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Sailing A Sea Of Doubt: A Critique Of The Rule Of Reason In U.S. Antitrust Law

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Abstract

“It is true that there are some cases in which the courts, mistaking . . . the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt” William Howard Taft¹ “Without further elaboration, reasonableness is too vague a standard to guide the businessman’s actions or the judge’s discretion. Such openness is a mixed blessing. Unbounded by technical limitations, it reaches every evil. But unless disciplined by the purposes of antitrust laws, it is a vagrant standard.” Phillip E. Areeda²

KEYWORDS: anti trust

*Marshall P. Madison Professor of Law, University of San Francisco School of Law. The author wishes to thank the many colleagues and friends who provided thoughtful suggestions, comments and encouragement. Professor Josh Davis and the faculty at the University of San Francisco Law School endured my early presentation of the central idea behind this article and gave me useful guidance. The law school also provided generous economic support. The University of Luxembourg Faculte de Droit, d’Economie et de Commerce, especially Professors Mark Cole and Stefan Braum, also provided a valuable opportunity to air my thoughts in a vibrant session with scholars, jurists and European practitioners. The University of Chicago Loyola’s School of Law and Professor Spencer Waller’s Antitrust Colloquium afforded me a similar opportunity on this side of the Atlantic. 1. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898). 2. PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1500 (1986).



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INTRODUCTION

Courts resolve antitrust cases by applying various modes of analysis.³ These modes range across a spectrum from so-called “full blown” rule of reason analysis at one end to *per se* condemnation at the other.⁴ *Per se* rules condemn limited categories of conduct by applying a conclusive presumption of net anticompetitive effects, while rule of reason analysis requires a court to engage in case-specific evaluation of evidence bearing on actual or predictable competitive effects.⁵ Although the *per se* rules have obvious advantages of clarity, administrability, and predictability, the sorts of conduct falling under these rules have been narrowed in recent years as courts have become more wary of condemning legitimate competitive conduct.⁶ For example, although vertical price restraints and certain vertical non-price restraints were *per se* illegal for roughly 100 years, recent cases have established that *all* vertical price and non-price restraints are to be evaluated based upon some degree of analysis of the defendant’s market power or ability to affect market competition, as well as a contextual review of the competitive effects of the challenged conduct. Thus, the rule of reason now applies to all antitrust matters other than hard-core cartel cases involving horizontal price fixing or market allocations.⁷ Although horizontal group boycotts and tying arrangements remain nominally subject to *per se* condemnation, even these offenses are evaluated more

3. Cal. Dental Ass’n v. FTC, 526 U.S. 756, 769 (1999).

4. *Id.*

5. *Id.* at 763.

6. The Supreme Court has over the past three decades relegated all vertical restraints to rule of reason analysis, thus removing vertical maximum and minimum price fixing, as well as vertical territorial restraints, from their prior analysis under *per se* rules. *See* Cont’l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), to extend rule of reason analysis to vertical territorial restraints); *State Oil Co. v. Kahn*, 522 U.S. 3 (1997) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), to extend the rule of reason to maximum resale price fixing); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (further overruling *Dr. Miles* to apply rule of reason analysis to minimum resale price fixing). The Court has also expressed reluctance in some cases to find that horizontal price fixing should be condemned, if at all, under *per se* analysis. *See, e.g., Cal. Dental*, 526 U.S. at 769.

7. *Leegin*, 551 U.S. at 886 (“Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . or to divide markets”) (citations omitted).

cautiously under a hybrid approach in which the court engages in market power analysis or an evaluation of proffered business justifications.⁸

At the same time, the broadening role for rule of reason analysis has been accompanied by Supreme Court decisions that have obscured the meaning and proper application of the rule, leaving lower courts with no clear standards.⁹ Indeed, the rule of reason is no rule at all, but rather a set of vague and inconsistent objectives that a court should set for itself in evaluating conduct under an antitrust challenge.¹⁰ That is, the “rule” merely directs the court to condemn conduct only where doing so will achieve certain purposes, such as protecting marketplace competition.¹¹ The various objectives are supposed to be achieved by balancing harms against benefits to competition and weighing such ineffables as the corporate purpose behind the conduct, its history, the marketplace context, and the experience of courts with similar restraints.¹² Furthermore, it is now explicit that the rule of reason provides no set boundaries around the depth or rigor of the legal and economic analysis required to decide an antitrust case. Instead, a court presented with an antitrust claim must decide for itself how much analysis is appropriate for the case before it: “What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”¹³ Courts and agencies are frequently overruled for having selected a level of inquiry that the reviewing court later deemed to be too deep or too shallow. The reasons offered for these reversals in many cases offer little guidance for future cases.

