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THE RULE OF REASON RE-EXAMINED

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Abstract

This article analyzes the application of the Rule of Reason as articulated by Justice Brandeis in *Chicago Board of Trade v. United States* to alleged restraints of trade in violation of section 1 of the Sherman Act. It argues that the Brandeis formulation, which requires courts to consider a broad range of economic factors and then weigh procompetitive benefits against anticompetitive effects, has proven unwieldy in the hands of trial judges. Because the Brandeis formulation provides little guidance as to how these factors should be weighed, courts have struggled to develop clear, predictable, and consistent standards under section 1. This article considers several alternatives to the Brandeis formulation and recommends that courts can revitalize the Rule of Reason by using the highly structured approach of the D.C. Circuit in the Three Tenors case to develop antitrust rules that are clear, predictable, and administrable.

The Rule of Reason Re-Examined

*By Edward D. Cavanagh**

This article analyzes the application of the Rule of Reason as articulated by Justice Brandeis in Chicago Board of Trade v. United States *to alleged restraints of trade in violation of section 1 of the Sherman Act. It argues that the Brandeis formulation, which requires courts to consider a broad range of economic factors and then weigh procompetitive benefits against anticompetitive effects, has proven unwieldy in the hands of trial judges. Because the Brandeis formulation provides little guidance as to how these factors should be weighed, courts have struggled to develop clear, predictable, and consistent standards under section 1. This article considers several alternatives to the Brandeis formulation and recommends that courts can revitalize the Rule of Reason by using the highly structured approach of the D.C. Circuit in the* Three Tenors *case to develop antitrust rules that are clear, predictable, and administrable.*

I. Introduction

The Rule of Reason has been the standard governing liability under section 1 of the Sherman Act[1] for over a century. Yet, notwithstanding Justice Brandeis's elegant articulation of the Rule in *Chicago Board of Trade v. United States*,[2] the courts continue to struggle with its application.[3] From the beginning, federal courts have been troubled by the open-ended nature of the Brandeis formulation of the Rule of Reason, which directed courts to examine a broad range of factors in analyzing competitive conduct but provided no guidance for how these factors should be analyzed or weighed so as to provide some semblance of clarity, predictability, and consistency in the application of antitrust standards.[4] To achieve these ends, courts began to look for analytical shortcuts in applying the Brandeis formulation and per se rules emerged.

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1. 15 U.S.C. § 1 (2006).
2. 246 U.S. 231, 238 (1918); *see infra* notes 48–64 and accompanying text.
3. *See* Timothy J. Muris, *The Rule of Reason After* California Dental, 68 Antitrust L.J. 527, 527 (2000) ("[A]ntitrust practitioners, scholars and jurists have struggled for decades with the appropriate form of analysis for restraints among competition."); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 14 (1977) (observing that the content of the Rule of Reason is largely unknown and characterizing the Rule as "little more than a euphemism for nonliability").
4. Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 255 (3d ed. 2005) (noting that under the Rule of Reason, nearly everything is relevant).

Per se jurisprudence flourished in the mid-twentieth century, and the courts applied per se rules to a variety of practices in the marketplace.[5] However, judicial enthusiasm for per se analysis began to recede in the mid-1970s. The decline of per se jurisprudence coincided with the ascendancy of the Chicago School of economic thought and its view that outside of a narrow band of conduct—horizontal agreements affecting price—per se rules would likely produce an unacceptable number of false positives. At the same time, and perhaps due to the Chicago School influence, courts became more comfortable integrating economic principles into their antitrust analyses and more willing to entertain economics-based arguments in order to achieve good outcomes.[6] As a result, antitrust analysis has become more fact-intensive, and the pendulum has swung away from simple, clear, and predictable rules back toward a more opaque, complicated, and less predictable antitrust jurisprudence.[7] Moreover, the analytic process has become muddied. Courts[8] and scholars[9] have suggested that the Rule of Reason and the per se rule present alternative modes of analysis.[10] That description is both inaccurate and misleading,[11] and has led to a great deal of dissatisfaction with antitrust law.[12] The Rule of Reason is best viewed as a continuum. The per se rule is not an alternative mode of analysis but rather simply a special spot on the Rule of Reason spectrum.

The Supreme Court has made clear its distaste for per se analysis[13] and has continually narrowed the types of conduct subject to per se condemnation.[14] Yet, the Court has done little to clarify the application of the Rule of Reason so as to produce results that are both fair and administrable. Indeed, the Court has recently portrayed antitrust as more a danger than a solution to competitive prob-

5. *See infra* Part II.C.

6. *See infra* notes 158–65 and accompanying text.

7. *See infra* Part II.E.

8. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007); Texaco, Inc. v. Dagher, 547 U.S. 1, 4 (2006); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1991); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 (1990); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

9. ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 18–19 (1978); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1378–79 (2009).

10. *Leegin*, 551 U.S. at 882; *Dagher*, 547 U.S. at 4; *Cal. Dental*, 526 U.S. at 779; *Atl. Richfield Co.*, 495 U.S. at 339; *GTE Sylvania*, 433 U.S. at 47–56.

11. *See Cal. Dental*, 526 U.S. at 779 ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' '[R]ule of [R]eason,' and 'quick look' tend to make them appear."); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating per se from Rule of Reason analysis."); Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 859 (1989) ("It is sometimes said there are two antitrust rules, per se and that of reason. This view is incorrect; there is only one form of analysis, the [R]ule of [R]eason.").

12. *See* Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 ANTITRUST L.J. 773, 773 (1988) ("Limited to two extreme methods of liability, antitrust tribunals have often appeared incapable of distinguishing, in a cost-effective manner, between conduct that harms and conduct that promotes consumer welfare.").

13. *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726 (1988) (any departure from the Rule of Reason standard "must be justified by demonstrable economic effect").

14. *See Leegin*, 551 U.S. at 889–99 (minimum resale price maintenance no longer per se unlawful); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (maximum resale price maintenance not subject to per se condemnation); *GTE Sylvania*, 433 U.S. at 57–58 (non-price vertical restraints should be adjudged under a Rule of Reason analysis).

lems and suggested that the complexity and lack of predictability under the Rule of Reason may be a reason to curtail antitrust enforcement.[15]

But the judiciary's lack of guidance is not the only concern about the continuing vitality of the Rule of Reason. Emerging scholarship in the field of behavioral economics has called into question fundamental assumptions of the neoclassical economic model that served as the foundation of the Rule of Reason analysis since the 1970s.[16] The neoclassical model holds that markets are largely self-correcting, and hence the need for antitrust intervention is typically small.[17] The behavioral model is empirically based, focusing on what market participants actually do (as opposed to what a theoretical model predicts about their behavior).[18] How the insights of behavioralists will reshape the Rule of Reason is not clear at this point in time. At the very least, they are red flags to courts to avoid knee-jerk acceptance of neoclassical assumptions that contradict experience or market facts.

After providing background on the development of the Rule of Reason under section 1, the emergence of per se jurisprudence, and the interrelationship between the two, this article explains the current uncertainty with respect to the Rule of Reason and section 1 analysis.

Simply put, the Rule of Reason is a "mess." Critics of the current antitrust litigation regime have identified three negative characteristics of the Rule of Reason: (1) high costs, (2) lack of predictability, and (3) significant risk of error.[19] They argue for simpler rules that would eliminate the need to assess complicated economic arguments.[20] One approach would be to address these concerns through a series of presumptions and safe harbors that would limit the range of economic issues before the court.[21] This concept might be aptly described as radical surgery.

A second, less radical, approach would be to retool the Rule of Reason by adding structure—a treatment regimen—that can guide litigants and decision makers in evaluating alleged restraints of trade to provide more clarity, greater predictability, fewer errors, and less expense in antitrust litigation.[22] This less invasive approach is akin to drug therapy in contrast to the above-described radical surgery.

15. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (expressing doubt that "careful case management" and "lucid instructions to juries" can effectively eliminate infirm claims); Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (identifying unlawful exclusionary conduct would prove to be a "daunting task" for "generalist" antitrust courts).

16. *See infra* Part II.F.

17. *See* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 Ind. L.J. 1527, 1549–50 (2011).

18. *See, e.g.*, Amanda P. Reeves, *Behavioral Antitrust: Unanswered Questions on the Horizon*, Antitrust Source 1–4 (June 2010), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Reeves6_24f.authcheckdam.pdf; Max Huffman, *Neo-Behavioralism?* 14–17 (Dec. 23, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1730365 (describing behavioral economics).

19. Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14–15 (1984).

20. *Id.* at 39 ("[N]either judges nor juries are particularly good at handling complex economic argument."); Bork, *supra* note 9, at 405–07.

21. *Id.* at 20–36, 39.

22. *See* PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

The third option is to do nothing and leave the lower courts to continue their struggle with the Rule of Reason through trial and error, sometimes getting it right and sometimes not, i.e., have the courts "play through the pain." This article favors the second option—a revitalized, highly structured Rule of Reason that uses burden of proof and burden shifting to minimize the need for courts to balance procompetitive benefits against anticompetitive effects and thereby simplifies the decision-making process, while at the same time lending clarity and predictability to that process.

II. Background

The Sherman Act, described by the Supreme Court as the "Magna Carta of free enterprise,"[23] was "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[24] The Sherman Act was revolutionary in the sense that at a time when laissez-faire[25] was the prevailing political philosophy, the statute authorized governmental intervention to preserve free markets.

