannot rely on rule-of-law principles. Instead, they must resort to lobbyists and lawyers, which can substantially waste scarce resources. Credible rules hem the agencies’ discretion and mitigate this rent-seeking, which is condemned by the Chicago School, post-Chicago, and non-Chicago commentators.\(^{212}\)

A second concern with the vague rule of reason is that a particular Administration can selectively enforce the Sherman Act to achieve its political (or personal) ends. Antitrust enforcement can be ideological\(^ {213}\) and highly politicized. The federal agencies have tremendous discretion when, if at all, and on whom to focus their pervasive prosecutorial antitrust powers. It is naïve to view the agencies beyond political pressure.\(^ {214}\) President Lyndon B. Johnson permitted a merger between two Houston banks in exchange for favorable coverage in the Houston Chronicle.\(^ {215}\) President


\(^{213}\) This conflict in ideologies within the United States extends to divergences between some U.S. and E.U. competition policymakers on issues of abuse of dominance and vertical restraints. See also Evans, supra note 98, at 74 (divergence in ideologies exacerbated by “lack of tools and a consensus on the balancing of consumer welfare, efficiency and innovation”).

\(^{214}\) Republicans in 2000 charged the DOJ under the Clinton Administration as too political and argued for the restoring the agency’s integrity. “There’s been a leadership vacuum, and the department has been politicized,” said former Bush administration attorney general William Barr. “The primary task will be to rebuild professionalism and morale—the department has to be re-professionalized.” Byron York, *Restoring Justice-If Bush Wins, A Great & Urgent Task*, NAT’L REV., June 5, 2000, 2000 WLNR 6447647. One of George W. Bush’s campaign promises was to make the DOJ less political. His new Attorney General will perform his duties “guided by principle, not by politics.” Bush added, “I wanted someone who would have a commitment to fair and firm and impartial administration of justice. I am confident I’ve found that person in John Ashcroft.” Jill Zuckman, *Bush Draws From Ends Of Political Spectrum: Ashcroft Nominated For Attorney General, Whitman For EPA Chief*, CHICAGO TRIB., Dec. 23, 2000. Seven years later, recounting some of the many egregious political abuses at the DOJ under the Bush Administration, newspapers were calling for restoring the rule of law to the DOJ. See, e.g., *Editorial: Restoring Faith*, ST. LOUIS POST-DISPATCH, Sept. 3, 2007; Pedro Ruz Gutierrez & Tony Mauro, *Getting Over Gonzales: DOJ Seeks To Recover: As The Attorney General’s Bumpy Reign Comes To A Close, What Will It Take To Repair Main Justice?*, LEGAL TIMES, Sept. 3, 2007; Opinion, *Our View Gonzales’ Resignation*, NAT’L L. J., Sept. 3, 2007.

\(^{215}\) MICHAEL R. BESCHLOSS, *TAKING CHARGE: THE JOHNSON WHITE HOUSE TAPES*,
Nixon used the antitrust laws as a sword of Damocles against the media networks and thwarted the antitrust litigation against contributor International Telephone & Telegraph Corp. The ITT scandal led to the criminal conviction of an Attorney General, part of the articles of

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

President Nixon in 1971 discussed intimidating the nation's three major television networks by keeping the constant threat of an antitrust suit hanging over them. In a July 2, 1971 taped recorded discussion, aide Charles W. Colson told Nixon that whether filing an antitrust case against ABC, NBC and CBS "is good or not is perhaps not the major political consideration. But keeping this case in a pending status gives us one hell of a club on an economic issue that means a great deal to those three networks... something of a sword of Damocles." Nixon responded, "Our gain is more important than the economic gain. We don't give a goddam about the economic gain. Our game here is solely political... As far as screwing them is concerned, I'm very glad to do it."

"If the threat of screwing them is going to help us more with their programming than doing it, then keep the threat," said Nixon. "Don't screw them now. [Otherwise] they'll figure that we're done." As for the antitrust actions, the White House kept the DOJ from filing suit until April 1972, when the government accused the networks of monopolizing prime-time entertainment with their own programs. The suits were dismissed in 1974 after the Administration refused to turn over subpoenaed records. The Ford administration renewed the complaints and subsequent consent decrees curtailed prime-time productions by the networks. Walter Pincus & George Lardner Jr., Nixon Hoped Antitrust Threat Would Sway Network Coverage, WASH. POST, Dec. 1, 1997, at A1, available at http://www.washingtonpost.com/wp-srv/national/longterm/nixon/120197tapes.htm.

The DOJ settled its antitrust suit challenging IT&T's mergers with several other corporations. Critics alleged that campaign contributions to Nixon's reelection effort in 1972 influenced the administration. Consumer advocates unsuccessfully attempted to have the district court overturn the settlement. "[T]here was no meaningful judicial scrutiny of the terms of the consent decree and no consideration of whether it was in the public interest," http://bulk.resource.org/gpo.gov/record/2004/2004_S03616.pdf

Nixon's Attorney General Richard Kleindienst was convicted for lying during his Senate confirmation hearings. When asked whether the White House interfered with the DOJ's antitrust action against ITT, Kleindienst testified, "I was not interfered with by anybody at the White House." Kleindienst testified that the Assistant Attorney General of the Antitrust Division, Richard McLaren, settled the ITT cases on his own, with no political pressure from anyone. Asked if Nixon played any role in the cases, Kleindienst assured the committee the president had not. David Stout, Richard G. Kleindienst, Figure in Watergate Era, Dies at 76, N.Y. TIMES, Feb. 4, 2000. The White House tapes show Nixon repeatedly ordering Kleindienst and others "to leave the [] thing alone." http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf; http://www.washingtonpost.com/wp-dyn/content/video/2007/05/22/V12007052200656.html.
impeachment against Nixon, and the Tunney Act, which requires a federal district court to find the DOJ consent decrees in the public interest.

A third concern with the vague rule of reason is that a particular Administration can abdicate its obligation to execute faithfully the laws by doing nothing. Although antitrust has always been political, more important than the shift from Democratic to Republican control was the ideological shift within the Republican party toward antitrust. After WWII through

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219 Article 2 § 4 of the Articles of Impeachment cited Nixon's failure “to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial and legislative entities concerning . . . the confirmation of Richard Kleindienst as Attorney General of the United States.”

220 Enacted in 1974, the Tunney Act sought to remove political influence from the DOJ’s decision to settle antitrust cases. As Senator Tunney later attested in a declaration submitted in the Microsoft antitrust litigation:

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

221 The Republican Party controlled the Executive Branch for 20 of the past 28 years. Before Reagan, the Republican Presidential Platforms generally supported antitrust enforcement. See, e.g., Republican Party Platform of 1976 (Aug. 18, 1976) (“The Republican Party believes in and endorses the concept that the American economy is traditionally dependent upon fair competition in the marketplace. To assure fair competition, antitrust laws must treat all segments of the economy equally. Vigorous and equitable enforcement of antitrust laws heightens competition and enables consumers to obtain the lowest possible price in the marketplace.”), Republican Party Platform of 1968 (Aug. 5, 1968) (“In addition to vigorous enforcement of the antitrust statutes, we pledge a thorough analysis of the structure and operation of these laws at home and abroad in the light of changes in the economy, in order to update our antitrust policy and enable it to serve us well in the future.”), Republican Party Platform of 1956, Aug. 20, 1956 (Proposing “Legislation to enable closer Federal scrutiny of mergers which have a significant or potential monopolistic connotations” and “Procedural changes in the antitrust laws to facilitate their enforcement”), Republican Party Platform of 1980’s laissez faire attitude toward antitrust emphasized: “The forces of the free market [which] must be brought to bear to promote competition, reduce costs, and improve the return on investment to stimulate capital formation in the private sector. The role of government must change from one of overbearing regulation to one of providing incentives for
President Carter, antitrust enforcement enjoyed greater bi-partisan support than currently. Under the Reagan Administration, antitrust enforcement became highly politicized. Congress expressed concern over the DOJ’s clear shift in antitrust enforcement priorities. The Reagan Administration focused on price-fixing or bid rigging in local road construction cases (245 cases or 47 percent of the criminal cases brought between 1982 and 1988) or government procurement (43 cases or 8 percent). They “brought the same case over and over again—a long series of challenges to interrelated regional and local conspiracies in the construction industry.”