The rule of reason evolved away from its former dichotomy with *per se* rules as courts became persuaded that economics should entirely supplant other values, such as marketplace fairness, wealth distribution, political concerns, and individual freedom, and at the same time grew

8. *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).

9. *See, e.g., Cal. ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1180 (9th Cir. 2010) (holding that the conduct in question, revenue-sharing among rivals, could not categorically be addressed under either *per se* rules or abbreviated rule of reason analysis, thus adopting a newly-fashioned “quick-look-plus-per-se-minus” mode of analysis).

10. *See, e.g., Maurice E. Stucke, Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009) (arguing that the rule of reason has so little content as to violate basic rule of law norms).

11. *Cal. Dental*, 526 U.S. at 779-80.

12. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918).

13. *Cal. Dental*, 526 U.S. at 781.

concerned that the certainty and predictability of the *per se* rules are often outweighed by their potential to condemn legitimate competitive conduct.¹⁴ Inherently, the rule of reason invites a more nuanced analysis than the more rigid *per se* rules, but there is a cost associated with expanding the rule of reason's scope. Certainty and predictability, and perhaps even deterrence, to some extent, give way to case-specific rule of reason evaluations; and the cost of those evaluations increases.¹⁵

The result has been an abandonment of categorical antitrust analysis, which was once its mainstay.¹⁶ In an earlier time, the analysis of a Section 1 case began, and frequently ended, with the characterization of the alleged restraint.¹⁷ If the restraint was in the nature of an exclusive dealer territory assignment agreed to between a manufacturer and a favored dealer, it was so characterized as a vertical territorial allocation and condemned *per se*.¹⁸ The process of characterization was thus the focus of the litigation of claims under Section 1.¹⁹ These categories began to blur along with the courts' emerging concern that antitrust law may condemn, and therefore deter, efficient marketplace conduct. Thus, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* ("BMI"),²⁰ an agreement that was price fixing "in the literal sense" was not characterized as prohibited price fixing in recognition of the potential that the efficiencies of musical composition rights clearing houses might more than offset the limitations they represented to free and open competition among their members.²¹ As discussed below, a few observers believe Section 1 analysis remains *too rooted* in categorization,²² but the Supreme Court

14. THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY 4-5 (John E. Kwoka, Jr. & Lawrence J. White eds., 4th ed. 2004). Cf. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 59 *et. seq.* (3d ed. 2005).

15. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L. J. 135, 155 (1984).

16. *Cal. Dental*, 526 U.S. at 779.

17. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55-65 (2007) (tracing the demise of the *per se* rule).

18. See, e.g., *White Motor Co. v. United States*, 372 U.S. 253 (1963).

19. See Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Law*, 93 IOWA L. REV. 1207 (2008).

20. 441 U.S. 1 (1979).

21. *Id.* at 8.

22. Lemley & Leslie, *supra* note 19.

has clearly shifted from categorical analysis²³ and has openly disparaged its propensity to yield “false positive errors,” condemning conduct that ought to be allowed.²⁴

Cut loose from categorical analysis, the rule of reason is truly a “vagrant standard.”²⁵ The rule has always had an unbounded character, as has been observed many times in the past. As a leading antitrust law scholar observed in his antitrust law treatise:

Without further elaboration, reasonableness is too vague a standard to guide the businessman’s actions or the judge’s discretion. Such openness is a mixed blessing. Unbounded by technical limitations, it reaches every evil. But unless disciplined by the purposes of antitrust laws, it is a vagrant standard. Uninstructed by knowledge of the economy generally or by experience with the particular market under scrutiny, the judge or jury may respond to the parties’ relative worthiness rather than concentrate on competitive effects.²⁶