This is not to suggest that some form of trade regulation was unknown at common law.[26] Common law courts dealt with covenants not to compete incident to a sale of a business[27] and covenants not to compete incident to employment relationships,[28] and there is authority for the proposition that these covenants should be upheld where "reasonable."[29] Robert Bork has argued that "[t]he common law of restraints of trade and monopolies has been a variable growth, composed of diverse and contradictory strains, many of them obviously irrelevant or even hostile to the policy of fostering competition."[30] As a result, "there was no unitary body of common law doctrine that could give meaning to the [Sherman Act]."[31]

A. Section 1 Prohibitions

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade."[32] The statutory formulation is breathtaking in

23. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
24. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
25. *See generally* Adam Smith, The Wealth of Nations (1776) (1991 ed. Prometheus Books).
26. *See, e.g.*, Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711). Indeed, several states enacted antitrust statutes prior to the passage of the Sherman Act. *See* Douglas Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. Competition L. & Econ. 427, 429 (2005) ("[Twenty-six] states had some form of antitrust statute on their books when the Sherman Act was passed in 1890."); David Millon, *The First Antitrust Statute*, 29 Washburn L.J. 141, 141 (1990) (at least twelve states had antitrust legislation prior to the United States Congress passing the Sherman Act in 1890); *see also* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 549–56 nn.30–44 (1944); Charles B. Nutting, *The Texas Antitrust Law: A Post-Mortem*, 14 Tex. L. Rev. 293, 294 n.3 (1936).
27. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898).
28. *Id.*
29. *Id.*
30. Bork, *supra* note 9, at 20.
31. *Id.*
32. 15 U.S.C. § 1 (2006).

its reach and in its simplicity. To establish a section 1 violation, a plaintiff must prove (1) some level of joint activity among defendants sufficient at least to infer an "agreement" and (2) that the defendants' conduct restrained trade. The statute does not identify the scope of the term "trade" or enumerate any practices considered to be "restraints"; instead, Congress intentionally left it up to the courts "to give shape to the statute's broad mandate."[33]

The statute's broad language raises the threshold question whether Congress intended the term "every" in the statute to be read literally. Common sense would suggest a negative answer, since "[e]very agreement concerning trade, every regulation of trade, restrains."[34] Indeed, the "very essence" of every contract is "to restrain."[35] If read literally, section 1 would prohibit *all* contracts in interstate commerce, no matter how innocuous.[36]

When the Supreme Court, per Justice Peckham, initially addressed this issue in a price-fixing case involving freight rate associations, it ruled that the statute must be read literally, rejecting the defendants' arguments that the rates they set were reasonable and would have been lawful at common law.[37] A year later, in a second case, Peckham retreated somewhat from his earlier literal construction of "every" and acknowledged that ordinary contractual arrangements, such as a sale of a business or a lease of property, would not be within the prohibitions of the Act.[38] The latter decision, however, shed no light on how courts should distinguish between ordinary contractual arrangements, which are lawful, and those agreements that would violate section 1.

Later, in *Addyston Pipe*, Judge Taft, writing for the Sixth Circuit, suggested a dividing line. In *Addyston Pipe*,[39] the Justice Department alleged that the defendant pipe manufacturers had engaged in a conspiracy to fix pipe prices and to divide markets.[40] The defendants argued that they had not violated section 1 because their prices were not unreasonable, that is, not too high.[41] Taft rejected that argument out of hand. His decision distinguished naked restraints of trade—those arrangements that serve no purpose other than to restrain—and restraints "ancillary" to lawful contracts and "necessary to the protection of the covenantee in carrying out" the main purpose of the contracts.[42] The court held that these ancillary restraints were not unlawful at common law and would not violate section 1, whereas naked restraints of trade are unlawful on their face.[43] In other words, legality under section 1 turned on the *character* of the restraint, not the *degree* of the restraint.

33. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) [hereinafter *NSPE*].
34. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *accord* Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2208 (2010) (citing *Chi. Bd. of Trade*, 246 U.S. at 238).
35. *Chi. Bd. of Trade*, 246 U.S. at 238.
36. *NSPE*, 435 U.S. at 687–88.
37. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 318 (1897).
38. United States v. Joint Traffic Ass'n, 171 U.S. 505, 573–77 (1898).
39. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
40. *Id.* at 272.
41. *Id.* at 279.
42. *Id.* at 284.
43. *Id.* at 282–83.

In 1911, the Supreme Court in *Standard Oil* clarified matters once and for all.[44] Recognizing that "the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade," the Court ruled that only *unreasonable* restraints of trade violate Section 1.[45] Put another way, the term "every" in the statute is not to be read literally. In so ruling, the Court related section 1 to the common law in a way that made sense but, at the same time, did not import into the Sherman Act jurisprudence the patchwork quilt of confusing and conflicting precedents that existed at common law.[46] Thus was born the Rule of Reason.

B. The Evolution of the Rule of Reason

Although *Standard Oil* established the Rule of Reason as the governing standard for adjudging liability under section 1 of the Sherman Act, the Court made no effort in that case to provide any content for the Rule.[47] The Court first addressed the Rule of Reason in depth seven years later in *Chicago Board of Trade*.[48] Chicago was the home of the leading grain market in the world and the Board of Trade was the exchange through which most trading in grain was done.[49] Grain was traded in three forms: (1) futures; (2) spot sales, i.e., unsold grain already in Chicago available for immediate sale; and (3) "to arrive," i.e., unsold grain in transit to Chicago.[50] "To arrive" grain was traded at a special call session held after the regular trading session closed at 1:15 p.m.[51] In 1906, the Board of Trade adopted the Call Rule, which prohibited members from purchasing or offering to purchase "to arrive" grain at the opening of a session at a price other than its bid at the close of

44. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

45. *Id.* at 59–60 ("[I]t follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether . . . a particular act had or had not brought about the wrong against which the statute provided.").

46. Later, in *Appalachian Coals*, the Supreme Court stated explicitly that in enacting the Sherman Act, Congress did not intend to adopt the common law antitrust jurisprudence:

> As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprises or through particularization defeat its purposes by providing loopholes for escape. The restrictions the act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933).

47. However, in a companion case, *United States v. American Tobacco Co.*, the Court did shed some light on the rule. 221 U.S. 106, 179 (1911) ("[I]t was held in the Standard Oil case that . . . as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which, because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.").

48. Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918).

49. *Id.* at 235.

50. *Id.* at 236.

51. *Id.*

the previous day's call session.[52] The practical effect of the Call Rule was to fix the bid prices for "to arrive" grain for about nineteen-and-a-half hours per day.

The Justice Department challenged the Call Rule as price-fixing in violation of section 1 of the Sherman Act and sought to enjoin the restriction.[53] The Board of Trade admitted the adoption and enforcement of the trading restriction but argued that the Call Rule was a reasonable restraint of trade and hence lawful because the Rule had no anticompetitive purpose and, indeed, was designed to promote competition in the sale of "to arrive" grain.[54] However, the trial court struck from the record all evidence regarding the purpose and procompetitive benefits of the regulation and thereafter entered judgment enjoining the Call Rule.[55]

Reversing, the Supreme Court concluded that the Call Rule was a reasonable restraint of trade and that the trial court had erred in condemning its price-fixing features out of hand. In an opinion by Justice Brandeis, the Court set forth the classic articulation of the Rule of Reason:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after 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.[56]

In determining whether the Call Rule was a reasonable restraint on business activity, Brandeis focused on three factors: (1) the nature of the Rule, (2) the scope of the Rule, and (3) the effects of the Rule.[57] As to the nature of the Rule, Brandeis concluded that the restriction on price-making for part of the trading day was not anticompetitive.[58] The Call Rule in no way prevented submission of bids after hours. The Rule simply required buyers to make up their minds prior to the close of the call as to how much they would be willing to pay before the Board reopened for trading the next day.[59]

In his discussion of the scope of the Rule, Brandeis underscored that the Rule was limited to "to arrive" grain and "applied only to a small part of the grain

52. *Id.* at 237.
53. *Id.* at 237–38.
54. *Id.* at 237.
55. *Id.*
56. *Id.* at 238.
57. *Id.* at 239–40.
58. *Id.* at 239.
59. *Id.*

shipped from day to day to Chicago" and then only for part of the day.[60] Members were free to purchase "to arrive" grain at any price during sessions and were also free to purchase grain on other markets without restrictions.[61]

Finally, Brandeis concluded that because the Call Rule applied only to a small part of the grain shipped to Chicago and then only for part of the business day and did not apply at all to grain shipped to markets outside Chicago, it had no appreciable effect on market prices for grain.[62] More important, according to Brandeis, the Rule helped to improve market conditions for "to arrive" grain significantly.[63] Having determined that the restraints imposed by the Board were on balance reasonable, the Court reversed the decision below and directed that judgment be entered for the defendant.[64]

A decade later, however, the Supreme Court sang a much different tune in *Trenton Potteries*.[65] There, the Court ruled that a price-fixing arrangement among manufacturers of vitreous pottery was unlawful on its face.[66] In so holding, the Court rejected the reasonableness standard set forth in *Chicago Board of Trade* as unduly burdensome on the government and "uncertain."[67] Nevertheless, rather than overruling *Chicago Board of Trade*, the Court distinguished that case because it involved regulation of a board of trade, rather than an agreement to fix prices in an open market.[68]

Still, *Trenton Potteries* did not definitively settle the treatment of horizontal price-fixing under the Rule of Reason. Six years later, the Court decided *Appalachian Coals*.[69] There, some 137 bituminous coal producers appointed an exclusive selling agent, who was charged with the task of getting the best price for individual members selling their coal.[70] Echoing *Chicago Board of Trade* and ignoring *Trenton Potteries*, the Court refused to enjoin the arrangement because it "better enable[d] the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general market."[71] The Court was also reluctant to condemn the agency arrangement in the absence of any proof of actual anticompetitive effects, but did acknowledge that the arrangement should be monitored and prosecuted if the transactions thereunder

60. *Id.*
61. *Id.*
62. *Id.* at 240.
63. *Id.*
64. *Id.* at 241.
65. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
66. *Id.* at 397–98.
67. *Id.* at 398 ("[I]n 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 on so uncertain a test as to 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.").
68. *Id.* at 395–98.
69. United States v. Appalachian Coals, Inc., 288 U.S. 344 (1933).
70. *Id.* at 356–57.
71. *Id.* at 366.

impaired competition.[72] Nevertheless, the Court's departure from *Trenton Potteries* is troubling and hard to reconcile with the outcome in that case. The holding may be best explained by the fact that the case arose in the midst of the Great Depression, and the Court was reluctant to condemn commercial activity and thereby perhaps accelerate the decline of the economy.