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


225 This ideological shift, Professor Ghosal demonstrates, is reflected in a clear compositional change in US antitrust enforcement between 1958 and 2002. In 1979, criminal cases targeting per se illegal cartel activity increased. Civil antitrust cases (namely, rule-of-reason offenses and per se offenses that the Administration elects to prosecute civilly) decreased. After this regime shift in the 1970s, Republican administrations initiated more per se criminal cases, and fewer rule-of-reason civil cases, than the Democratic Clinton administration. Ghosal, supra note 223, at 20. The Reagan administration argued that its enforcement policies followed the law’s evolution. But the DOJ “actively encouraged many of those changes by participating in court proceedings as an amicus curiae (friend of the court).” U.S. GAO, REPORT TO THE CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, JUSTICE DEPARTMENT: CHANGES IN ANTITRUST ENFORCEMENT POLICIES & ACTIVITIES, GAO/GGD-91-2 10 (Oct. 29, 1990), http://archive.gao.gov/d22t8/142779.pdf. [hereinafter 1990 GAO Study]. Congress included language in the Antitrust Division’s appropriation prohibiting it from using any funds to overturn or alter the per se prohibition against RPM under the antitrust laws. Id. at 33. Reagan took issue and interpreted the bill “narrowly to apply only to attempts to seek a reversal of the holdings of a certain line of previously decided cases.” President Reagan Statement on Signing a Fiscal Year 1984 Appropriations Bill (Nov. 28, 1983), http://www.reagan.utexas.edu/archives/speeches/1983/112883a.htm.

226 1990 GAO Report, supra note 225, at 43.

227 Pitofsky, Next 100 Years, supra note 142, at 819.
administrations, the Reagan Administration never challenged vertical restraints or (after settling AT&T) monopolies.\textsuperscript{228}

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

In thinking about the “transition” and what, if any, implications this organizational change might have on the Division, let me just say clearly and unequivocally that the Division's current mission is no different today than it was under my predecessors. The core values of antitrust law, as interpreted by the courts, remain constant. Under the rule of law, it is those values, not the predispositions of the person holding my job, that dictate the enforcement agenda. Anyone . . . expecting a major shift in enforcement policy is likely to be disappointed.\textsuperscript{229}

Antitrust enforcement policy, however, underwent a major shift. The Bush administration erected an enforcement hierarchy, which focused primarily on criminal cartel behavior.\textsuperscript{230} Unlike the European Commission, the DOJ under the Bush Administration never challenged any significant monopolistic restraints,\textsuperscript{231} and civil antitrust enforcement declined.\textsuperscript{232}

\textsuperscript{228} 1990 GAO Report, \textit{supra} note 225, at 44. The DOJ had other antitrust offenses to prosecute. One DOJ official during the Reagan Administration declined to bring many antitrust cases that the staff attorneys claimed were winnable under existing legal precedent. In his view, these cases made no “economic sense” or were not in the public interest. 1990 GAO Report, \textit{supra} note 225, at 45; \textit{see also} Robert Pitofsky, \textit{Antitrust in the Decade Ahead: Some Predictions About Merger Enforcement}, \textit{57 ANTITRUST L.J.} 65, 71 (1988) (Senate Judiciary Committee identifying ten mergers where the relevant Antitrust Division Section Chief recommended challenging, “only to see that recommendation overruled by the front office.”).


\textsuperscript{231} Between 1998-2000, for example, the DOJ filed five Section 2 monopolization cases. In the six years thereafter, the DOJ cites one action involving Section 2. U.S. Dep’t of Justice, Antitrust Div., \textit{Workload Statistics: FY 1997–2006},
Besides cartel enforcement, its inactivity has been noted by the press, antitrust scholars, politicians, and practitioners.

Lack of transparency and accountability compounds the dangers of the vague rule of reason. The Tunney Act arose from the concern that the


232 Between 1995 and 1999, the DOJ opened 76 Section 2 investigations, and filed 7 civil actions challenging monopolistic abuses. That dropped to fifty investigations between 2000 and 2004 and 2 filed civil actions, dropped further to 17 actions between 2005-2007 and no civil actions challenging monopolistic abuses. The decrease in Section 2 activity was not offset by more Section 1 or Section 7 investigations or lawsuits. Instead, the number of civil and criminal Section 1 actions dropped in 2000-2004, as did the number of merger investigations and Section 7 lawsuits. According to one source, the DOJ was involved in the fewest number of filed antitrust cases in 2001, 2002, and 2003 than any other year this past quarter-of-a-century. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t541.pdf. This decline in antitrust enforcement is not attributable to staffing (the number of Division attorneys in these two time-periods was comparable) or budget (which when factoring inflation increased after 1999). See also Deborah L. Feinstein, Recent Trends In U.S. Merger Enforcement: Down But Not Out, 21-SUM ANTITRUST 74 (2007).

233 See, e.g., Christopher O'Leary, Sizing Up the Candidates: Depending Who Wins the Presidency, Dealmakers Could See the M&A Landscape Significantly Altered, Mergers & Acquisitions: Dealmakers J., Mar. 1, 2008, 2008 WLNR 4207716 (“Bush administration’s placid, laissez faire attitude toward antitrust enforcement has a rapidly approaching expiration date” with upcoming election); Mark Boslet, Europe Takes Greater Role: Microsoft Won’t Fight Ruling In EU Court, S.J. MERCURY NEWS, Oct. 23, 2007, at 1C (noting how center of gravity of antitrust enforcement shifted overseas during the Bush administration); Stephen Labaton, Sirius Chief Talks of Ways to Get XM Deal Approved, N.Y. TIMES, Mar. 1, 2007 (“Bush administration has been more permissive on antitrust issues than any administration in modern times’’); Dennis Berman, The Game: Handicapping Deal Hype and Hubris, WALL ST. J., Jan. 16, 2007, at C1 (“The federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish.’’); Steven Pearlstein, The Quiet Rise of a Software Powerhouse, WASH. POST, May 31, 2006 (Administration’s “quiet approval’’ of Blackboard’s acquisition of WebCT “is the best evidence yet that the Bush administration has abandoned antitrust enforcement’’); Stephen Labaton, Street Scene: Legal Beat; New View Of Antitrust Law: See No Evil, Hear No Evil, N.Y. TIMES, May 5, 2006, at C5 (besides cartel enforcement, Bush Administration “has taken the most relaxed and least aggressive approach since the last years of the Reagan presidency’’).