However, the current problems with the rule of reason have little to do with judges or juries failing to discipline their evaluation of conduct with reference to the purposes of antitrust law. Instead, the rule is inherently confusing, unadministrable, unpredictable, and its many details have been poorly fleshed out by the Supreme Court.²⁷ Many of the most basic questions about the rule of reason remain needlessly unanswered. As discussed later in this Article, after 100 years the courts have not even gone so far to establish whether market power is a necessary element of a rule of reason case and in fact have articulated inconsistent answers to that basic question.²⁸ Another unsettled matter is just when a full-blown rule of reason analysis is “meet for the case.”²⁹

23. Cal. Dental Ass’n v. FTC, 526 U.S. 756, 780-81 (1999) (“[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”).

24. See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007) (“[W]e have previously hedged against false inferences from identical behavior”); Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (“The cost of false positives counsels against an undue expansion of § 2 liability”).

25. Areeda, *supra* note 2.

26. *Id.*

27. See *infra* Part IV.

28. See *infra* Part IV.

29. Cal. Dental Ass’n v. FTC, 526 U.S. 756, 780-81(1999).

There is no clear articulation of a standard by which parties and courts can predict how much analysis a case will entail. Also unclear is whether actual anticompetitive effects or theoretical ones govern in any particular case, since in at least the *Cal. Dental* decision Justice Souter seemed to place a heavy burden on plaintiffs once the Court constructed what amounted to purely speculative efficiency justifications.³⁰ These seemingly basic elements of rule of reason analysis remain unsettled after all this time. Thus, as the rule of reason has come to dominate antitrust law, it has at the same time, produced a discordant body of case law.

It was understandable why the rule of reason in earlier years might have gone without much development as a result of the process of *stare decisis*. Plaintiffs had more reason to pursue *per se* cases through trial, and so the many obstacles in the way of rule of reason plaintiffs may have resulted in a paucity of judicial decisions to give more content to the rule of reason. However, the Supreme Court cases that gave the rule of reason its dominant role in Section 1 litigation date back at least as far as the landmark decision in *Continental T.V., Inc. v. GTE Sylvania* in 1977, when the Court overturned its then-recent decision that had declared vertical territorial restraints to be *per se* unlawful.³¹ For more than three decades now, the rule of reason has continued its steady ascent, and it now controls most antitrust litigation.³²

One commentator noted as long ago as 1994, the rule of reason “has no substantive content.”³³ More recently, another scholar has argued that current standards under Section 1 do not even live up to the requirements of the rule of law, mainly by imposing sanctions on citizens who have no way of predicting if their conduct is unlawful.³⁴ That the rule of reason continues to lack substantive content is an ever-enlarging problem as the rule of reason has displaced *per se* analysis considerably more since Mr. Piraino’s thoughtful article.³⁵

It is of course desirable, indeed unavoidable, that the rule of reason invites some degree of flexibility. Commerce, in a sense, is like a flowing river. As Heraclitus noted 2500 years ago, “[n]o man ever steps

30. See generally *id.*

31. 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

32. See *supra* note 6.

33. Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754 (1994).

34. Stucke, *supra* note 10.

35. See *supra* note 6.

in the same river twice, for it's not the same river and he's not the same man."³⁶ No two restraints are identical, and no two restraints are imposed within identical marketplace contexts.³⁷ Still, flexibility is not the same as abject indeterminateness. Various critiques of the rule of reason that predate the Court's shift away from categorical analysis raised concerns about the rule's unbounded character.³⁸ The boundaries that categories established have now eroded to the point that the rule of reason knows no meaningful boundaries. The administration of antitrust litigation, business planning, and the efficacy of the law are all adversely affected by this. If the particular categories that informed an earlier antitrust jurisprudence are wanting, the solution is not to abandon all content and leave judges and juries to make unguided decisions. Instead, the categories need to be refined.