The question of how to analyze horizontal price-fixing under the Rule of Reason was definitively resolved in *Socony-Vacuum*,[73] where the Court condemned a joint effort by major oil producers to shore up gasoline prices by removing "distress" gasoline from the market through a coordinated purchasing program under which the defendants committed to buying all low-priced gasoline from independent producers.[74] Noting that price is the "central nervous system of the economy,"[75] the Court found this arrangement clearly and equivocally illegal on its face: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[76]

In other words, any joint effort by competitors to manipulate prices is unlawful. The fact that prices might have fallen as a result of the agreement is no defense, since absent the agreement, prices may have fallen even further.[77] Likewise, the fact that a price increase was "reasonable," i.e., not oppressive, is no defense.[78] The Court ruled that "the law does not permit an inquiry into [the reasonableness of price-fixing arrangements]. They are all banned because of their actual or potential threat to the central nervous system of the economy."[79] The Court made anemic efforts to distinguish *Chicago Board of Trade* and *Appalachian Coals* but did not purport to overrule either case.[80] At the same time, the Court stated unequivocally that once horizontal price-fixing had been established, no question of reasonableness was open to the court to pursue.[81]

C. The Rise of Per Se Rules

The Rule of Reason calls for alleged restraints under section 1 to be adjudicated on a case-by-case basis. However, judicial experience has shown that some restraints, such as horizontal price-fixing, are so pernicious and so devoid of economic benefit that they can be readily condemned without the need for detailed

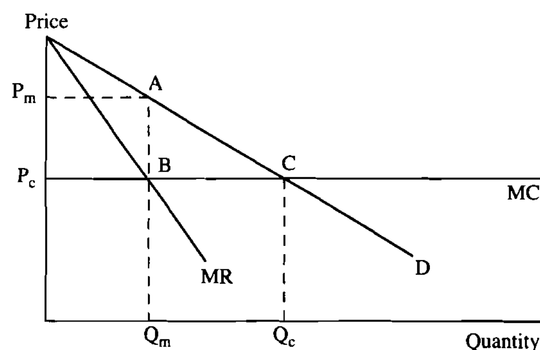
72. *Id.* at 373–75.
73. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
74. *Id.* at 166–68.
75. *Id.* at 224 n.59.
76. *Id.* at 213.
77. *See id.* at 218–19.
78. *Id.* at 221 ("Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow . . . .").
79. *Id.* at 224 n.59.
80. *Id.* at 214–18.
81. *Id.* at 213.

economic analysis.[82] The Court has accepted the learning from economics that horizontal price-fixing inevitably results in higher prices, lower output, and economic waste.[83]

Price-fixing conspiracies benefit participants at the expense of the public. So rare and speculative are the societal benefits of price-fixing and so obvious are the anticompetitive effects that detailed analysis is unnecessary and summary condemnation is appropriate.[84] The seeds for the per se rule against horizontal price-fixing were sown in *Addyston Pipe* with the identification of a category of naked restraints. The concept was nourished under *Trenton Potteries* and came to full

82. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of restraints, however, have such predictable and anticompetitive benefit that they are deemed unlawful per se."); FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411, 434 n.16 (1990) ("[P]rice-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public."); Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988) ("per se rules are appropriate only for conduct 'that would always or almost always tend to restrict competition and decrease output'" (citations omitted)); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103–04 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

83.



The figure above illustrates the pernicious effects of horizontal price-fixing. In a perfectly competitive market, a seller theoretically will produce at the point where the marginal cost (MC) intersects with the demand (D) curve, point C. This will yield a total output of Q_c units at a price of P_c per unit. A monopolist, however, theoretically will produce at a level where the marginal cost and marginal revenue (MR) curves intersect, yielding a lower output of Q_m at a higher per unit price of P_m. A market where all the competitors agree to fix prices operates as a market under the control of a monopolist because absent price competition, each firm would set price at its optimal welfare level—where marginal costs equals marginal revenue. In a monopolized market an amount equal to rectangle $P_m ABP_c$ is the monopoly overcharge, the amount transferred from the consumers to the monopolist. The amount equal to triangle ABC, the welfare triangle, represents the loss to society in allocative efficiency because of the monopolistic conduct.

84. *See, e.g.*, United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927).

fruition in *Socony-Vacuum*. Today, there remains a broad consensus condemning price-fixing among competitors as unlawful on its face.[85]

Under per se analysis, the plaintiff is relieved of the obligation to define a relevant market and to prove market power.[86] Once the court determines that the defendants' conduct falls within a per se category, it is "conclusively presumed to unreasonably restrain competition."[87]

Per se rules offer significant benefits to the courts and to litigants that the Rule of Reason lacks.[88]

1. Clarity. Per se rules draw bright-line rules as to whether conduct is lawful or not. Clarity is especially important in the price-fixing realm, where a violation can give rise to criminal sanctions.

2. Predictability. The per se rule, like a traffic signal, provides an ex ante standard. Parties know that if they run a red light, there will be consequences, even if no tangible harm, such as a traffic accident, ensues. On the other hand, the Rule of Reason analysis espoused by Brandeis is an ex post exercise. Under the Rule of Reason, parties who disobey the traffic signal do so at their own risk. They will be held liable if they cause actual harm (such as a collision) but face no liability otherwise. Thus, for most restraints, it is difficult to predict whether one will face liability under such a standard.

3. Administrability. Per se rules limit proof and remove from the court the burdens of having to weigh benefits to one sector of the economy against harms to another sector.

4. Efficiency. Precisely because the per se rule limits proof, it limits the cost of adducing evidence and the length of trials. Less proof also typically means simplification of issues and less wear and tear on both the litigants and the judiciary.[89]

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85. *See supra* note 82 and accompanying text.

86. *N. Pac. Ry.*, 356 U.S. at 5.

87. *Id.*

88. *See* United States v. Topco Assocs., 405 U.S. 596, 609 n.10 (1972) ("[W]ithout 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 or illegal under the Sherman Act."). As then-Judge Breyer stated:

> [A]ntitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. Indeed, the need for clarity and administrability sometimes leads to per se rules that prohibit inquiry into actual harms and benefits of challenged conduct. They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (citations and parenthesis omitted); *see also* Pac. Bell Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust law.").

89. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 n.14 (1982); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977) (per se rules tend to provide guidance to the business

Given the benefits of per se analysis, courts over time, not surprisingly, began to expand the category of per se offenses to include horizontal division of markets,[90] concerted refusals to deal (group boycotts),[91] and tying arrangements. The Supreme Court's 1972 decision in *Topco*, condemning horizontal agreements to divide markets, even in the absence of a price-fixing feature, represents the high water mark of per se jurisprudence. Justice Marshall, writing for the Court, stated:

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion in another sector is one important reason we have formulated *per se* rules.[92]

Underscoring the importance of having predictable legal rules in the antitrust realm, Justice Marshall further observed that Congress, if it wished, could enact legislation limiting the reach of per se rules, thereby leaving the courts "free to ramble through the wilds of economic theory in order to maintain a flexible approach."[93] The downside of maintaining a flexible approach to section 1 analysis is amply demonstrated by Justice Brandeis's opinion in *Chicago Board of Trade*. That decision and rationale have been heavily criticized,[94] and its shortcomings will only be summarized here. First, Brandeis's discussion of anticompetitive effect and reasonableness is misdirected.[95] He ignores Judge Taft's teaching in *Addyston Pipe* that in assessing an alleged violation under section 1, the court must distinguish between naked restraints of trade and ancillary restraints.[96] The proper focus of the inquiry is thus on the character of the restraint. The Call Rule was a direct restraint on price and therefore a naked restraint of trade. As Judge Taft observed, the question of reasonableness is not open to the courts in those cases where the restraints

community and minimize the burdens on litigants and the judicial system); *Topco*, 405 U.S. at 609–10; Stucke, *supra* note 9, at 1404–05, 1422–24. *But see* Jonathan Baker, *Per Se Rules in the Antitrust Analysis of Horizontal Restraints*, 36 ANTITRUST BULL. 737, 738 (1991) ("Yet the business certainty and litigation cost reduction benefits of per se rules are easy to overstate.").

90. *Topco*, 405 U.S. at 596.

91. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

92. *Topco*, 405 U.S. at 609–10.

93. *Id.* at 610 n.10.

94. *See* Bork, *supra* note 9, at 42, 44 (criticizing Brandeis for "advocating a deviant [R]ule of [R]eason," for concluding that the Call Rule's restraints were procompetitive without any record support, and for his failure to be "explicit about what his approach would mean for the law generally"); ABA Monograph No. 23, *The Rule of Reason* 5 (1999) ("Commentators have long criticized the breadth of Brandeis' statement in *Board of Trade*" as "legitimizing the 'big case' in antitrust."); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 255 (3d ed. 2005) ("Brandeis' statement of the [R]ule of [R]eason . . . has been one of the most damaging in the annals of antitrust" in that it "has suggested to many courts that . . . nearly everything is relevant."); Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 RES. L. & ECON. 1, 4 (1992) ("[O]pen-ended listing of possibly relevant factors is hardly illuminating as to their analytic inter-relationship, nor does it inform a decision maker of what weights to ascribe to different factual conclusions.").

95. *See* Bork, *supra* note 9, at 42–44.

96. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898).

involve horizontal arrangements among competitors to fix prices.[97] Those arrangements are unlawful on their face and subject to summary condemnation.

Instead of focusing on the character of the restraint, Brandeis looks to the degree of the restraint. He concludes that because the Call Rule affects only a small part of the exchange's daily volume, applies to only part of the day, does not affect grain traded on other exchanges, permits after-hours bidding, and facilitates operation of the exchange, it is reasonable.[98] Brandeis thereby disregards Judge Taft's admonition for judicial restraint and proceeds to "set sail on a sea of doubt" by purporting to identify those restraints that are in the public interest and those that are not.[99]

Second, even if the question of reasonableness were open to the court, there is nothing before the tribunal that would justify the Board's bidding ban. All evidence of reasonableness had been kept out of the record by the trial court.[100] At the very least, the case should have been remanded for further fact-finding. Instead, accepting the Board of Trade's *arguments* as *facts*, the Court reversed and entered judgment for the defendant.[101]

Third, the procompetitive benefits of the Call Rule cited by Brandeis bear no relationship to the Board's price-fixing rule involving "to arrive" grain. The Court sets forth a laundry list of improvements that came about with the creation of the Call Rule.[102] However, the Court fails to show how price-fixing was necessary to achieve any of the purported improvements. The fact is that all of these procedures could have been implemented without the price-fixing feature of the Call Rule. The price-fixing feature of the Call Rule is thus in no way ancillary to a lawful transaction.

Fourth, there was clearly a less restrictive alternative to price-fixing to achieve the desired ends of the Call Rule. Brandeis cited two purportedly procompetitive goals of the Call Rule: (1) to foster the convenience of traders and (2) to break a monopoly of four firms in after-hours trading.[103] The first goal clearly would not implicate antitrust policy but the second would. However, the Board could have broken the alleged monopoly of after-hours traders without prohibiting overnight bidding altogether. For example, it might have taken steps to increase the number of firms engaged in overnight trading.

Fifth, the Rule of Reason as articulated by Justice Brandeis is an administrative nightmare. It provides little practical guidance to lower courts.[104] Because everything counts under the Rule, it invites "endless fishing expeditions" into defen-

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97. *Id.*

98. Chi. Bd. of Trade v. United States, 246 U.S. 231, 237–39 (1918).

99. *Addyston Pipe*, 85 F. at 283–84.

100. *Chi. Bd. of Trade*, 246 U.S. at 237.

101. *Id.* at 241.

102. *Id.* at 240–41.

103. *Id.* at 237.

104. *See* VII PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1500, at 380 (3d ed. 2010) [hereinafter AREEDA & HOVENKAMP] ("Without further elaboration, 'reasonableness' is too vague to guide

dants' records, which makes antitrust litigation both costlier and more complex for the parties and more burdensome for the courts.[105] What is fundamentally a benefit/burden test is overbroad and unfocused.[106] On the burden side, it makes no attempt to distinguish between naked restraints of trade, which serve no purpose other than to impair competition, and ancillary restraints of trade, which are necessary to effectuate a lawful transaction. Instead of focusing on the nature (or character) of the restraint, the courts are asked to focus on the degree of the restraint. On the benefit side, the courts are encouraged to take a broad view of procompetitive benefits.[107] In *Chicago Board of Trade* itself, Justice Brandeis identified a series of purportedly procompetitive benefits that have no relation to the price-fixing provision in the Rule and could have been achieved by less restrictive means.[108] In other words, *Chicago Board of Trade* does not even consider that existence of a less restrictive alternative might render the restraint imposed unreasonable.