236 Kolasky, supra note 191; Feinstein, supra note 232.

237 Warren S. Grimes, Transparency in Federal Antitrust Enforcement, 51 BUFF. L.
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economic power of the companies under scrutiny could skew antitrust settlements.\textsuperscript{238} The Act enabled courts to examine antitrust settlements to “deter and prevent settlements motivated either by corruption, undue corporate influence, or which were plainly inadequate.”\textsuperscript{239}

The decision to settle, like the decision to prosecute, rests in the prosecutor’s discretion. The Tunney Act increases transparency for antitrust settlements, but there is little accountability when the antitrust agencies do nothing. In a positive step, the antitrust agencies during the Bush Administration have issued closing statements in several high-profile matters.\textsuperscript{240} It is still difficult, however, to appraise whether the agencies made the right call, especially when the agencies do not examine systematically their earlier decisions’ consequences.\textsuperscript{241} Under the rule of reason, liability depends upon case-specific facts, which are known to the agency, but unknown to individual citizens. Administration officials can respond, “Tell me the mergers we should have challenged. Tell me the facts we missed.” But given the informational asymmetry, the public entrusts the administration to execute faithfully the laws. Besides periodic questioning at Congressional oversight hearings, the political appointees need not defend their inactivity. By the time the competitive effects of their decisions manifest, the appointees have left.


\textsuperscript{238} 119 CONG. REC. 3451 (Feb. 6, 1973) (‘‘[i]ncreasing concentration of economic power, such as occurred in the flood of conglomerate mergers, carries with it a very tangible threat of concentration of political power. Put simply, the bigger the company, the greater the leverage it has in Washington.’’) (Sen. Tunney).
\textsuperscript{239} \url{http://bulk.resource.org/gpo.gov/record/2004/2004_S03616.pdf}.
\textsuperscript{240} See, e.g., Statement of Chairman Majoras, Commissioner Kovacic, & Commissioner Rosch Concerning the Closing of the Investigation, In re Comcast, Time Warner Cable, & Adelphia Commc’ns, FTC File No. 051-0151 (Jan. 31, 2006) (approving decision by Bureau of Competition to close investigation, and setting forth reasons); U.S. Dep’t of Justice, Antitrust Div., Statement on the Closing of its Investigation of Whirlpool’s Acquisition of Maytag (Mar. 29, 2006) (setting forth background on transaction and reasons for allowing the merger to proceed); see also U.S. Dep’t of Justice, Antitrust Div., Issuance of Public Statements Upon Closing of Investigations (Dec. 12, 2003); FTC, Commission Closing Letters, \textit{available at} \url{http://www.ftc.gov/os/closings/commclosing.htm} (collecting a number of FTC’s closing letters).
\textsuperscript{241} Stucke, \textit{Behavioral Economists}, supra note 21, at 575-79.
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In applying the law, judges “cannot act wisely unless they know the sources of law, the reason of it, and why it is subject to change, and why they have authority to change it.” 242 Vague standards invite judges to inject their ideological beliefs into competition policy, 243 which can reduce the judiciary’s effectiveness in providing social order. 244 The burgeoning “New Legal Realism” scholarship has focused on the influence of the judge’s ideology on the outcome. 245 Business lobbyists, once focusing on legislation, are now more active in the selection of state supreme court judges. 246

The Court’s widely-criticized decision in Bush v. Gore serves as a springboard into its current politicization. 247 Five of the ten most conservative justices (ranked by fraction of conservative votes in non-unanimous cases between 1937-2006) are on today’s Court. 248 A CBS

243 Frank H. Easterbrook, Judicial Discretion in Statutory Interpretation, 57 OKLA. L. REV. 1, 6 (2004) (“what judges have done is little different from what the FTC does as one political party or another acquires control of that agency and endows it with a different economic perspective”).
244 WORLD BANK, supra note 1, at 129.
245 One recent empirical study, for example, found a strong correlation between validation rate and the ideological alignment of judges and agencies: in reviewing EPA and NLRB decisions for arbitrariness, Republican (Democratic) appointed judges are more likely to invalidate liberal (conservative) decisions than conservative (liberal) ones. Thomas J. Miles & Cass R. Sunstein, The New Legal Realism 13 (Dec. 2007), http://ssrn.com/abstract=1070283.
247 See, e.g., Clive Crook, The Highest Bearpit in the Land, FIN. TIMES, June 30, 2008, at 9. Republic-nominated Supreme Court justices were in the minority during 1963-69, had a simple majority during 1970-71, and attained in 1972 (and maintained thereafter) a two-thirds majority. Ghosal, supra note 223, at 3. Not all Republican-nominated justices (e.g., Justices Stevens and Souter) are more conservative than Democratic-nominated justices. But analysis of Supreme Court voting between 1937-2006 found justices appointed by Republican presidents tend to vote more conservatively than those appointed by Democratic presidents. William M. Landes & Richard A. Posner, Rational Judicial Behavior: A Statistical Study 8-9 (Apr. 2008), http://ssrn.com/abstract=1126403. More recent appointees have significantly higher ideology scores. Id. at 15. Republican-appointed appellate judges are “more likely to vote conservative, with the imbalance being greater among judges appointed by the most recent Republican Presidents—Reagan and the two Bushes.” Id. at 23-24.
248 Landes & Posner, supra note 247, at 46 (Justices Thomas (1), Scalia (3), Roberts (4), Alito (5), Kennedy (10); 4 of the 5 remaining conservative justices were fairly recent:
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commentator summarized the Court’s 2007-08 term: “As they have every term over the past few decades, the Justices once again sided in most cases with employers over employees, with big business over consumers, and with the government over individuals.”

The Court, of course, can identify recent decisions where consumers prevailed. But more than 16 years have passed since the Court decided an antitrust case in plaintiff’s favor. Of the past 18 Supreme Court antitrust decisions, defendants are 18-0. Over a longer timeframe, the Court has shifted from ruling in the antitrust plaintiff’s to defendant’s favor. Again, this is not determinative: the Court need not intercede when antitrust plaintiffs rightfully win, but only when the lower courts misapply antitrust law. But there is no evidence that the lower courts are pre-disposed to antitrust plaintiffs, requiring the Court to veer them to the appropriate mean. Moreover, the Court’s recent activism in Leegin and Billing, and dicta in Trinko raise independent concern.

Given its activism and lower transaction costs to affect competition policy (5 justices as opposed to a majority of Congress and the President), the Court has become an attractive magnet for corporate rent-seekers to affect competition policy. When it devolves into a blatant contest among

Rehnquist (2), Burger (6), O’Connor (7) and Powell (8)).


Over the past four decades, antitrust defendants’ win percentage before the Court increased: 36% (Oct. 1967-Oct. 1976), 45% (’77-’86), 50% (’87-’96), 100% (’97-’06). Brannon & Ginsburg, supra note 250, at 17.

See Jeffrey Rosen, Supreme Court Inc.: How the Nation’s Highest Court Has Come to Side With Business, N.Y. TIMES, Mar. 16, 2008, at 38 (Sun. Magazine). Although the Court of late grants certiori to less than 2% of petitions, the U.S. Chamber of Commerce’s petitions between 2004 and 2007 were granted at a rate of 26%. Id. at 44. One popular blog tracks the won-loss for business interests, and in particular the U.S. Chamber of Commerce’s litigation arm. The U.S. Chamber of Commerce filed 16 briefs in the Court’s 2006-7 term; of the Court’s 14 signed opinions, the Chamber’s side won 12. In the 2007-8 term, the Chamber of Commerce’s winning percentage dropped from 85.7% to 53.3% (8 of 15 cases in which it was a party or wrote an amicus in 2007). http://www.scotusblog.com/wp/ot-07-business-docket-review/#more-7642; see also Richard J. Lazarus, Advocacy Matters Before And Within The Supreme Court: Transforming The Court By Transforming The Bar, 96 GEO. L.J. 1487 (2008) (detailing rise in Court’s recent business docket, its favorable response to the legal arguments raised on behalf of business interests by private Supreme Court Bar).
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Clear rules inhibit strike suits by plaintiff attorneys or competitors. (Indeed, the clearer, more predictable the rule, the greater the risk of Rule 11 sanctions for spurious cases.)