This Article presents a critique of the rule of reason and offers an approach for restoring some of its content. It begins by reviewing the historical development and expanding role of the rule of reason as applied to horizontal restraints³⁹ through the Supreme Court's most recent comprehensive explication of the rule in *Cal. Dental*.⁴⁰ The Article then offers a critique of the modern approach to rule of reason analysis and explains its analytical incoherencies. The Article explores the courts' diverse and inconsistent applications of the rule of reason to demonstrate how poorly the rule of reason standard works and to identify specific areas that remain in doubt. Since the Federal Trade Commission has attempted to reformulate the rule of reason within the constraints of *Board of Trade* and *Cal. Dental*, its so-called "inherently

36. PLATO, CRATYLUS, in 1 THE DIALOGUES OF PLATO 191 (B. Jowett trans. & ed. 3d ed., Oxford Univ. Press 1892).

37. Barbara Ann White, *Countervailing Power - Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045, 1069 (1992).

38. See Piraino, *supra* note 33.

39. This article does not address the rule of reason in the vertical context, which implicates a somewhat different set of considerations. However, the essential problems with the rule of reason, particularly its vacuity, are equally of concern in any context in which the rule is applicable. To the extent that a clarified mode of analysis is required for horizontal restraints as argued here, the same can be said for vertical restraints even if the modes of analysis in the latter context may be more complex due to the greater claims to competitive legitimacy that may be made for vertical arrangements.

40. 526 U.S. 756 (1999).

suspect” approach is considered a possible repair.⁴¹ Finally, the Article concludes by proposing a complete reversal and repudiation of current rule of reason doctrine and substituting it with a categorical approach that will allow the business community, victims of antitrust violations, government enforcers, and the courts a measure of transparency and predictability.

I. THE EVOLUTION AND EXPANSION OF THE RULE OF REASON

The history of the rule of reason, and in fact of Section 1 doctrine as a whole, can be seen as a trial-and-error evolution. It began with the Court’s unqualified view of the prohibition against all restraints of trade in *Trans-Missouri Freight*,⁴² which the Court tempered in *Standard Oil*.⁴³ Section 1 doctrine then developed into categorical modes of analysis with the introduction of *per se* illegal categories of conduct. For an extended period, the crux of antitrust analysis was a process of categorizing conduct, placing it either into or outside of certain categories that were deemed illegal *per se*.⁴⁴ Since *per se* rules admitted of no justifications for the conduct, categorization eventually became more complex as the Court came to find value in evaluating the economic context for conduct that literally qualified as *per se* illegality but where rigid prohibition seemed potentially overbroad.⁴⁵ Thus *NCAA*,

41. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005), *aff’g In re Polygram Holding, Inc.*, No. 9298, 136 F.T.C. 310 (2003); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *aff’g In re N. Tex. Specialty Physicians*, No. 9312, 140 F.T.C. 715 (2005); *In re Realcomp II Ltd.*, 2009-2 Trade Cas. (CCH) P 76784 (F.T.C. Oct. 30, 2009).

42. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 312 (1897).

43. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911).

44. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 202-04 (West 2000).

45. An early example of the Court’s expression of concern about condemning legitimate conduct under *per se* rules is found in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8-9 (1979). There, the Court observed: “[t]o the Court of Appeals and CBS, the blanket license involves ‘price-fixing’ in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. [Footnote omitted] But this is not a question simply of determining whether two or more potential competitors have literally “fixed” a ‘price.’ As generally used in the antitrust field, ‘price-fixing’ is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals’ literal approach does not alone establish that this particular practice is one of those types or that it is “plainly anticompetitive” and very likely without ‘redeeming virtue.’ Literalness is overly simplistic and often overbroad.

Professional Engineers,⁴⁶ and other cases established a hybrid “quick look” third mode of analysis.⁴⁷ Nonetheless, the process of categorization in antitrust cases remained essential. This introduction of truncated rule of reason analysis, however, significantly blurred the categories of conduct, and the Court began to question whether the categorical approach really worked.⁴⁸ Eventually in *Cal. Dental*, the Court abandoned categories altogether and introduced a truly case-specific and more deeply contextual regime for Section 1 analysis.⁴⁹ The rule of reason now calls for an “enquiry meet for the case.”⁵⁰

Coinciding with the trend toward blurring and then eliminating categorical antitrust analysis, the Court also shifted away from most vestiges of the *per se* rules, leaving only hard-core cartel activity subject to them.⁵¹ The Court’s increasing skepticism about the economic consequences of rigid *per se* rules led to the overturning of previously long-standing *per se* prohibitions against vertical market allocations and resale price maintenance.⁵² Aside from horizontal cartels, all conduct is now subject to some degree of rule of reason analysis. The end result is that the rule of reason has become considerably more important, but at the same time much less clear and predictable in its application.