Additionally, it requires the courts to balance procompetitive benefits against anticompetitive effects, a task that is beyond the ken of most generalist courts.[109] On the one hand, long after *Chicago Board of Trade*, the Supreme Court has recognized the difficulties that courts have in analyzing complex economic problems or to weigh in any meaningful manner the destruction of competition in one sector against promotion of competition in another sector.[110] Nevertheless, the Rule of Reason's directive to weigh competitive effects still stands today. "Weighing" suggests that factors have weight, but the Supreme Court offers no guidance as to how that weight is to be determined. For example, in *GTE Sylvania*, a paradigm Rule of Reason case, the Supreme Court directs that in cases involving non-price

the business firm's actions or the judge's discretion. Such openness is a mixed blessing. Unbounded by technical limitations, it reaches every evil. But unless disciplined by the purposes of the antitrust laws, it is a vagrant standard. Uninstructed by knowledge of the economy generally or by experience with the particular market under scrutiny, the judge or jury may respond to the parties' relative worthiness rather than concentrate on competitive effects."); Easterbrook, *supra* note 19, at 10–13.

105. Areeda & Hovenkamp, *supra* note 104, ¶ 1502, at 389 ("This standard formulation is often and properly criticized for being too unfocused—for making almost everything about an industry relevant and for inviting litigants and courts on endless fishing expeditions into defendant's records.").

106. See *id.* ¶ 1500, at 381–82. Areeda and Hovenkamp observe:

> Even an elaborate trial will seldom enable the tribunal to reach confident judgments about the past or future. In this sense, the [R]ule of [R]eason promises too much. We cannot realistically hope to know and to weigh confidently all that bears on competitive impact.

Id.

107. *Chi. Bd. of Trade*, 246 U.S. at 238.

108. *Id.* at 240.

109. *See* United States v. Topco Assocs., 405 U.S. 596, 609–10 (1972); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J., dissenting); Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 Antitrust L.J. 391, 393 n.12 (2000); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 Antitrust L.J. 893, 913–14 (1985) ("The balancing process inherent in any [R]ule of [R]eason analysis . . . at least as currently applied . . . produces a hopeless morass."); Easterbrook, *supra* note 19, at 11 ("[I]t is fantastic to suppose that judges and juries could make . . . a full inquiry into the economic costs and benefits of a particular business practice . . . .").

110. *See supra* note 92 and accompanying text.

vertical restraints, the courts weigh the benefits of promoting interbrand competition against the burdens imposed on intrabrand competition and then decide whether the net benefits outweigh the net burdens.[111] However, weighing the benefits to interbrand competition against the burdens on intrabrand competition is a bit like comparing apples and oranges; the two are simply not comparable.[112] Accordingly, the exercise is "pointless."[113]

On the other hand, one can argue that weighing is no big deal and that courts engage in that process all of the time.[114] Nevertheless, it is one thing in torts for a court to weigh the cost of an accident to a victim against the defendant's cost of preventing that accident. It is quite another thing to ask a fact finder in a courtroom setting to replicate and analyze the whole range of price-output decisions that may be entailed in the imposition of territorial restraints.[115] Antitrust has been referred to as a statutory tort,[116] but it is a tort of a far different magnitude than a garden-variety automobile accident. Except in the rare case where the benefits and burdens are clearly defined and quantifiable, the weighing process in antitrust is extremely difficult.

Moreover, the weighing process itself invites error.[117] It is simply not reasonable

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111. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977).

112. Easterbrook, *supra* note 19, at 13 ("It is pointless to weigh inter- against intra-brand competition because they are not commensurable.").

113. *Id.*

114. For example, before granting a preliminary injunction, a court must weigh the probability of success on the merits against the possible harm caused by granting the injunction. In conflict of laws, courts may weigh various interest factors in determining which law to apply in a particular case.

115. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 731–32 (1977) (noting the difficulty of recreating real world price-output decisions in the courtroom).

116. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986).

117. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 916–17 (2007) (Breyer, J., dissenting) ("One cannot fairly expect judges and juries [in resale price maintenance cases] to apply complex economic criteria without making a considerable number of mistakes."). Justice Breyer elaborated:

> How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*. For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintenance products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf-space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.
>
> I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. But applying these criteria in court is often easier said than done. 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. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One 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.

to expect judges and juries to be mistake-free in weighing benefits and burdens as the Rule of Reason requires.[118]

Equally important, by swinging the courtroom door wide open to all manner of evidence in defense of an alleged restraint, the Brandeis holding encourages costly discovery, as well as satellite litigation over disputed discovery requests, more burdensome trial records, and lengthier cases, which together significantly add to the cost of litigation.[119] The added cost factor is not neutral. Rather, it favors defendants, who typically have deeper pockets and greater staying power than plaintiffs.

Finally, the case-by-case approach espoused by Brandeis makes it much more difficult for business concerns to predict outcomes.[120] This loss of predictability is acutely felt in those situations where the monetary stakes are high and the financial fates of the litigants are at stake. These inadequacies may not have been apparent to the Court at the time, but over the years, as business transactions have grown more complex, economic principles have become better understood, and antitrust analysis has become more nuanced, the shortcomings of the Brandeis formulation of the Rule of Reason have become manifest.[121] Despite all of its infirmities, *Chicago Board of Trade* has never been explicitly overruled by the Supreme Court, and courts continue to cite the Brandeis articulation of the Rule of Reason with approval.[122]

Although Justice Brandeis's articulation of the Rule of Reason in *Chicago Board of Trade* is perhaps elegant prose, it is, in the words of then-Professor Easterbrook, an "empty" formulation.[123] Easterbrook delivers a devastating one-paragraph critique:

> If the economist has a way to approach new practices, a judge today has none. According to the Supreme Court, "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. . . . [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint. . . ." How does a court tell whether the arrangement promotes or suppresses competition? It must consider

Id. (citations omitted); *see also* Easterbrook, *supra* note 19, at 11 ("The welfare implications of most forms of business conduct are beyond [judicial] ken.").

118. *Leegin*, 551 U.S. at 916–17 (Breyer, J., dissenting); *see generally* Christopher R. Leslie, *Rationality Analysis in Antitrust Law*, 158 U. PA. L. REV. 261, 264 (2010) ("[F]ederal judges are generally not effective arbiters of whether alleged business conduct is implausible. . . . [M]ost federal judges have no relevant business experience, do not keep abreast of the pertinent economics and historical scholarship, do not appreciate the full range of business objectives or how businesses operate, and are subject to cognitive biases.").

119. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) (noting the high cost of discovery in antitrust cases).

120. *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972); Carlson Mach. Tools, Inc. v. Am. Tool, Inc., 678 F.2d 1253, 1259 (5th Cir. 1982); *see also* Stucke, *supra* note 9, at 1424–28 (pointing out how the Rule of Reason creates uncertainty: (1) its focus on competitive effects rather than conduct, (2) difficulties in proving market power, (3) exclusive use of the neoclassic economic model to determine anticompetitive effects, and (4) a steady stream of defenses).

121. *See* AREEDA & HOVENKAMP, *supra* note 104, ¶ 1500, at 381–82.

122. *See supra* notes 69–72 and accompanying text.

123. Easterbrook, *supra* note 19, at 11–12.

> 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 achieved are all relevant facts. These formulations are empty. Judges and justices rightly protest that courts cannot make these judgments. "Courts are of limited utility in examining difficult economic problems. . . . [They are] ill-equipped and ill-suited for such decision-making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[124]

The Rule of Reason as stated by Justice Brandeis does indeed have many shortcomings as a legal standard, especially when compared to the per se approach.[125] This is not to suggest that per se rules are a panacea. Because the anticompetitive impact of a horizontal division of markets is identical to that of horizontal price-fixing, per se condemnation of such arrangements is not controversial.[126] More controversial is the application of per se rules to tying arrangements and group boycotts. Tying has been held unlawful per se since the 1947 *International Salt* decision, wherein the Court condemned the defendant's practice of leasing its patented salt processing machine only to those who would agree to buy unprocessed salt from the defendant, thereby leveraging its patent monopoly into unprocessed salt.[127] A key element of tying is proof of sufficient economic power in the market for the tying product (the salt processor) to appreciably restrain commerce in the market for the tied product (unprocessed salt).[128] That element requires an investigation into market facts that the per se rule would foreclose. Courts addressed this anomaly by presuming market power in the market for the tying product because it was patented,[129] copyrighted,[130] or unique.[131]

However, in *Hyde*,[132] the Court was confronted with an alleged tying situation where there was no basis to presume economic power in the market for the tying product. An anesthesiologist, who had been turned down for a position at Jefferson Parish Hospital because it had an exclusive contract with another provider of anesthesiological services, claimed that the hospital was engaged in unlawful

124. *Id.* at 11–12 (citations omitted).

125. *See* Stucke, *supra* note 9, at 1421 ("[T]he [R]ule of [R]eason has been criticized for its inaccuracy, its poor administrability, its subjectivity, its lack of transparency and its yielding inconsistent results.").

126. What is controversial is whether the particular arrangement is indeed a true horizontal division of markets or a vertically imposed restraint. *See* United States v. Topco Assocs., 405 U.S. 596, 613–19 (1972) (Burger, C.J., dissenting).

127. Int'l Salt Co. v. United States, 332 U.S. 392, 395 (1947). Unlawful tying has four elements: (1) two products—the "tying" product and the "tied" product; (2) anticompetitive forcing, i.e., the sole of the tying product is conditioned on the purchase of the tied product; (3) sufficient economic power in the market for the tying product to appreciably restrain commerce in the market for the tied product; and (4) a not insubstantial amount of commerce is involved. *Id.*

128. *Id.*

129. *Id.*

130. United States v. Loew's, Inc., 371 U.S. 38 (1962).

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

132. Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984).

tying because it forced surgery patients, as a condition of obtaining surgical services, to use the hospital's exclusive provider of anesthesiological services.[133]

Despite expressly reaffirming the per se rule against tying, the Court engaged in a detailed analysis of the hospital's economic power in surgical services and ultimately concluded that the hospital did not have sufficient market power in surgical services to appreciably restrain commerce in anesthesiological services.[134] Justice O'Connor, concurring, unsuccessfully urged the majority to acknowledge that its own analysis of the case—specifically, its examination of the defendant's market power in surgical services—foreclosed any argument that tying was still a per se illegal offense.[135] Moreover, notwithstanding the seemingly irrefutable logic of Justice O'Connor's concurrence in *Hyde*, the Court has clung to the perception that tying is per se unlawful,[136] even while holding, in later cases, that the existence of intellectual property rights in the market for the tying product does not, ipso facto, create a presumption of market power.[137]

The difficulties in determining what conduct should be subject to the per se rule underscore the shortcomings of per se analysis. First, as Justice Marshall has observed, "[p]er se rules always contain a degree of arbitrariness."[138] In theory, courts apply per se condemnation only after having sufficient experience with a restraint to conclude that its anticompetitive effect far outweighs any procompetitive benefit. Yet, there is no discussion in any case about how courts would reach such a conclusion. The arbitrary application of per se analysis is perhaps best illustrated by the line of cases involving vertically imposed territorial restraints. In *White Motor*, the Supreme Court, per Justice Douglas, reversed the trial court's ruling that a manufacturer's imposition of territorial restrictions on where its dealers could sell its products was per se illegal.[139] Justice Douglas emphasized that the Court lacked sufficient experience with such restrictions to condemn them summarily.[140]

Five years later in *Schwinn*,[141] the Supreme Court summarily condemned vertically imposed territorial restraints where the seller parts with title, dominion, and risk of goods sold to a dealer subject to territorial restraints.[142] The Court offered no explanation as to what happened in the intervening years to justify per se

133. *Id.* at 5.