One frequent complaint is the “litany of costs” and risks associated with the rule of reason. The Supreme Court recently recognized how the “extensive scope” of antitrust discovery is “inevitably . . . protracted” and “unusually high cost.” The Court recognized that a rule-of-reason case is costlier to pursue than a per se case. But the Court never asks why antitrust discovery is inevitably costly and protracted.

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

Compounding the problem are the incremental costs to retrieve and review electronic data, such as e-mail and back-up tapes. See AMC Report, supra note 11, at 165 (some commentators reporting “a ten-fold increase in the volume of documents collected per employee due to electronic documents”). Although antitrust counsel billing hourly stand to profit, corporate plaintiffs and defendants ultimately incur the opportunity costs, disruption and expense of extensive discovery. Stipulations, by reducing the number of contested issues, can reduce discovery costs. But in my experience, antitrust defense
One reason is that so many fact-intensive issues are relevant in a rule-of-reason case.\(^{263}\) With a per se price-fixing claim under Section 1, the critical issue is proving an agreement. Under the rule of reason, not only must plaintiffs prove an agreement, but:

- anticompetitive effects within a properly defined product and geographic market, which entails issues of cross-elasticity of demand, as well as supply substitutability into those markets, and ease of entry;
- pro-competitive justifications for the restraints (including the extent to which the restraints increased productive efficiencies, lowered marginal costs, and yielded pro-competitive benefits to consumers);
- whether these pro-competitive justifications are pretextual (i.e., restraints are not reasonably necessary to achieve the pro-competitive objectives);
- whether lesser restrictive alternatives exist for these restraints; and
- whether the anticompetitive effects outweigh the pro-competitive benefits.

None of these issues are easily established. Defining the relevant market, by itself, is fact-intensive, time-consuming, costly, and imprecise.\(^{264}\) Although some restraints are blatantly anticompetitive, others are more nuanced. Neither the judiciary nor parties’ economic experts have sufficient expertise on the actual workings of the market to assess accurately these restraints’ likely effects.

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\(^{263}\) Willard K. Tom & Chul Pak, Toward a Flexible Rule of Reason, 68 ANTITRUST L.J. 391, 399 (2000).

\(^{264}\) Because businesses and antitrust economists generally viewed markets dissimilarly, it generally took, in my experience, a team of 8-15 DOJ paralegals, lawyers, and economists between 5 to 7 months for their merger review. See also AMC Report, supra note 11, at 164 (“For both agencies, the length of second request [merger] investigations averaged about six months from the opening of the investigation in FY2005.”). Given the time constraints of a merger (including the risk that talented executives leave the acquired firm), the parties generally expedite document production to achieve substantial compliance. Thus, merger review is considered fast-track, with civil non-merger investigations lasting considerably longer. One study found that the “U.S. second request process is by far the most costly in the world, imposing twice the external costs (including payments for attorneys, economists, and document productions) than do second-phase investigations in the European Union.” AMC Report, supra note 11, at 163. Another survey found “second request investigations took seven months and resulted in median compliance costs of $3.3 million.” Id. at 163.
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As proof that plaintiffs can prevail under a rule-of-reason case, some cite the Government’s case against Visa and Mastercard. In December 1993, the DOJ opened a preliminary investigation on the overlapping structure of Visa and MasterCard. During its 5-year investigation of Visa’s and MasterCard’s activities, the DOJ’s Civil Task Force interviewed “approximately 180 individuals.” Besides the many attorney and paralegals, at least 9 DOJ economists were involved. On October 7, 1998, the United States sued the two credit card manufacturers. The Government’s Complaint alleged only two counts under Section 1 of the Sherman Act; much of the 43-page Complaint was devoted to issues of market definition, defendants’ market power in the network market, barriers to network entry, and competitive effects. After nearly two more years of additional discovery, the case was tried before the district court sitting without a jury. It lasted thirty-four trial days (between June 12 and August 22, 2000). The district court described the volume of evidence:

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

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266 Moltenbrey Decl., supra note 265, ¶ 6. Approximately 115 of these individuals were officers and employees of defendants or their member banks. The remainder were officers or employees of defendants’ competitors or other industry participants. Id.


269 Count One involved Visa’s and MasterCard’s governance rules, which permitted each association’s members to sit on either Visa’s or MasterCard’s Board of Directors, but not both. Count Two targeted the associations’ exclusionary rules, under which each association’s members can issue credit or charge cards of the other association, but not American Express or Discover cards. United States v. Visa U.S.A., Inc., 183 F. Supp. 2d 613, 615 (S.D.N.Y. 2001).
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Express and Discover-among others. 270

One year after the trial, and nearly eight years after the investigation began, the district court issued more than 145 pages of findings of fact and conclusions of law. The Government prevailed on one of its two counts. 271 After modifying its judgment, 272 the district court in 2002 stayed its judgment pending appeal. 273 Defendants, not the Government, appealed. The Second Circuit affirmed the one count, where the district court found for the Government. 274 After a decade since the DOJ’s investigation began, the Supreme Court denied defendants’ petition for certiori. 275 The costs in prosecuting and defending this action must have been staggering. 276 But compared to some other rule-of-reason cases, this one was quick. 277

270 Visa, 163 F. Supp. 2d at 331.
271 The district court found (1) that the Government failed to prove that Visa and MasterCard associations’ governance structures resulted in a significant adverse effect on competition or consumer welfare; but (2) the Government successfully demonstrated that the defendants’ exclusionary rules and practices resulted in such adverse effect and should be abolished.
272 Visa, 183 F. Supp. 2d at 613.
275 Visa, 543 U.S. at 811.
276 In response to a written demand from Senator Slade Gorton, a Republican from Microsoft’s home state, the DOJ in 1999 reported that its rule-of-reason monopolization case against Microsoft cost $13.3 million. This was “paltry” compared to the estimated expenses of other major antitrust cases, which “easily can run $750,000 each month.” Ted Bridis, U.S. Tab Is $13 Million In Microsoft Cases, PHILADELPHIA INQUIRER, Oct. 7, 1999. RealNetworks reported spending in three months $3.7 million in legal expenses related to its antitrust lawsuit against Microsoft. Kim Peterson, RealNetworks Surprises Media Analysts With First-Quarter Profit, SEATTLE TIMES, May 5, 2005, 2005 WLNR 7041781. Estimates of the DOJ costs in other landmark rule-of-reason investigations and cases (all in 1999 dollars) run higher: the IBM investigation cost “well above $29 million;” the FTC spent an estimated $30 million investigating Exxon (An Exxon attorney estimated both sides’ legal costs to exceed $200 million); the AT&T litigation cost about $34 million. James V. Grimaldi, Microsoft Case Costs Justice Department $13.3 Million, SEATTLE TIMES, Oct. 6, 1999, 1999 WLNR 5492010.
277 One popular antitrust casebook describes the issues related to the “big case.” PIOTOFSKY, TRADE REGULATION, supra note 57, at 113 (“In both government and private
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Rule-of-reason litigation is a crusade, enlisting legions of economists, lawyers, and paralegals. It is unclear how many private litigants (even with the prospect of trebled damages) will incur the opportunity costs and other expenses to embark on such a crusade (especially if their chance of prevailing is less than 1/3).278

D. Rule of Reason’s Infirmities Under Rule-of-Law Principles Have Significant Implications on Antitrust Enforcement and Competition Policy

The first implication is, because a rule-of-reason case is so costly to try, fewer cases will be brought.279 This is significant because over the past 30 years, private plaintiffs have brought the overwhelming majority of antitrust cases.280 Faced with a vague standard, “the threat of discovery actions, it is not uncommon for discovery, trial, and appeal to take ten or more years and to involve a vast number of documents.”). Visa was quick compared to IBM and some of antitrust’s other big cases. Id. at 113-17. Prosecuting criminal offenses, in contrast, is generally more straight-forward: often the law is settled, pleading the complaint or indictment is simpler, and discovery issues are less protracted. Antitrust damages, said Senator Sherman, should be “commensurate with the difficulty of maintaining a private suit.” 21 CONG. REC. 2456-60 (1890). Under neoclassical economic theory, the optimal penalty (which includes civil damages and criminal penalties) levied against an antitrust offender equals the violation’s expected net harm to others (plus enforcement costs) divided by the probability of detection and successful prosecution. Stucke, Morality, supra note 139, at 459. Successful antitrust plaintiffs can recover their cost of the suit, including reasonable attorney’s fees, and trebled damages. 15 U.S.C. § 15. Whether the odds of an antitrust plaintiff prevailing with a meritorious rule-of-reason claim is at least 33% is unclear. See Douglas H. Ginsburg, Vertical Restraints: De Facto Legality Under the Rule of Reason, 60 ANTITRUST L.J. 67, 71 (1991) (plaintiffs lost 41 of the 45 (more than 90 percent) non-price vertical restraint cases studied, but no analysis of merits of rule-of-reason claims).