A. EARLY DEVELOPMENT OF THE RULE OF REASON

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

When two partners set the price of their goods or services, they are literally ‘price-fixing,’ but they are not *per se* in violation of the Sherman Act. *See* *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff’d*, 175 U. S. 11 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label ‘*per se* price-fixing.’ *See id.* That will often, but not always, be a simple matter.

46. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679 (1978).

47. *Id.*

48. *NCAA*, 468 U.S. at 110.

49. 526 U.S. at 779.

50. *Id.* at 781.

51. *See generally supra* note 6.

52. *Id.*

Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be unlawful.⁵³

Initially, the Supreme Court interpreted the Sherman Act based on its literal meaning, and that all agreements in restraint of trade or commerce were declared by Section 1 to be unlawful – an approach that had more appeal as a matter of strict statutory construction than as a matter of public policy.⁵⁴ As the Court observed many years later, “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”⁵⁵ The *Trans-Missouri Freight*⁵⁶ decision thus portended to outlaw common commercial arrangements, even if on balance they were efficient and procompetitive.

Thus, fourteen years after *Trans-Missouri Freight*, the Court adopted another approach for interpreting the statute, finding its language sufficiently unclear as to justify judicial interpretation, and calling on the common law to support the imposition of a rule of reason to clarify the statute’s purportedly vague and undefined terms, specifically the terms “restraint of trade or commerce.”⁵⁷ The *Standard*

53. 15 U.S.C. § 1 (2006).

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

55. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918).

56. 166 U.S. 290.

57. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (“And as the contracts or acts embraced in the provision were not expressly defined . . . it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been

Oil decision gave no clear indication of what was meant by a “rule of reason,” but evaluated various aspects of the Standard Oil trust by reference to its “intent and purpose to exclude others” from competition, the character of the defendants’ conduct, and the resulting extension of power over the petroleum industry.⁵⁸

During the same term, the Supreme Court described *Standard Oil* to hold:

[T]hat as the words ‘restraint of trade’ at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have a like significance.⁵⁹

Thus, in its earliest formulation, the rule of reason took its direction from the common law, and evaluated whether the intended or actual effect of a challenged restraint unduly contravened the public’s interest in “the free movement” of trade in the channels of interstate commerce.⁶⁰ The common law had long recognized the validity of contracts that restrained trade, provided that they were “reasonable . . . in reference to the interests of the parties concerned and reasonable in reference to the interests of the public”⁶¹

violated. Thus, not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.”).

58. 221 U.S. at 75-76.

59. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

60. *Id.* at 180.

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

One important early gloss on the rule of reason was provided by Judge Taft in *United States v. Addyston Pipe & Steel Co.*,⁶² where he articulated what eventually became known as the ancillary restraints doctrine.⁶³ After tracing the common law rules applicable to agreements not to practice one's trade and not to compete with a business in a contract for its sale, Judge Taft observed that to be lawful, the contract that imposed some restraint on trade or competition:

[M]ust be one in which there is a main purpose, to which the covenant in restraint is merely ancillary. The covenant is inserted only to protect one of the parties from injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract... is merely to restrain competition, and enhance or maintain prices, it would seem that there is nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void... There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.⁶⁴

Under the ancillary restraints doctrine, the initial step involves asking whether there is some legitimate agreement to which the restraint is ancillary, and, if so, whether the restraint is reasonable in relationship to the legitimate objectives of the parties.⁶⁵ A restraint is unreasonable under this approach either if it is “naked” and unconnected with any legitimate transaction, or if the restraint is connected to something legitimate but excessive for its purposes.⁶⁶ This ancillary restraint doctrine falls neatly out of common law cases that approved of a seller's covenants not to compete with the business being transferred, provided

62. 85 F. 271 (6th Cir. 1898).

63. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006).

64. *Addyston Pipe*, 85 F. at 282-83.