134. *Id.* at 26–29.

135. *Id.* at 35 (O'Connor, J., concurring).

136. *See id.* at 32 (Brennan, J., concurring) (in light of the Court's longstanding per se condemnation of tying, it is up to Congress to change the rule).

137. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42–43 (2006).

138. United States v. Container Corp. of Am., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

139. White Motor Co. v. United States, 372 U.S. 253 (1963).

140. *Id.* at 261 ("This is the first case involving territorial restrictions in a vertical arrangement; and we know too little of the actual impact of both that restriction and the one affecting customers to reach a conclusion on the bare bones of the documentary evidence before us.").

141. United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

142. *Id.* at 381 ("On this record, we cannot brand the District Court's finding as clearly erroneous and cannot ourselves conclude that Schwinn's franchising of retailers and its confinement of retail sales to them—so long as it retains all indicia of ownership, including title, dominion and risk, and so long as the dealers in question are undistinguishable in function from agents or salesmen—constitute an 'unreasonable' restraint of trade.").

condemnation. A decade later, the Court revisited vertically imposed territorial restraints in *GTE Sylvania*[143] and rescinded the per se rule, noting that *Schwinn* "was an abrupt and largely unexplained departure from [*White Motor*]."[144]

Second, literal application of the per se rule may mischaracterize the transaction and create the risk of false positives.[145] As the Supreme Court noted in *BMI*, "easy labels do not always supply ready answers."[146] There, the Court criticized the Second Circuit's characterization of BMI's blanket license as '"price-fixing' in the literal sense," calling it "overly simplistic" and reiterating that per se condemnation is reserved for behavior that is "plainly anticompetitive and very likely without redeeming virtue."[147] The Court ruled that the blanket license was outside the per se category because it was reasonably necessary to effectuate rights of copyright holders granted under the Copyright Act.[148] The Court concluded that the blanket license "is not a 'naked restraint of trade with no purpose except stifling of competition.'"[149] On the contrary, the blanket license creates significant efficiencies by lowering transaction, enforcement, and monitoring costs.[150] In addition, the blanket license creates a new product, permitting prompt access to music and great flexibility in the choice of musical material.[151] Accordingly, summary condemnation of the blanket license was inappropriate.

Third, per se analysis does not always deliver on the expectation of lower litigation costs. Plaintiffs, for obvious reasons, typically prefer to litigate cases under a per se theory. Nevertheless, it is not unusual for plaintiffs to proceed under the Rule of Reason as an alternative theory of recovery in the event the court concludes that per se analysis is inappropriate.[152] Arguably, that scenario produces the worst of both worlds—all the costs of the full-blown Rule of Reason without any of the savings of the per se rule.

Fourth, notwithstanding the outward appearance of the per se rule as categorical, courts have recognized exceptions to its application. This is especially true in the tying area, where courts have upheld tying arrangements necessary to preserve goodwill or to facilitate new product introduction.[153]

D. The Per Se Rule Decline

As discussed above,[154] the 1972 *Topco* case, which involved market allocation, represented the high-water mark of per se jurisprudence. Nevertheless, even as

143. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

144. *Id.* at 47.

145. *See* United States v. Topco Assocs., 405 U.S. 596, 613–19 (1972) (Burger, C.J., dissenting).

146. Broad. Music, Inc. v. CBS, 441 U.S. 1, 8 (1979).

147. *Id.* at 7–9.

148. *Id.* at 19.

149. *Id.* at 20 (citations omitted).

150. *Id.*

151. *Id.* at 20–21.

152. That is precisely what the FTC did in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

153. *See, e.g.*, United States v. Jerrold Elec. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

154. *See supra* notes 90–93 and accompanying text.

the courts became ever more enamored of per se rules in the late 1960s and early 1970s, there was a mounting academic criticism of per se analysis, notably in the area of vertical restraints.[155] *Schwinn* was a particular target of scholarly scorn.[156] Apparently heeding this criticism, the Court in *GTE Sylvania* overruled *Schwinn* and held that vertically imposed territorial restraints would henceforth be adjudged under the Rule of Reason.[157] Significantly, the *GTE Sylvania* opinion contains extensive citation to economic scholarship criticizing per se treatment of vertically imposed territorial restraints, but provides little useful guidance to courts on how to balance procompetitive benefits against anticompetitive effects.[158]

GTE Sylvania marked the beginning of a new era in antitrust jurisprudence. Accepting the neoclassical economic model as a frame of reference, courts began to embrace economic analysis as part of the antitrust decision-making process instead of avoiding it. Courts thereafter came to understand that the competitive risks posed by vertical restraints were of a much different character and magnitude from those posed by horizontal restraints.[159] Whereas cooperation among rival manufacturers, who are supposed to be vigorously competing for each other's business, is rightly viewed with suspicion because such cooperation may pose a significant threat to competition, cooperation among a manufacturer and a retailer is another story. It is only natural for Ralph Lauren to cooperate with Bloomingdales and other retailers, since he relies on them to get his goods into the hands of consumers. Ultimately, Ralph Lauren must decide how best to put his goods into the stream of commerce. He may opt to sell to all comers. Alternatively, he may choose to limit the number of retailers selling his products and the locations from which they can operate, not necessarily to raise prices and to limit output, but to realize distributional efficiencies, to prevent free riding by competing retailers, and to encourage retailers to promote his products. Unlike the cartel participants who reduce output to sustain monopoly prices, a manufacturer imposing vertical restraints has little economic incentive to reduce output because lower output would mean lower profits. On the contrary, a manufacturer hopes that vertical restraints will enable retailers to sell more goods and thereby result in *increased* production.

In short, vertical non-price restraints are not naked restraints of trade; they *can* serve a purpose beyond restraining commerce. For that reason, per se condemnation of vertical non-price restraints is, generally speaking, overbroad. This is not to say that vertical non-price restraints cannot impair competition or that they should be treated as per se lawful. Courts have simply held that, unlike in per se cases, defendants should be given the opportunity to justify their alleged

155. *See* Bork, *supra* note 9, at 280–85.

156. *Id.* at 285 ("Antitrust is capable of sustaining meaningless distinctions and stale paradoxes but those of *Schwinn* were too many and too obvious to persist for long. The precedent suffered a timely and deserved demise shortly after its tenth anniversary.").

157. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

158. *Id.* at 48 n.13.

159. *See* Bork, *supra* note 9, at 280–98.

anticompetitive conduct.[160] Some thirty years after *GTE Sylvania*, the Supreme Court held that under the logic of that case, resale price maintenance should no longer be subject to per se scrutiny.[161] All vertical restraints, except for tying, are now subject to Rule of Reason analysis,[162] and per se treatment of tying is a mere formality. Moreover, the Supreme Court has shown no inclination to expand the universe of cases falling into the per se category.[163] Courts have "eschewed adoption of an evidentiary standard that 'could deter or penalize perfectly legitimate conduct' or 'would create an irrational dislocation in the market' by preventing legitimate communication between a manufacturer and its distributors."[164] In the wake of *GTE Sylvania* and *Monsanto*, there is now a

> presumption in favor of a [Rule of Reason] standard; that departure from that standard must be justified by demonstrable economic effect, such as facilitation of cartelization, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view toward protecting the doctrine of *GTE Sylvania*.[165]

E. THE INTERRELATIONSHIP OF THE RULE OF REASON AND THE PER SE RULE

The infusion of economic thought into antitrust analysis has proven beneficial in that it helps courts better understand whether certain business practices are anticompetitive. Economic insights often underscore the arbitrariness and over-inclusiveness of the per se rule. At the same time, the incorporation of economic analysis has complicated the inquiry and made it both more expensive and less predictable. The resulting tension has created confusion and uncertainty in antitrust with which the courts continue to struggle.

As discussed above,[166] the Rule of Reason is the liability standard under section 1 of the Sherman Act. It is a spectrum.[167] On one end of the spectrum are naked restraints of trade that have no redeeming procompetitive value, and on the other end of the spectrum are agreements that do not restrain trade in any way. In the

160. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007).

161. For nearly a century, vertically imposed price-fixing—resale price maintenance—had been condemned as per se unlawful under the holding in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In 2007, the Supreme Court overruled *Dr. Miles* and held that henceforth minimum resale price maintenance will be governed by the Rule of Reason. *Leegin*, 551 U.S. at 889–92, 898. In so ruling, the Court acknowledged that resale price maintenance can have anticompetitive consequences and that it was by no means declaring resale price maintenance per se lawful.

162. Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 726 (1988).

163. *Id.*

164. *Id.* (citations omitted).

165. *Id.*

166. *See supra* notes 1–3 and accompanying text.

167. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1991) ("[T]here is often no bright line separating per se from Rule of Reason analysis."); *see generally* Thomas Lambert, Dr. Miles *Is Dead, Now What? Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937, 1968 n.122 (2009); *see also* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 S.M.U. L. REV. 693, 709 (2009) (the *California Dental* opinions "leave readers with the notion that the [R]ule of [R]eason is a continuum").

middle of the spectrum are the more difficult cases where courts traditionally have had to analyze and weigh anticompetitive effects and procompetitive benefits.