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279 Posner, Next Step, supra note 131, at 15; Pitofsky, Discounters, supra note 142, at 1489.

280 Between 1975-2007, the United States brought 2,531 civil and criminal antitrust cases. This represents 7.8% of all federal antitrust claims. Annually, the government on average accounts for 8.5% of total claims, with the actual percentage significantly lower since 2000 (ranging between 3.4 and 5.9%). SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.41, http://www.albany.edu/sourcebook/pdf/t5412007.pdf.
expense will push cost-conscious defendants to settle even anemic cases before reaching a summary judgment. Plaintiffs with meritorious claims may forego antitrust litigation. Indeed, since the Court’s Sylvania decision, there are fewer private federal antitrust cases. Few antitrust cases are brought annually relative to total litigation. Some enterprising plaintiff lawyers seek redress under state business tort claims. Others abandon

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281 Twombly, 127 S.Ct. at 1967.
282 See supra note 280. The data do not distinguish between per se and rule-of-reason cases. After a low point in 1990, private antitrust cases increased. Part of the increase, after 2005, may be attributable to the Class Action Fairness Act of 2005, 28 U.S.C. § 1453, which makes removal of class actions filed in state court easier, and thereby affects incentives to rely on state or federal antitrust statutes.
283 For example, of the 1,198,108 actions involving federal questions filed between September 1997 and 2004, only 5,510 cases (0.46%) involved federal antitrust claims, of which a smaller percentage involve rule-of-reason claims.
284 See, e.g., ABA SECTION OF ANTITRUST LAW, BUSINESS TORTS AND UNFAIR COMPETITION HANDBOOK ix, xiii (2d ed. 2006) (noting shift in prominence of state business tort claims and federal antitrust claims); A. Michael Ferrill & James K. Spivey, Clearing The Sylvania Hurdle: Developments In Business Torts And Dealer Termination, 11-FALL ANTITRUST 5 (1996) (As with other traditional antitrust claims, dealer complaints are increasingly being brought under state law tort theories, given the availability of punitive damages, which may far surpass the treble damages available under the antitrust laws, more receptive state courts, and with the infusion of economic theory into antitrust law, business torts often are easier to explain to a jury, and ultimately to prove); William L. Jaeger, New Tools For The Plaintiff In The 1990s, 4 SPG ANTITRUST 4 (1990)
Second, an independent judiciary and the rule of law may be the only protections left for consumers and smaller competitors. Firms with market power may have little utility for judicial redress of antitrust violations. After all, “where force can be used, law is not needed.” Troubling under an evolutionary economic perspective, entrants with potentially innovative technologies may lack comparable alternatives, and be foreclosed from the market. Indeed, a profit-maximizing competitor opts for litigation when it represents the remaining (or less costly) alternative.

Third, the Court’s choice of rules will affect future market behavior


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

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

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

World Bank, supra note 1, at 119 (“Studies on commercial litigation in Italy, Romania, Russia, Slovakia, Ukraine and Vietnam show that newly created private enterprises, which do not have established supplier and customer networks or significant market power, are most likely to resort to the use of commercial courts. Older, especially state-owned, enterprises are often able to settle disputes out of court.”).

Stucke, Monopolies, supra note 28.
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(and its future rules). “How the game is actually played is a consequence of the formal structure [e.g., formal rules, including those by the government], the informal institutional constraints [e.g., societal norms and conventions], and the enforcement characteristics.”290 A market’s performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. Changing the game’s rules can lead to different outcomes.291 If the institutional constraints reward (or are indifferent to) monopolization, that will be the outcome.292 “The ideal economic model,” unlike the current rule of reason, “comprises a set of economic institutions that provide incentives for individuals and organizations to engage in productive activity.”293

The Court, in recent years, shows little interest in appraising its standard’s costs and the extent its standard’s deficiencies discourage productive activities. Instead, the Court simultaneously states that its rule of reason is the prevailing standard, while using its standard’s negative effects to dismantle the antitrust scaffolding that supports in part the market structure. In Billing, the Court used its standard’s deficiencies (i.e., the high risk of inconsistent outcomes) to contravene Congress’s broad savings clauses in both the Securities Act and Securities Exchange Act, and further restrict antitrust enforcement in regulated industries.294 In Twombly, the Court used high discovery costs arising from its standard to add another layer of uncertainty for pleading civil antitrust claims. This will further limit plaintiffs’ judicial access:

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

290 NORTH, supra note 2, at 52.
291 Kerber, Efficiency, supra note 177, at 16.
292 NORTH, supra note 2, at 50.
293 Id. at 158; Kerber, Efficiency, supra note 177, at 21 (noting Ordoliberal concept of shaping the rules for this market game so that only the quality of performance (merit) determines market success).
294 127 S.Ct. at 2399.
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become a legal standard. To say that pleading requirements are “contextual” does not much advance the inquiry or practice.\textsuperscript{295}

Such increased procedural formalism will have rule-of-law implications. As one study found, it can bring “extreme costs and delays, unwillingness by potential participants to use the court system, and ultimately injustice.”\textsuperscript{296}

Finally, the Court’s reliance on its rule of reason will weaken its remaining per se rules,\textsuperscript{297} which are critical in the DOJ’s criminal enforcement against hard-core cartels.\textsuperscript{298} The Court in \textit{Leegin} further

\textsuperscript{295} Minutes, Civil Rules Advisory Committee, Nov. 8-9, 2007, at 34, \url{http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf}. Because the Federal Rules of Civil Procedure are transsubstantive, \textit{Twombly} generates ambiguity on the extent to which pleading standards now vary in civil litigation. Although Sherman Act violations can be civilly or criminally prosecuted, one district court refused to apply \textit{Twombly}’s heightened pleading requirements for a criminal indictment alleging a Section 1 violation. United States v. Northcutt, No. 07-60220-CR, 2008 WL 162753, at *2 (S.D. Fla. Jan. 16, 2008). Depending how courts apply \textit{Twombly}, the United States may bear a lower pleading burden when seeking to incarcerate defendants (and fully deprive their liberty), than when seeking to enjoin certain behavior through a civil action.

\textsuperscript{296} An analyses of legal procedures triggered by resolving two specific disputes—eviction of a non-paying tenant and collection of bounced check—in 109 countries found lower procedural formalism in the richer countries, and greater procedural formalism in civil law countries (especially French civil law countries). Formalism was “nearly universally associated with lower survey measures of the quality of legal system, including judicial efficiency, access to justice, honesty, consistency, impartiality, fairness, and even human rights.” Simeon Djankov et al., \textit{Courts: the Lex Mundi Project} 36-37 (Mar. 2002), \url{http://ssrn.com/abstract_id=304453}.