65. *Id.*

66. *Id.*

that the restraint was reasonably limited in time and geographic scope to permit the buyer to fully exploit the business without interference from the seller.⁶⁷

The ancillary restraint doctrine does not entirely encompass the rule of reason, but provides a useful starting point for antitrust analysis of many arrangements that are removed from the reach of *per se* rules. However, even if a restraint that forms part of a legitimate transaction fails to meet the ancillary restraint test, such as by being unduly restrictive for the purpose intended, it may nevertheless be lawful, where, for example, the parties obviously lack sufficient market power to affect marketplace competition.⁶⁸

B. BOARD OF TRADE

The most enduring explication of the rule of reason is found in Justice Brandeis' landmark opinion in *Board of Trade of the City of Chicago v. United States*:⁶⁹

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 is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁷⁰

This statement of the rule of reason has guided the courts for nearly 100 years,⁷¹ as recently as this past term, providing the basis for the Supreme Court's ruling that professional sport league restraints should

67. *Mitchell v. Reynolds*, (1711) 1 P. Wms. 181 (Eng.); *Dyer's case* (1414), 2 Hen. fol. 5, pl. 26 (Eng.).

68. *See Dagher*, 547 U.S. at 7-8.

69. 246 U.S. 231 (1918).

70. *Id.* at 238.

71. This language has been quoted by courts more than 240 times, based on a LEXIS search of the text.

be treated under the rule of reason on the ground that some cooperation is necessary to make the end product available.⁷²

Board of Trade marked an important departure from the ancillary restraint approach in the *Addyston Pipe* decision, which had tied the Sherman Act to the common law rule against restraints on trade.⁷³ Justice Brandeis in *Board of Trade* considered relevant a variety of questions going to the nature of the marketplace, the business involved in the restraint, its history and most importantly the actual or probable effects of the restraint, none of which had significance under common law.⁷⁴ The common law ancillary restraint rule was limited to an examination of the parties' intent and the relationship between their legitimate business transaction and the restraint. *Board of Trade* shifted the analysis toward a more modern economics approach that weighs the actual or probable effect of a restraint by examining the relevant economic market in order to assess the market power of the parties, and thus their ability to have an impact on consumer welfare. Analysis of the market "condition before and after the restraint is imposed" takes the Court far more deeply into economic analysis of effects than was ever contemplated by the ancillary restraint doctrine.

One can compare the approach in *Board of Trade* with the common law by considering such cases as *Mitchell v. Reynolds*. *Mitchell* involved the sale of a bakery under a covenant by the seller not to compete with the buyer for a period of time in the same locale. The covenant not to compete in this historic case was lawful under the common law rule regardless of whether the parties had intended to assure the bakery's buyer of a local monopoly for a period of years, which may very well have been the situation. *Mitchell* says nothing about the condition of the relevant market for the baking trade in the locale because the only issue was whether the restriction on the seller was minimally broad enough to assure the buyer of the fruits of the acquisition transaction. The rule of reason in *Board of Trade* might have yielded a different outcome if the parties not only sought to protect the buyer's legitimate interests but also to assure it of a continuing monopoly; if the history of the baking trade in the relevant market made clear that the seller was the buyer's only likely rival; if the buyer had previously started to enter the bakery market to compete with the seller and was induced instead to purchase

72. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010).

73. *Bd. of Trade*, 246 U.S. 231; *Addyston Pipe & Steel Co.*, 85 F. 271.

74. *Bd. of Trade*, 246 U.S. at 238.

the seller's business at a price that shared the monopoly profits that flowed from eliminating rivalry, and so on.

C. THE DEVELOPMENT OF *PER SE* CATEGORIES

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

[C]onsidering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts⁷⁵

A dichotomy between rule of reason analysis and *per se* rules emerged more clearly in *United States v. Trenton Potteries*,⁷⁶ where the Court held that price-fixing agreements could not be defended on the ground that the price, as fixed, was asserted to have been a reasonable one. In so holding, the Court signaled an irrebuttable presumption of unreasonableness in price-fixing cases:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.⁷⁷

By 1947, the Court was able to articulate unambiguously that price fixing was *per se* unlawful: "Whatever justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness."⁷⁸ This led to a categorical approach to Section 1 analysis:

75. 221 U.S. 1, 65 (1911).