The spectrum approach is useful because it underscores the fact that there are no hard lines separating per se and Rule of Reason analysis.[168] The fact that conduct falls outside of the per se area of the spectrum does not necessarily mean that a court must undertake the detailed analysis described in *Chicago Board of Trade* to determine the legality of the conduct. As Professor Areeda has observed, elaborate inquiry is not always necessary; "the [R]ule of [R]eason can sometimes be applied in the twinkling of an eye."[169] For example, in *NCAA*,[170] the Supreme Court struck down under section 1 of the Sherman Act NCAA rules that (1) made the NCAA the exclusive agent to negotiate television rights to college football games on behalf of member schools; (2) prohibited individual television packages for their football programs; (3) limited the number of times member schools could appear on national television; and (4) required the television networks to include the football games of at least eighty-two member institutions.[171]

At first glance, the artificial limitation on output implemented by the agreement would appear to fall in per se territory. The Supreme Court, however, declined to characterize this arrangement as per se unlawful, noting that the NCAA rules and regulations were akin to those of a professional sports league and that some cooperation among member institutions was necessary if the product of college football were to exist at all.[172] Nevertheless, the Court found that no detailed analysis was necessary to conclude that the NCAA policy with respect to televi-

168. *Cal. Dental*, 526 U.S. at 780–81. The Court observed:

> There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry met for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id.

169. PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (FJC 1981). Areeda further stated:

> The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement "reasonable" under Sherman Act § 1.

Id. The Supreme Court has cited this passage with approval. *See, e.g.*, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2217 (2010); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.39 (1984); Worldwide Basketball & Sports Tours, Inc. v. NCAA, 383 F.3d 955, 961 (6th Cir. 2004).

170. *NCAA*, 468 U.S. 85.

171. *Id.* at 94.

172. *Id.* at 100.

sion rights violated section 1. First, the Court found that the arrangement was manifestly anticompetitive.[173] It limited output of televised college football games and artificially inflated their price.[174] Moreover, because of the NCAA controls over television rights, the price paid to member schools to televise games bears no relationship to the quality of the teams competing or to consumer preferences.[175] Second, like any successfully functioning cartel, the NCAA could monitor members and sanction violators.[176] Indeed, the NCAA had used the threat of sanctions to scuttle a proposed television arrangement between major college football programs and NBC that was negotiated outside its auspices.[177] Third, the Court concluded that the NCAA plan lacked significant procompetitive benefits; it rejected out of hand the procompetitive justifications for the arrangement: (1) to protect live gate attendance and (2) to promote competitive balance in college football.[178] With respect to protection of live gate attendance, the Court observed that the NCAA had taken no steps to assure that televised games would not conflict with live games.[179] In any event, the NCAA plan was viewed by the Court as an acknowledgment that ticket sales to live games could not compete with interest in televised games; the NCAA plan, by limiting televised games, would thwart consumer preference.[180] The Court gave short shrift to the latter justification, noting that the television plan bears no reasonable relationship to any effort to equalize competition.[181]

The Supreme Court employed a similar truncated analysis in *Indiana Federation of Dentists* ("*IFD*"),[182] condemning a joint refusal by a group of dentists to provide their patients' insurers with X-rays and treatment plans for prior approval.[183] Insurers declined to pay benefits to their insureds for dental work that was not pre-approved. The Court concluded that the activity of the participating dentists was a species of boycott but that conduct did not fit the mold of the classic group boycott and thus was not subject to per se scrutiny.[184] Nevertheless, the Court also found that no elaborate industry analysis was required to demonstrate the anticompetitive character of the conduct, since the dentists' joint refusal to compete for a package of services offered to customers "impairs the ability of the market to advance social welfare by insuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them."[185] The Court then quickly dispatched IFD's quality of care justification for

173. *Id.* at 106 ("The anticompetitive consequences of this arrangement are apparent").
174. *Id.* at 106.
175. *Id.*
176. *Id.* at 96.
177. *Id.* at 94–95.
178. *Id.* at 115–20.
179. *Id.* at 116.
180. *Id.* at 116–17.
181. *Id.* at 117.
182. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).
183. *Id.* at 465–66.
184. *Id.* at 458–59.
185. *Id.* at 459.

non-compliance. It rejected the argument that where unlimited information is available to consumers in a free market, they will make bad decisions on dental care.[186] Nor was there any reason to believe that information about dental services is more harmful to consumers than information about goods and services in other markets.[187] Finally, IFD failed to show that use of X-rays by insurance companies to evaluate claims submitted by their insureds impaired standards for providing dental care.[188]

In *NCAA* and *IFD*, the Supreme Court utilized what has become known as the "quick look" or "truncated" Rule of Reason analysis. Both cases involved conduct that was highly suspicious but at the same time sufficiently unique to avoid ready characterization as naked restraints of trade. Lack of experience with these types of restraints left the Court reluctant to condemn them out of hand. At the same time, elaborate inquiry was not necessary to ascertain their competitive merit. Once a court finds that the conduct is highly suspicious, the burden shifts to the defendant to demonstrate that the conduct does not threaten to raise price or to reduce output. Failure to make that showing results in summary condemnation of the conduct without the further detailed inquiry envisioned in *Chicago Board of Trade*.

Subsequently, in *California Dental Association* ("*CDA*"),[189] the Supreme Court made explicit what had been implicit in *NCAA* and *IFD*: "The truth is that our categories of analysis of anticompetitive effect are far less fixed than terms like 'per se,' 'quick look,' and '[R]ule of [R]eason' tend to make them appear."[190] The Court described the Rule of Reason as a spectrum, stating that "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment."[191] The Court proposed a sliding scale, suggesting that "the quality of proof required should vary with the circumstances."[192] The Court thus in principle acknowledged the concept of "quick look" but ultimately concluded that a "less quick look" was necessary to assess CDA's advertising restrictions because it was not intuitively obvious that restrictions on advertising alone would have an anticompetitive effect and because the restrictions might have promoted competition by eliminating misleading and unverifiable discount advertising.[193] At the same time, the Court emphasized that the alternative to a "quick look" is not necessarily a full-blown Rule of Reason analysis.[194]

CDA's recognition that there are no bright lines separating restraints that are per se illegal from those requiring more detailed analysis and that a court's in-

186. *Id.*
187. *Id.*
188. *Id.*
189. Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1991).
190. *Id.* at 779.
191. *Id.* at 780–81.
192. *Id.* at 780.
193. *Id.* at 781. The majority, however, did not appear to grasp that the FTC's objection was not to the mere existence of the advertising guidelines but rather to the anticompetitive manner in which those guidelines were implemented by CDA. *Id.* at 782 (Breyer, J., dissenting).
194. *Id.*

quiry must be proportional to the needs of the case provides useful insights, but ultimately the decision disappoints because it provides little meaningful guidance to lower courts on when to utilize the "quick look." The guidance that the Court does offer is, to say the least, unhelpful: for example, the Court opines that "quick look" applies where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets."[195] The Court offers no explanation as to why the touchstone for determining the degree of market analysis in normally complicated antitrust cases should be one with *limited* economic knowledge, instead of one with extensive or simply reasonable knowledge of markets. Essentially, the Court left the issue of implementation of "quick look" to be developed on a case-by-case basis in the lower courts.[196] That lack of guidance is a critical omission at a time when courts are increasingly moving away from per se analysis in antitrust cases.[197]

In the years since *CDA* was decided, the "quick look" doctrine appears to be in limbo.[198] It has been barely mentioned by the Supreme Court. In *Dagher*,[199] the Court expressly ruled that "quick look" analysis was inapplicable.[200] In *Leegin*, without specific reference to *CDA*, the Court contemplated a detailed Rule of Reason analysis in resale price maintenance cases.[201] *Leegin* did suggest, however, that lower courts could "devise rules . . . to make the [R]ule of [R]eason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[202]

195. *Id.* at 770; *see also* Waller, *supra* note 167, at 709–11 (describing the holding as "most unsatisfying" and observing how the Court offers "little guidance as to how to choose where any individual case falls on [the Rule of Reason] spectrum").

196. Nor have the lower courts been particularly helpful. *See, e.g.*, Worldwide Basketball & Sports Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004) ("Under the 'quick look' approach extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice."). *But see* Thomas Greany, *Chicago's Procrustean Bed: Applying Antitrust Law in Healthcare*, 71 ANTITRUST L.J. 857, 868 (2004) ("While the Court's opinion in *California Dental* may have muddied the application of the [R]ule of [R]eason and quick-look methodologies, and its treatment of evidence is highly questionable, it nevertheless marks an important step forward in placing market failure at the center of antitrust analyses in healthcare cases.").

197. *See* Stucke, *supra* note 9, at 1413 ("But the Court never gave guidance as to where along the continuum the lower courts should evaluate specific kinds of restraints. Absent such guidance, antitrust plaintiffs face a difficult tactical decision: if they litigate only a per se or quick look theory, they may be prevented from further factfinding if the court opts for a [R]ule of [R]eason analysis. Risk averse counsel will ultimately prepare for a full-blown [R]ule of [R]eason, plead their case to include all three standards, and hope that the trial court opts for the quick-look or per se standard in a preliminary hearing. The necessity of a comprehensive trial strategy, however, defeats the purpose of the quick look. And trial courts are likely to opt for [R]ule of [R]eason to lower the risk of reversal because they lack guidance on the proper legal standard for particular restraints.").

198. *Id.* at 1413–14.

199. Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).

200. *Id.* at 7 n.3.

201. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898–99 (2007).

202. *Id.*

F. Rethinking the Neoclassical Model: Behavioralism

The economic recession of 2008, triggered by the meltdown of financial markets, and the work of scholars in the field of behavioral economics have called into question the fundamental economic assumptions underlying the Rule of Reason analysis.[203] Dating back to the Supreme Court's decision in *GTE Sylvania*, the neoclassical economic model, closely associated with the Chicago School, has been the predominant school of economic thought in antitrust analysis.[204] The neoclassical model serves two interrelated functions. First, it provides the basic economic assumptions—the "organizing principles"—for modern antitrust analysis.[205] Second, neoclassical models may be offered in place of empirical evidence as proof of the competitive effects of certain conduct, instead of as confirmation of existing empirical evidence.[206] Neoclassical analysis, in turn, is rooted in two basic assumptions: (1) markets are self-correcting and (2) firms and consumers behave rationally and generally act as profit maximizers.[207]

Both foundational prongs of the neoclassical model are under attack. The 2008 financial collapse has shaken the faith of even the most ardent free market economists in self-correcting markets and has led to calls for greater regulation of the financial sector.[208] In addition, scholarly research in the field of behavioral economics attacks the rational profit-maximizer assumption head-on by assuming that human beings have cognitive limitations that prevent them from processing information perfectly and maximizing its utility.[209]

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203. *See* Reeves, *supra* note 18, at 1–4; Reeves & Stucke, *supra* note 17; Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (2008); *see also* Leslie, *supra* note 118, at 265; Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 Loy. U. Chi. L.J. 513, 529–30 (2007); Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 Haifa L. Rev. 237, 242–43 (2008); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the Vienna Competition Conference, Behavioral Economics: Observations Regarding Issues that Lie Ahead (June 9, 2010) (transcript available at http://www.ftc.gov/speeches/rosch/100609viennaremarks.pdf) [hereinafter Rosch, Observations].