\textsuperscript{297} Expert Masonry, Inc. v. Boone County, Ky., 440 F.3d 336, 343 (6th Cir. 2006): But distinguishing restraints that warrant application of the per se rule from those that qualify for rule of reason analysis is not always easy or straightforward. As courts have taken a more explicitly economic approach to antitrust, the old distinction between per se and rule of reason analysis has lost some of its former clarity, resulting in the advent of the so-called “quick look” approach wherein the court must decide, in close cases, whether a restraint is facially anticompetitive before applying either per se or rule of reason analysis.

\textit{See also California Dental}, 526 U.S. at 779 (“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. . . . 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.”).

\textsuperscript{298} See \textit{Br. of Amicus for the United States} at 18-19, \textit{Dagher}, 547 U.S. 1 (Nos. 04-805 & 04-814) (“effective criminal prosecution of hard-core cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials with extended arguments about the reasonableness of such practices”).
III. SHORTCOMINGS OF THE RULE OF LAW

Even if antitrust’s rule of reason suffers deficiencies under rule-of-law principles, it does not follow automatically that the standard is deficient. The rule of law, like antitrust, is not an end, but the means to achieve some greater moral and social interest. For example, if a law permits torturing another nation’s citizens, the law’s application (although consistent with rule-of-law principles) is inconsistent with the principles’ greater aims. Even as the means, the ideals underlying the rule of law can be approached, but not perfected. Drafting, administering, and learning specific rules, as the thicket of tax codes attests, can be costly. Thus, the marginal costs (in comparison to the marginal benefits) in approaching the rule-of-law principles must be considered.

A. Rule of Law Must Account the Law’s Development & Growth

A rigid conception of the rule of law does not account for the cause of action’s origin under the common law. A prima facie intentional tort represents the tort at its infancy, and weighing (and unpredictability) is at its zenith. The fact-finder in each case balances afresh the litigants’ conflicting interests in light of society’s social and economic interests generally. As that cause of action matures, there is less need for such

299 An agreement among competitors to fix price or reduce output is per se illegal. If the conspirators agree to use RPM to facilitate their cartel, their agreement “would have to be held unlawful under the rule of reason.” Leegin, 127 S.Ct. at 2717. This makes no sense. If the agreement has to be held unlawful (regardless of the defenses or defendants’ lack of market power) then the Court has reverted to per se illegality, and rule-of-reason analysis no longer applies. If the competitors agreed to collude on price, then the agreement itself, not the means (whether by RPM or bid rotation), is determinative. The Court’s comment has already caused confusion. See Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3rd Cir. 2008) (rule-of-reason analysis applies even when plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers).

300 Fallon, supra note 110, at 9.


302 Tortfeasors, who intentionally cause injury to another, are liable if their conduct “is generally culpable and not justifiable under the circumstances.” RESTATEMENT (SECOND) OF TORTS § 870 (1979). Only a few states recognize a prima facie tort as an independent cause of action; but it serves a useful analytical framework on a tort’s evolutionary development.

303 Id. § 870 cmt. c.
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Legal rules over time replace or limit the factors to be balanced. The tort as it develops is formalized with specific elements. The defendant’s interests are protected by established privileges, with their individual attributes set by legal rules.

The legal rule, once developed, represents the existing order. But even here, the law remains dynamic. One can consider the rule of law as complete when each new case is decided. It is each case’s relation to the whole that gives the individual case its significance. If the new legal case is similar to the old and conforms to current legal conventions, it, like any replica of past works, is soon forgotten. An attorney may seek to distinguish through a trifling difference her client’s ordinary case from the existing order. But these ordinary cases are dispensed with ease; its treatment more closely approximates the rule-of-law ideals. Indeed, the affront to the rule of law is when ordinary cases are treated whimsically.

The novel legal case, rather than an affront to the rule of law, represents the law’s incremental growth. Under the rule of law, one still responds flexibly with various alternatives to resolve novel problems that continually emerge over time. The novel case readjusts the relations, proportions, values of each legal precedent toward the whole, and becomes part of the whole.

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304 Id. § 870 cmt. d (“The more mature the stage of development” of the tort, “the more definite the contours of the tort and the privileges that may be defenses to it.”).

305 Id. § 870 cmt. c (“no need of using the balancing process afresh for each case in which an established tort exists; and the task is merely to apply the legal rules to the facts.”).

306 Id.

307 T.S. Eliot, The Function of Criticism, in SELECTED ESSAYS 1917-1932 12 (1932) (in discussing the relation of the new to the old in art, “The existing order is complete before the new work arrives; for order to persist after the supervision of novelty, the whole existing order must be if ever so slightly, altered; and so the relations, proportions, values of each work of art toward the whole are readjusted; and this is conformity between the old and the new.”).

308 NORTH, supra note 2, at 154. For example, one study of the economic loss rule doctrine (ELR) in 465 state appellate court decisions between 1970-2005 found the following pattern. In the survey’s first 20 years, courts increasingly accepted the ELR. But in its last 10 years, courts moved away from strictly applying the ELR and more frequently invoked its generalized (and sometime idiosyncratic) exceptions. As the study’s authors conclude, “Although the ELR is quite widely accepted, the law does not come to a rest, and states continue experimentation, often in ways inconsistent with the ELR and its generally recognized exceptions. Experience slows this experimentation down, as one would expect, but not completely.” Anthony Niblett et al., The Evolution of a Legal Rule 37 (Feb. 22, 2008), http://ssrn.com/abstract=1114941.

309 What if most cases, like Lake Wobegon’s children, are unique, rather than
Absent this safety valve, the law becomes contorted. This is borne out in the debates surrounding a residual hearsay exception in the Federal Rules of Evidence.\textsuperscript{310} Unlike the residual hearsay exception, antitrust’s per se rules lacked a safety valve. As a result, courts dissatisfied with the outcome sheltered competitively neutral or pro-competitive behavior from illegality by torturing the definition of the term “agreement” under Section 1. Depending on the courts’ attitude toward RPM’s benefits and harms, for example, their interpretation of “agreement” fluctuated.\textsuperscript{311} Similarly, the per

\textsuperscript{310} Tension exists between two themes underlying the evidentiary rules: the need for uniformity and predictability versus flexibility (given the variety of cases where the Rules apply). The hearsay exceptions were “designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay.” Original Advisory Committee’s Notes to Former Fed. R. Evid. 803(24), reprinted in II MOORE’S FEDERAL RULES PAMPHLET 2008 § 807.4[1] (2007). But the Advisory Committee thought it “presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.”\textsuperscript{Id.} The Committee wanted to leave some room for evidentiary law to develop. The House Judiciary Committee, however, deleted the catch-all, favoring uniformity. The catch-all injected too much uncertainty into evidentiary law and impaired practitioners’ ability to prepare for trial. The hearsay exceptions should grow by amendments to the Rules, not on a case-by-case basis.\textsuperscript{Id. at § 807.4[3].} The Senate Judiciary Committee disagreed. Absent a safety valve, the courts will shoehorn certain hearsay into the existing exceptions, rendering them “tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed).”\textsuperscript{§ 807.4[4].} Exceptional circumstances may arise where the court finds the hearsay to have guarantees of trustworthiness equivalent to, or greater than, the guarantees reflected by the enumerated exceptions. This evidence should be properly admissible. But the Senate was concerned that a broad hearsay exception in offering too much flexibility could “emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rule.”\textsuperscript{Id. at § 807.4[4].} So the Senate offered a compromise: Provide the courts some flexibility for the exceptional circumstance, but not enough to authorize major judicial revisions of the hearsay rule, which is best accomplished by legislative action.