76. 273 U.S. 392, 397 (1927).

77. *Id.*

78. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1947).

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are “illegal *per se*.” In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.⁷⁹

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

D. THE “QUICK LOOK” RULE OF REASON AND THE COURT’S EMERGING DISSATISFACTION WITH CATEGORICAL ANALYSIS

The dichotomy between the rule of reason and the *per se* categories of analysis was always blurred by the problems of characterizing challenged conduct as fitting, or not fitting, into one of the *per se* forbidden categories.⁸⁰ As such, the Court found itself faced with cases that challenged the categories of antitrust modes of analysis.⁸¹ Thus, the establishment of common pricing for all copyrighted musical compositions made available for licensing through the American Society of Composers, Authors and Publishers and Broadcast Music Inc. was rather obviously “price fixing” among the owners of the copyrights, but was evaluated under the rule of reason after the Court refused to characterize it as such.⁸² The problem, the Court noted, was that the conduct involved price fixing in only a literal sense; the context was a collaboration that provided a different product than any of the

79. Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978).

80. See Lemley & Leslie, *supra* note 19, at 1225 (“One of the problems with categorical analysis is that the boundaries of categories shift without logic or warning.”).

81. See, e.g., Broad. Music, Inc. v. CBS, Inc. 441 U.S. 1 (1979); Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. 679.

82. *Broad. Music, Inc.*, 441 U.S. at 8 (“[E]asy labels do not always supply ready answers.”).

collaborating participants could have marketed independently.⁸³ Since this new product needed a price, *someone* had to set it and doing so should not be condemned as anticompetitive without an analysis of the economic context in which the conduct took place – even though the conduct was literally price fixing.⁸⁴ The Second Circuit had condemned the arrangement, which indicated that the categorical approach was leading to undesirable results.⁸⁵ The Supreme Court’s decision further demonstrates that the Court was stretching to exclude the blanket licenses from the “price fixing” category.⁸⁶

Eventually, the very notion of the categorical dichotomy began to unravel in *National Society of Professional Engineers v. United States*,⁸⁷ where the Court applied rule of reason analysis to strike down a professional association rule that discouraged competitive bidding on the basis of price. Although the conduct was essentially a form of price fixing, the court did not apply the *per se* rule, nor did it explain its reasons for not doing so.⁸⁸ The *BMI* problem was not present in *Professional Engineers* where the price restraint applied to the separate services provided by each independent professional, rather than to the pricing of the distinct output of a joint venture among rival sellers.⁸⁹ Nevertheless, the Court declined to apply either the *per se* rule or a full-blown rule of reason analysis.⁹⁰ Instead, the Court stated that although “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement,” it was necessary to evaluate the Association’s proffered justifications for its rule before concluding that the restraint on price competition was a direct affront to the Sherman Act.⁹¹ The analysis appeared to proceed without reference to the usual categories of antitrust analysis.

In 1979, the Court seemed to rely on categorical analysis, but began to recognize explicitly a third category of “truncated” rule of reason analysis when it struck down the NCAA’s rules restricting the number of football game television broadcast rights that any member team could

83. *Id.* at 14.

84. *Id.* at 8-10.

85. *Id.* at 6.

86. *Id.* at 8-9.

87. 435 U.S. 679 (1978).

88. *Id.* at 687.

89. *Id.* at 681.

90. *Id.* at 692.

91. *Id.* at 692, 695.

sell and limiting price competition in bidding for television contract arrangements.⁹² The Court struck down the rule as an unlawful restraint on price and output, but declined to apply a straightforward *per se* analysis noting that the industry of college football is one “in which horizontal restraints on competition are essential if the product is to be made available at all.”⁹³ Nor did Justice Stevens delve into anything resembling a fulsome rule of reason analysis, which would have involved weighing the *Board of Trade* elements: evidence concerning any peculiar facts about the industry; market conditions before and after the restraint; the nature of the restraint and its probable and actual effects; and the purpose behind the restraint and the problem it was purportedly imposed in order to solve.⁹⁴ Instead, the Court entertained only the last of these factors by considering rather briefly the various justifications offered by the NCAA.⁹⁵ In adopting this approach and deviating from *Board of Trade*, the Court observed in a famous footnote:

Indeed, there is often no bright line separating *per se* from rule of reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.⁹⁶

After *NCAA*, even categorizing conduct as a “naked restraint” did not resolve the extent of inquiry required.