204. *See* Reeves, *supra* note 18, at 1 n.4; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the Bates White Antitrust Conference, Antitrust Law Enforcement: What to Do About the Current Antitrust Cacophony 5 (June 1, 2009) (transcript available at http://www.ftc.gov/speeches/rosch/090601bateswhite.pdf); *see also* Bork, *supra* note 9; Richard A. Posner, Antitrust Law: An Economic Perspective (1976).

205. *See* Rosch, Observations, *supra* note 203, at 9.

206. *Id.* at 7–8; *see also* Leslie, *supra* note 118, at 263–64 ("Federal judges are more frequently concluding that some types of anticompetitive conduct are facially irrational and implausible and, therefore, could not have occurred as a matter of law (because it is implausible that a business would act irrationally).").

207. Rosch, Observations, *supra* note 203, at 7–8; *see also* Leslie, *supra* note 118, at 265 ("As a result of the dominating influence of law and economics scholars, antitrust law now worships at the shrine of rationality. Rationality serves as the foundation for most model building and policy prescriptions within the law and economics school, as evidenced by such concepts as the rational actor theory and rational choice theory."); Herbert Hovenkamp, The Antitrust Enterprise 134 (2005) ("The entire antitrust enterprise is dedicated to the proposition that business firms behave rationally.").

208. *See, e.g.*, Edmund L. Andrews, *Greenspan Concedes Error in Regulation*, N.Y. Times (Oct. 23, 2008), *available at* www.nytimes.com/2008/10/24/business/economy/24panel.html; *see also* Jones v. Harris Assocs. L.P., 527 F.3d 728, 729 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc); Richard A. Posner, A Failure of Capitalism: The Crisis of '08 and the Descent into Depression (2009).

209. *See supra* note 203.

This is not to suggest that the neoclassical model be tossed out lock, stock, and barrel. Behavioral theory sits somewhat uncomfortably beside the neoclassical model. It is not a substitute for neoclassical analysis.[210] Indeed, even ardent supporters of behavioralism acknowledge that it lacks the organizing principles of the neoclassical model.[211] Whereas neoclassical analysis emphasizes theory based on assumptions, behavioralism emphasizes facts based on what people actually do.[212] Behavioralism can help courts and litigants understand the limits of neoclassical theory and to reject theoretical assumptions when they are at odds with the facts. Behavioral insights thus serve to keep courts grounded in the real world. Without this reality check, courts that are enamored with economic theory can come to incorrect results.[213]

That is precisely what happened in *Kodak*.[214] In that case, service providers argued that Kodak had unlawfully forced buyers of its copying machines to purchase Kodak maintenance services as a condition to purchasing spare parts for the copying equipment.[215] Kodak argued that because it lacked market power in the primary market (copiers), it necessarily lacked market power in the aftermarket for spare parts and servicing.[216] Kodak urged that rational buyers would engage in lifecycle pricing and that in making purchasing decisions would take into account the cost of the original equipment as well as the aftermarket costs.[217] The Supreme Court disagreed and held that lack of market power in the primary market did not preclude exercise of market power in the aftermarket where asymmetries in information with respect to total costs or the cost of obtaining such information was prohibitive.[218] In other words, the market realities that the cost of obtaining information on lifecycle pricing may be significant and the process of

210. *See* Rosch, Observations, *supra* note 203, at 9; Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1560–61 (1998) (describing behavioral economics as "merely a set of challenges to the theory-builders").

211. Rosch, Observations, *supra* note 203, at 9.

212. Reeves, *supra* note 18.

213. For example, in the Whole Foods/Wild Oats merger, the FTC, challenging the merger, argued that the relevant product market was the premium, natural organic supermarket ("PNOS"). FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 1, 3–4 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008). The merging parties argued that PNOS was not a relevant product market because most conventional supermarkets had premium and organic sections and that customers would simply switch to conventional supermarkets if the newly merged entity tried to increase its prices, 548 F.3d at 1033. Under this so-called critical loss analysis, it would be unprofitable for the merged Whole Foods to raise its prices. *Id.* at 1039.

The FTC attacked the theory of critical loss analysis, pointing out that Whole Foods' own documents showed that Wild Oats customers would prefer to turn to Whole Foods instead of conventional supermarkets after the merger and that it would be therefore profitable for Whole Foods to impose post-merger price increases. *Id.* at 1039–40, 1043–45. Denying the preliminary injunction, the trial court rejected the fact-based FTC position in favor of the theory-based arguments of Whole Foods but was subsequently reversed by the D.C. Circuit. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008). Behavioral principles would push a court to look to the facts and to reject theories at odds with the facts. *See* Leslie, *supra* note 118, at 264–65; Huffman, *supra* note 18, at 21–22.

214. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

215. *Id.* at 458.

216. *Id.* at 465–66.

217. *Id.* at 470–74.

218. *Id.* at 473–74.

calculating the lifecycle price may be complex trumped the theory that primary markets and aftermarkets are not linked.[219] Thus, while in theory it may be rational for buyers of copiers to engage in lifecycle pricing, real-world buyers do not always do so because information is not equally available to all or because it is too costly for some buyers to obtain. In short, behavioral economists have demonstrated that the assumptions of the neoclassical model do not always pertain to the real world.[220] In those situations, the courts should follow the facts and not theories at odds with the facts.[221] Behavioral economics does not replace the neoclassical model, but it can help inform the analytic process and thereby produce better antitrust outcomes.

III. Next Steps

The Rule of Reason is clearly in need of repair. This Part discusses three possible approaches: (1) acknowledging the shortcomings of the Rule of Reason and bypassing it whenever possible, i.e., bypass surgery; (2) retaining the basic concept of the Rule of Reason, but imposing structure by limiting proof and using burden-shifting to minimize the need for courts to balance procompetitive benefits against anticompetitive effects, i.e., drug therapy; and (3) doing nothing, i.e., have the courts "play through the pain" and hope that through trial, error, and experience, they will achieve good outcomes over the long term.

A. Bypass Surgery

Recognizing that "[t]he traditional Rule of Reason falls prey to all of the limits of antitrust," Judge Easterbrook has proposed replacing that traditional analysis with "a series of simple filters."[222] The Easterbrook filters include:

1. Market power, i.e., "the ability to raise price significantly without losing so many sales that the increase is unprofitable."[223] If market power is absent, the antitrust inquiry ceases.[224]
2. Antitrust injury. Supra-competitive profits must have been caused by an antitrust violation. "Unless there is a link between the antitrust injury and the defendant's profit, there is no need for a judge to impose a sanction."[225]
3. Defendants must have engaged in the same competitive activities as their marketplace rivals.[226]

219. *Id.*

220. *See* Leslie, *supra* note 118, at 264 (advocating a more limited role for rationality in antitrust cases).

221. *Id.* at 265 ("Judges should focus more on the facts presented by the plaintiff than on any economic theory championed by the defendant or held by the judge.").

222. Easterbrook, *supra* note 19, at 20–36, 39.

223. *Id.* at 20.

224. *Id.*

225. *Id.* at 24.

226. *Id.* at 30–31.

4. Defendants' market shares must have declined because of the alleged unlawful conduct. If their market shares rise, the conduct is not anticompetitive; a firm that anticompetitively raises its prices will sell fewer units.[227]

5. Plaintiff must prove that its action is not filed to impair a rival's ability to compete by raising that rival's costs.[228]

The filters would be "designed to screen out beneficent conduct and pass only practices that are likely to reduce output and increase price."[229] If the conduct successfully passes through all the filters, then it raises no competitive concerns.[230] Each filter, Easterbrook concedes, "errs, if at all, on the side of permitting questionable practices."[231] He defends this bias in favor of business practices because the price of prohibiting or deterring efficient business practices is relatively high, while the cost of allowing anticompetitive practices to slide is relatively low.[232]

Easterbrook's preference for false positives over false negatives is rooted in his belief that markets are self-correcting and will effectively eliminate anticompetitive practices before they can become entrenched. On the other hand, he believes that erroneous judicial condemnation of lawful behavior would chill competitive vigor of sellers and would deny consumers the benefits of competition. However, Easterbrook's reliance on the market mechanism to eliminate anticompetitive practices may be misplaced. Recent events, notably the 2008 market crash, strongly suggest that markets may not be self-correcting. Even if the markets are self-correcting in the long term, consumers may be vulnerable to anticompetitive behavior in the short term that can wreak havoc with the marketplace. As John Maynard Keynes observed, "*In the long run*, we are all dead."[233] The Easterbrook analysis does not offer any remedy for such short-term consumer injury.[234]

In addition, Easterbrook may overstate the anticompetitive impact of false positives.[235] The assumption is that once a court wrongly condemns a procompetitive practice, that practice will cease. Experience in the marketplace suggests that is simply not the case. For example, for decades, sellers challenged restrictions on resale price maintenance. Similarly, sellers also challenged vertically imposed territorial restrictions. Far from discouraging procompetitive behavior, erroneous judicial rulings may energize the business community to force courts to re-examine questionable decisions. Finally, the Easterbrook proposal is designed principally to reduce the cost of error in antitrust cases.[236] Instead, the focus should be on

227. *Id.* at 31.
228. *Id.* at 36.
229. *Id.* at 39.
230. *Id.* at 39–40.
231. *Id.* at 40.
232. *Id.*
233. John Maynard Keynes, Tract on Monetary Reform 80 (1923).
234. *See* Muris, *supra* note 11, at 864 (pointing out that Easterbrook's approach requires proof of market power, which can be a costly exercise, and that a properly structured Rule of Reason analysis is unlikely to produce error).
235. Huffman, *supra* note 18, at 13.
236. Easterbrook, *supra* note 19, at 14–16; Fred S. McChesney, *Easterbrook on Errors*, 6 J. Competition L. & Econ. 11, 14 (2010) ("Logically, *The Limits of Antitrust* is based on the trade-off between two sorts of error in antitrust cases.").

designing an analysis that is going to get correct antitrust outcomes on a case-by-case basis. At the end of the day, perhaps, Easterbrook's simple filters are not so simple after all.

Similarly, the Supreme Court in *Twombly*[237] proposed to bypass the Rule of Reason through pleading rules. As discussed above,[238] one of the ironies of the movement away from per se analysis is that while the courts could thereby avoid outcomes that might have been viewed as arbitrary or hostile to competition, the result has been antitrust litigation that is lengthier, more costly, and less predictable and that has created difficult issues for generalist judges operating outside of their comfort zones and thus prone to error. Application of the Rule of Reason in these circumstances is likely to lead to error in some cases and thereby generate false positives.