\textsuperscript{311} Pre-Sylvania, courts generally construed vertical agreements liberally. Anything by the manufacturer beyond a simple statement of discounting policy and subsequent termination would likely constitute an “agreement.” The Court had a “narrow channel” for manufacturer under \textit{Colgate}. George W. Warner \& Co. v. Black \& Decker Mfg., 277 F.2d 787, 790 (2d Cir. 1960); PITOFFSKY, TRADE REGULATION, supra note 57, at 684. Leading up to, and post-Sylvania, courts began construing “agreement” narrowly. \textit{Sylvania} adopted the Chicago-school economic doctrine that manufacturers’ have strong legitimate business interest in maintaining prices to foster services and curb free-riders. Thus, evidence of pricing suggestions, persuasion, conversations, arguments, exposition or pressure no longer meant an “agreement.” \textit{See, e.g.}, Garment District, Inc. v. Belk Stores Serv., Inc., 799 F.2d 905 (4th Cir. 1986). Some courts required plaintiff to show that the manufacturers used “coercion” on retailers to comply with suggested prices. Part of this was attributable to
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The rule of group boycotts announced in *Klor's* proved unworkable. The lower courts chafed, and *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.* provided a safety valve. So too *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* and *NCAA* provided a safety valve for pro-competitive ventures among competitors.

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

B. Central Planners

One criticism of Justice Scalia’s conception of the rule of law is that the judge anticipates future cases where the rule might be thought problematic and disposes of them in advance. As a French Minister of Justice noted a century ago, “The more the intellectual domain of humanity is enlarged, the more the development of industry and of science diversify forms of production and forms of property, the greater the political ascendancy of the proletariat tends to cause a recognition by society of new commercial realities, as manufacturers’ need to communicate with its retailers about its product’s sales. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). But the tortured definition of agreement for vertical restraints was also attributable to the reality that finding an “agreement” determined liability. *Sylvania*, 433 U.S. at 48 n.14 (“many courts ‘have struggled to distinguish or limit Schwinn in many ways that are a tribute to judicial ingenuity’”) (quoting Stanley D. Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 272 (1975)); *Arthur*, supra note 12, at 351; *Flynn*, supra note 12, at 627.


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


316 468 U.S. at 114.


right and contracts heretofore unknown, the less can it be pretended that a code can contain and hem in the powerful movements of a nation’s life." 319

It is simplistic to label a complex regulatory system as either rules- or principles-based. 320 A purely principles-based approach is unworkable. Friedrich Hayek, among others, eschewed intervening on a case-by-case basis with ex post totality-of-circumstances standards; instead, he advocated effecting economic policy through ex ante rules applying to general situations. 321 The more the state plans, the more often its action are decided on the full circumstances of the particular moment, the less predictable the state becomes, and the more difficult planning becomes for the individual. 322

On the other hand, relying on myriad specific rules is suboptimal. Human behavior is hardly uniform over various contexts to lend itself to simple predictive rules. Antitrust (or any other) law cannot anticipate every socially undesirable anticompetitive action. Nor can a rule be self-contained to foreclose the novel. For then the drafter assumes infallibility: The rule directs future action, but is incapable of being altered by the present. Events overtake myriad specific rules. 323 These rules then represent slalom poles for counsel, leading to absurd results (and distortion of resources). Myriad rules are also difficult to internalize. 324 Moral or social principles can provide context, and thereby unify, myriad rules. Absent an underlying moral or social principle, the law becomes unintelligible and invites rent-seekers to secure statutory exceptions. These special-interest exceptions do not strike a discordant note, because the rules themselves are not in harmony. A vague standard then may be preferable to specific, but suboptimal,
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rules. 325 Antitrust need not digress into binary labels of seeking a rules- or principles-based system. Antitrust should blend rules with general principles to enhance predictability for ordinary cases while preserving flexibility for novel restraints. 326 The Court can articulate specific rules that further antitrust’s general principles, while maintaining the rule of reason for novel cases. The workability of this tandem is tested in part on the percentage of cases it efficiently resolves. For example, one consumer protection statute includes specific rules on telephone directory listings for florists, 327 but its continued relevancy exists in the general prohibitions on unfair or deceptive acts. 328 The specific rule illustrates the application of the general principles of unfair and deceptive practices for specific practices in particular industries.

IV. TOWARD A BETTER RULE OF REASON

Some Chicago School adherents may applaud the Roberts Court’s judicial activism. Others are disturbed. Under the guise of the burgeoning “post-modern” behavioral economic literature, 329 a more liberal Court can satiate its paternalism for irrational consumers. The new economic wisdom would quickly eradicate the Roberts and Rehnquist Courts’ dated Chicago School social policies. As Professor Handler observed in the 1950s, and as the Sherman Act’s subsequent evolution affirmed, “In no branch of the law has dissent played a more significant role than in antitrust.” 330 Although a perfectly realized rule of law may be unattainable, antitrust standards must be reoriented toward rule-of-law ideals.

First, the Court’s antitrust standards should be in accordance “with the originally intended and understood meaning of the directives of legitimate, democratically-accountable lawmaking authorities.” 331 Congress never

325 After Socony, some business groups lobbied for the rule of reason: “The old Rule of Reason, if applied, would cure part of the problem, if revived, because it is flexible—but it is also highly indefinite. Most businessmen and lawyers, even so, prefer the flexibility of a Rule of Reason, even with its indefiniteness.” BUSINESS ADVISORY COUNCIL, EFFECTIVE COMPETITION 5 (1952).
326 Cunningham, supra note 10, at 1435.
328 See, e.g., Tenn. Code Ann. §§ 47-18-104(a) & (b)(27).
329 For an informative discussion on the topic, see DAN ARIELY, PREDICTABLY IRRATIONAL (2008).
330 Handler, supra note 31, at 39.
331 Fallon, supra note 110, at 38.
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drafted the Sherman Act as a vehicle for the Court to advance its or certain economists’ ideologies. The Court must refrain from announcing new policies based on its perception of “modern” economic theory that run counter to the Sherman Act’s originally intended and understood meaning. Its earlier statements, such as antitrust law’s primary concern is inter-brand competition, have nurtured today’s suboptimal competition policies. Reckless statements today, such as charging monopoly prices is an important element of the free-market system, can lead to uninformed competition policies, inconsistent with the citizens’ preferences. To give content to the Sherman Act, the Court should again interpret “its words in the light of its legislative history and of the particular evils at which the legislation was aimed.” Any trade-off or policy pronouncement must come from Congress, not the democratically unaccountable judiciary.

Second, today’s extreme standards (per se and rule of reason) are unsatisfactory for evaluating many ordinary restraints. Rather than reflexively return to ground zero (namely, the 1918 CBOT rule-of-reason factors), the Court should endeavor to cast more intelligible rules, consistent with the Sherman Act’s principles.

Given its infirmities under the rule of law, the full-scale rule of reason should be limited to novel cases where the courts have little experience with the challenged restraint. Even here, the courts can employ a more structured rule of reason that minimizes the need for judicial weighing. First, if properly applied, the rule of reason should minimize contentious issues of market definition. Circumstantial evidence of market power via market definition is a weak proxy for direct evidence. If the challenged

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332 Seven years after the Sherman Act’s passage, the Court recognized the shortfalls of resorting to the Act’s legislative history. Trans-Missouri Freight, 166 U.S. at 318-19. Judicial investigation of legislative history, the Court observed, is like “looking over a crowd and picking out your friends.” Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005) (citation omitted). Nonetheless, the number of party-goers is finite, unlike the variety of possible judicial justifications. Unlike the unstructured chatter at a party, the Court previously discerned several important themes from the Act’s legislative history. Trans-Missouri Freight, 166 U.S. at 319; Standard Oil, 221 U.S. at 52, 50, 57 & 83-84.