Emphasizing the financial burdens of antitrust litigation, the potential for error, and the high costs of false positives, *Twombly* ruled that the district court must act as a gatekeeper and screen out claims that are not plausible at the motion to dismiss stage.[239] Precisely what constitutes a "plausible" claim remains a matter of debate in the lower courts,[240] but it is clear that the Supreme Court intended to raise the bar for pleadings in federal court.[241] *Twombly* held that a complaint must contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]."[242]

Under *Twombly*, a complaint that fails the plausibility test must be dismissed.[243] In so ruling, the Court concluded that remedies short of dismissal could not prove effective in containing costs.[244] It specifically eschewed procedures that have traditionally been viewed as vehicles for cost savings: discovery limitations, judicial management of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries.[245] Relying on pleading rules and economic theory, the Court in *Twombly* dispatched the complaint to the scrap heap. The Court found the complaint deficient because it alleged only parallel conduct and did not contain independent factual allegation of agreement among alleged conspirators.[246]

Lower courts have clearly heeded *Twombly's* admonitions and have not hesitated to dismiss antitrust complaints at the pleadings stage.[247] Undoubtedly, dismissals at the pleadings stage can reduce litigation costs. That cost savings,

237. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
238. *See supra* Part II.E.
239. *Twombly*, 550 U.S. at 558–59.
240. *See In re* Text Messaging Antitrust Litig., 630 F.3d 622, 626–27 (7th Cir. 2010) (*Twombly's* scope is "unsettled").
241. Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010).
242. *Twombly*, 550 U.S. at 556.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 564.
247. *See, e.g.*, Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1333 (11th Cir. 2010) (finding allegations of relevant market deficient and "conclusory").

however, comes at a price. First, as with the Easterbrook filters, it increases under-enforcement and hence underdeterrence of anticompetitive behavior. Second, this approach is at odds with the Federal Rules of Civil Procedure, which encourage courts to allow meritorious claimants their day in court.[248] Indeed, the bypass approach is a step backward to the common law era, when trials were to be avoided.

Finally, the bypass approach does not address, and hence is not illuminating with respect to, the implementation of the Rule of Reason in those cases—however limited in number—that survive motions to dismiss. The foregoing infirmities disqualify bypass surgery as the appropriate vehicle for reforming the Rule of Reason.

B. Drug Therapy

An alternative and less invasive approach, which might be described as drug therapy in contrast to Judge Easterbrook's radical surgery, is based on the D.C. Circuit's decision in *Three Tenors*.[249] That decision provides a model for an abbreviated but nuanced and case-specific inquiry under the Rule of Reason.[250] In *Three Tenors*, Warner Communications, Inc. agreed to license to PolyGram the international distribution rights of a 1998 album recorded by the iconic Three Tenors.[251] Later, the two companies entered into a separate agreement to suspend advertising and discounting of two earlier albums by the Three Tenors, one distributed by Warner and the other distributed by PolyGram.[252] The FTC challenged the latter agreement as an unlawful restraint of trade.[253]

The FTC found that the second agreement, although not per se unlawful, was "inherently suspect" and hence presumptively unlawful.[254] The defendants then had the burden of rebutting the presumption of illegality but failed to do so.[255] Accordingly, the agreement was held unlawful. The D.C. Circuit affirmed. The

248. *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002) ("The liberal notice pleading system of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.").

249. Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

250. That concept is not new. *See, e.g.*, VII Areeda & Hovenkamp, *supra* note 104, ¶ 1511c, at 465–67 (outlining a step-by-step structural Rule of Reason analysis); Joel Klein, Acting Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address to the ABA's Antitrust Section Semi-Annual Fall Policy Program: A Stepwise Approach to Antitrust Review of Horizontal Agreements 4–6 (Nov. 7, 1996) (transcript available at http://www.justice.gov/atr/public/speeches/0979.htm); U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Licensing of Intellectual Property § 3.4 (Apr. 6, 1995), *available at* http://www.justice.gov/atr/public/speeches/0979.htm); *see also* Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the National Association of Attorneys General, Antitrust Federalism: Enhancing Federal/State Cooperation (Oct. 7, 2009) (transcript available at http://www.justice.gov/atr/public/speeches/250635.htm) (proposed structured Rule of Reason analysis for resale price maintenance claims post-*Leegin*); Muris, *supra* note 11, at 862–64.

251. *PolyGram Holding*, 416 F.3d at 31.

252. *Id.* at 32.

253. *Id.*

254. *Id.* at 32–33.

255. *Id.* at 33.

appellate court agreed that "[a]n agreement between joint ventures to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price-fixing agreement between competitors."[256] The court went on to reject PolyGram's proffered justification that the restrictions were necessary to maximize profits on the 1998 album, holding that "[a] restraint cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product."[257] In so ruling, the court embraced the analysis proffered by the FTC:

> We therefore accept the Commission's analytical framework. If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm. That much follows from the caselaw; for instance, in *NCAA* the Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." Similarly, in *IFD*, the Supreme Court ruled a horizontal agreement to withhold services could not be sustained because the dentists failed to advance any "credible argument" that "some countervailing procompetitive virtue . . . [redeemed] an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place.'"[258]

Using *Three Tenors* as a template, the drug therapy approach would involve the following framework.

1. Per Se Zone

If the restraint is of the kind that invariably restrains trade with little or no measurable benefit to consumers, such as horizontal agreements to affect price or to divide markets, then it can be condemned out of hand, without inquiry into market facts or procompetitive benefits.[259]

2. "Quick Look" Zone

The question here is whether the restraint, though not one falling on the per se end of the spectrum, is one that the plaintiff can show will nevertheless by its very nature likely harm consumers.

a. If that is the case, the restraint is "inherently suspect" and the burden then shifts to the defendant to come forward with a plausible and legally cognizable justification for its restraint.[260] The justification may be that there are plausible reasons why the conduct may not be expected to have

256. *Id.* at 37.
257. *Id.* at 38.
258. *Id.* at 36 (citation omitted).
259. *Id.* at 34–35.
260. *Id.* at 35–36.

anticompetitive effects in the market or reasons why the conduct may actually benefit consumers by creating efficiencies.[261]

b. If the defendant offers such justification, the burden then shifts to the plaintiff to address the justification in one of two ways.[262] First, the plaintiff can explain, without adducing evidence, why it can confidently conclude the restraint likely harms consumers.[263] Second, the plaintiff can come forward with evidence to show that anticompetitive effects are likely.[264]

c. Under *Three Tenors*, if the plaintiff succeeds on either ground, the burden of proof shifts to the defendant to prove that (1) the restraint does not harm consumers or (2) the restraint has procompetitive virtues that outweigh any burden on consumers.

Here, the drug therapy proposal would depart from *Three Tenors* in two significant ways. First, whereas *Three Tenors* would require the defendant to show that on balance the restraints are procompetitive,[265] this proposal requires proof that the benefits *substantially* outweigh the burdens on competition. This departure recognizes the difficulties that courts have in balancing and would ease those difficulties by letting the restraint stand only when the benefits therefrom are significant. The added burden on the defendant in this instance is justified because the restraint is inherently suspect from the outset. Second, it places the additional burden on the defendant to show that this inherently suspect restraint is reasonably necessary to produce the substantial procompetitive benefits that have been demonstrated by the defendant. If the outcome could be achieved by a less restrictive alternative, the restraint would be condemned. In assessing procompetitive benefits, the courts must be sure that that these procompetitive benefits are real and not theoretical.

3. Conduct Elsewhere on the Spectrum—Ancillary Restraints

Three Tenors concluded that "if competitive harm wrought by the restraint is not readily apparent from the nature of the restraint itself, or the charged party offers a plausible competitive justification for the restraint," then and only then would a court be forced to undertake "a more searching analysis of the market circumstances surrounding the restraint."[266] Because, as discussed above,[267] the court there found the restraint in question to be inherently suspect, and ultimately that the restraint was unlawful, it did not have to undertake a more searching analysis. Nevertheless, the *Three Tenors* approach is instructive in this situation also.

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261. *Id.* The practice should be actually and not merely theoretically procompetitive. *See* Varney, *supra* note 250, at 8.

262. *PolyGram Holding*, 416 F.3d at 36.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 33.

267. *See supra* notes 253–55 and accompanying text.

a. The first step is to examine whether the conduct in question adversely affects competition through, *inter alia*, higher prices, lower output, impairment of consumer choice, or reduction in innovation. Generally, this inquiry will entail a detailed examination of the market in question: market definitions, market participants, their relative size and market shares, the degree of concentration in the market, the vigor of price competition, and barriers to entry. Market power is often used as a surrogate for anticompetitive effects, if proof of actual effects is not available. If the parties to the challenged arrangement lack market power, the conduct is lawful.

b. On the other hand, if there is proof of actual anticompetitive effects or the exercise of market power is plausible, the next step is to determine whether there are procompetitive benefits, such as efficiencies that may lower costs, improve product quality, or create new services. If not, the conduct is unlawful. If efficiencies are created, then they must be evaluated.

c. In examining efficiencies, the court must first determine whether they could be achieved by less restrictive alternatives. If less restrictive alternatives exist, the conduct is unlawful. If there are no less restrictive alternatives, the court must determine whether the restraint is reasonable. Here, courts use something of a sliding scale—the greater the threat to competition, the greater the need to show efficiencies. Conversely, the lesser the threat to competition, the less crucial the need to show efficiencies.

d. At this point, the traditional Rule of Reason analysis calls for balancing. That process, however, is imprecise. As Areeda and Hovenkamp observe, "[b]ecause both theory and data are usually insufficient and because quantification in terms of a common denomination is usually impossible, balancing will inevitably be crude and should be avoided unless absolutely necessary."[268] Using the template set forth here, courts would rarely get to the point where balancing would be necessary. In the rare cases that appear to be "ties," the conduct should be condemned unless the defendants can come forward with a less restrictive alternative. In other words, once significant anticompetitive effect is established, the tie goes to the plaintiff.

C. Playing Through the Pain

The third option is to have courts continue to apply traditional Rule of Reason analysis, i.e., have the courts play through the pain. Eventually, this approach may generate workable, predictable standards, but the short-term costs, in terms

268. Areeda & Hovenkamp, *supra* note 104, ¶ 1507, at 425.

of error, are likely to continue to be unacceptably high. It seems that only inertia would favor this approach. Inertia can be a very powerful force, but ultimately it is not a reason to preserve the status quo. The time has come for the courts to provide a nuanced approach to antitrust analysis under the Rule of Reason and to leave the open-ended *Chicago Board of Trade* behind.

IV. Conclusion

The core concept of the Rule of Reason—that only conduct that restrains competition without providing significant consumer benefits is unlawful under the Sherman Act—remains sound. The Brandeis formulation in *Chicago Board of Trade*, however, has always promised more than it could deliver. That case invites a broad, open-ended inquiry into market conditions and business behavior that inevitably drives up litigation costs, complicates proceedings, and renders outcomes less predictable. Courts can revitalize the Rule of Reason by utilizing the drug therapy approach described herein to develop antitrust rules that are clear, predictable, and simple to administer.