333 Trinko, 540 U.S. at 407.

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

335 Apex Hosiery, 310 U.S. at 489.
restraint has been in force for several years, the antitrust plaintiff must identify the restraint’s anticompetitive effects. Thus, the exercise of market definition is limited to provide context to the area of commerce affected by the anticompetitive restraint. By focusing on actual anticompetitive effects, the court need not engage in tradeoffs. If the challenged restraint’s net result, for example, is higher prices and reduced output, it is difficult to fathom offsetting pro-competitive justifications that defendants can offer. Even if defendants could establish that the practice fosters competition in another market, it is doubtful that the courts and antitrust agencies can quantify these pro- and anti-competitive effects. The courts should not engage in further trade-offs, which are beyond their competence or authority under the Sherman Act. Ultimately, Congress must decide such trade-offs.

Using market share as circumstantial evidence of market power should be relegated to those few cases where the harm is largely prospective (e.g., mergers under Section 7 or nascent restraints). The antitrust plaintiff must establish both the severity and probability of the alleged likely anticompetitive effects, which defendant can rebut with the magnitude and likelihood of pro-competitive benefits.

On the other hand, besides hard-core cartels or behavior with significant anti-competitive effects, the courts should hesitate in condemning categorically particular practices without regard to its justification. Commonplace restraints do not merit rule of reason. Instead, the Court must aim for differentiated rules that further the Sherman Act’s legislative aims. As several scholars argued, in many cases, simpler is better: especially when resources are scarce and the marginal social benefits to increased complexity are slight. The Court can begin with presumptions based on the prevailing empirical evidence. One key issue, which the majority in Leegin avoids, is

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336 Indeed, the Court in CBOT noted that the challenged restraint “had no appreciable effect on general market prices” or on output (“the total volume of grain coming to Chicago”). 246 U.S. at 240. Instead, the challenged restraint had several pro-competitive benefits including increasing price transparency.

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

338 Kolasky, supra note 191, at 88.

339 Christiansen & Kerber, supra note 115, at 229-233.
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the percentage of cases where RPM leads to positive and negative effects.\textsuperscript{340} The Court fell into the “never” fallacy: “Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.”\textsuperscript{341} But this is true of horizontal agreements among competitors to fix price,\textsuperscript{342} or many possible criminal acts, like homicide, which can be legal or illegal depending on the surrounding circumstances. That does not justify jurors’ assessing guilt under the rule of reason. A second issue is the extent the new rule (in lieu of per se liability) reduces or increases error and regulation costs. The majority in \textit{Sylvania} and \textit{Leegin} rejected any standard less than the full-blown rule of reason. Justice White in \textit{Sylvania},\textsuperscript{343} like Justice Breyer in \textit{Leegin},\textsuperscript{344} offered an incremental shift from per se liability. Even if the majority of Justices had concerns with the intermediary standard, they cannot assume that its shortcomings are greater than the rule of reason’s.

Third, the Court cannot assume that better legal standards will arise independently. Effective learning “takes place only under certain conditions; it requires accurate and immediate feedback about the relation between the situational conditions and the appropriate response.”\textsuperscript{345} Such feedback is

\textsuperscript{340} \textit{Leegin}, 127 S.Ct. at 2729 (Breyer, J. dissenting) (before settling on rule of reason, Court should ask how often are harms or benefits likely to occur, and how “easy is it to separate the beneficial sheep from the antitrust goats”); Christiansen & Kerber, \textit{supra} note 115, at 19; Br. of Amici Curiae Economists in Support of Pet’r at 16, \textit{Leegin}, 127 S.Ct. 2705 (noting “some disagreement within the economics literature, and among \textit{amici}, regarding the frequency” of minimum RPM’s pro- or anti-competitive effects).

\textsuperscript{341} \textit{Leegin}, 127 S.Ct. at 2709.

\textsuperscript{342} “Literal” price fixing, as in \textit{BMI}, may be benign. Even “hard core” price fixing, as the Court recognized, may be competitively neutral. Thus, even for \textit{per se} violations, private plaintiffs must prove antitrust injury. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

\textsuperscript{343} \textit{Sylvania}, 433 U.S. at 71 (White, J., concurring) (proposed using market power as a screen and an exception for infant industries: “Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the \textit{Schwinn} restraints to justify a rule-of-reason standard, even if the same weight is given here as in \textit{Schwinn} to dealer autonomy”).

\textsuperscript{344} \textit{Leegin}, 127 S.Ct. at 2737 (modified per se to allow an exception for the more easily identifiable and temporary condition of new entry).

\textsuperscript{345} Amos Tversky & Daniel Kahneman, \textit{Rational Choice & the Framing of Decisions}, \textit{in} \textit{RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS & PSYCHOLOGY} 90-91 (Richard M. Hogarth & M.W. Reder eds. 1987). Two recent business articles, for example, highlight this information flow. Hirotaka Takeuchi et al., \textit{The Contradictions That Drive Toyota’s Success}, \textit{HARV. BUS. REV.}, June 2008, at 96, 101 (encouraging experimentation and learning from successes and failures); Gary L. Neilson et al., \textit{The Secrets to Successful Strategy Execution}, \textit{HARV. BUS. REV.}, June 2008, at 61, 63 (based on survey of over 20,000 people in 31 companies, among the more important traits to implement strategy are
lacking in antitrust analysis currently since:

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

Moreover, division of labor and increased specialization have further dispersed knowledge within today’s society. This dispersal “requires a complex structure of institutions and organizations to integrate and apply that knowledge.”

Collecting information on how various markets work, and the impact of restraints on those markets, entails high transaction costs. A court’s view, on the other hand, is limited to the evidence supplied by the parties.

The federal antitrust agencies must assist in this undertaking. Conspicuously absent from the agencies’ amicus brief in *Leegin* was empirical evidence in support of RPM’s costs and benefits. Rather than lobby the courts with ideologically-driven rhetoric or standards, the federal antitrust agencies must better comprehend how markets operate and evolve. This requires more empirical analysis on their part.

**CONCLUSION**

Although “we are accustomed to think of antitrust as part of our statutory law,” observed Professor Handler, “actually all of its doctrines, both before and since 1890, are the creation of judges.” The Court replaced its literal construction of the Sherman Act with the rule of reason. But its standard never evolved to something workable or consistent with rule-of-law ideals.

As Justice Scalia observed, by adopting a “totality of circumstances

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348 *Leegin*, 127 S.Ct. at 2705 (Breyer, J. dissenting) (noting absence of empirical evidence by FTC).
349 Stucke, *Behavioral Economists, supra* note 21, at 579-86.
test” to explain its decision, the court “is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding.” 351 This might be appropriate for the case at the margins, 352 or a prima facie tort. But it should not be the “usual” standard for a statute on the books for over a century. Indeed, Justice Scalia recognized, as his brethren in the 1960s and 1970s, the totality-of-circumstances standard “is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.” 353 If the Court is regressing to the Sherman Act’s infancy (indeed going beyond the common law legal presumptions), this represents that “equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.” 354

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

Despite a century of litigation experience with the Sherman Act, the Court can only offer the weary Sisyphus the promise that its rule of reason one day may transform into something better. Future courts can “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.” 355 Future courts one day might “establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.” 356 Until then, businesses, consumers, and lower courts are stuck with the Court’s rule of reason.

351 Scalia, supra note 128, at 1180-81.
352 Id. at 1181.
353 Id. at 1182.
354 Id.
355 Leegin, 127 S.Ct. at 2720.
356 Id. at 2709.