E. *CAL. DENTAL* AND THE DISINTEGRATION OF THE CATEGORICAL MODES OF RULE OF REASON ANALYSIS

In *Cal. Dental*, the Supreme Court finally repudiated altogether the notion that the rule of reason embodies a single unified substantive standard and shifted it to an undefined process by which courts are to proceed in evaluating alleged antitrust violations.⁹⁷ At the same time, the Court repudiated categorical modes of analysis that had governed Section 1 since *Trenton Potteries*.⁹⁸ *Cal. Dental* made clear that the categorical approach was fully repudiated:

92. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

93. *Id.* at 101.

94. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

95. *NCAA*, 468 U.S. at 113-15.

96. *Id.* at 103, n.26.

97. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779-81 (1999).

98. 273 U.S. 392 (1927).

The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like “*per se*,” “quick look,” and “rule of reason” tend to make them appear. We have recognized, for example, that “there is often no bright line separating *per se* from rule of reason analysis,” since “considerable inquiry into market conditions” may be required before the application of any so-called “*per se*” condemnation is justified. “Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.” Indeed, the scholar who enriched antitrust law with the metaphor of “the twinkling of an eye” for the most condensed rule of reason analysis, himself cautioned against the risk of misleading even in speaking of a “spectrum” of adequate reasonableness analysis for passing upon antitrust claims: “There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for Nevertheless, the quality of proof required should vary with the circumstances.” P. Areeda, *Antitrust Law* ¶1507, p. 402 (1986).⁹⁹

F. EXPANSION OF THE RULE OF REASON

During this same period in which the categorical approach gave way to a less definite one, the Court retreated from *per se* analysis except as to the residual price fixing and market allocation offenses.¹⁰⁰ The Supreme Court’s recent decisions express a decided ambivalence about the relative benefits of *per se* rules as opposed to rule of reason analysis.¹⁰¹ On the one hand, the Court has noted certain obvious benefits of *per se* rules:

This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation

99. *Cal. Dental*, 526 U.S. at 781 (case citations omitted).

100. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 435-36 (1990).

101. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (referring to “false positives” and “false inferences” as concerns supporting a relaxation of standards for motions to dismiss antitrust claims); *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (limiting Section 2 liability to avoid potential “‘false positive’ mistaken inferences that chill the very conduct the antitrust laws are designed to protect”); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) (noting that application of *per se* rules “raises the total cost of error” while reducing costs of decision-making).

into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.¹⁰²

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

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

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still. So it is with boycotts and price fixing... Every such horizontal arrangement among competitors poses some threat to the free market.¹⁰³

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

Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.¹⁰⁴

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

103. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 433-34 (1990).

104. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (U.S. 1972).

Notwithstanding the administrative and other benefits of *per se* rules, the Court has overturned all *per se* rules that previously applied to vertical price and non-price restraints, weakened the *per se* rule applicable to tying by requiring proof of market power,¹⁰⁵ and has created no new *per se* rule in at least a half century.¹⁰⁶ In *Leegin Creative Leather Products v. PSKS, Inc.*, the Court acknowledged its “reluctance to adopt *per se* rules.”¹⁰⁷ In balancing the trade-off between efficient and predictable *per se* rules and the reduced error potential of more thorough rule of reason analysis, the federal courts have discernibly shifted to favor the latter.¹⁰⁸ Reluctance to apply a rule that might generate “false positive” antitrust condemnation has repeatedly surfaced in recent opinions under both Sections 1 and 2 of the Sherman Act.¹⁰⁹ On balance, the battle between the *per se* rules and the rule of reason has resulted in a “triumph” of the latter.¹¹⁰ Thus, aside from cases involving hard-core cartel activity, all Section 1 cases are relegated to *Cal. Dental’s* “continuum” rule of reason.

The Court’s doubts about the wisdom of *per se* rules are not new. In *Topco*, Justice Blackmun concurred in the decision to condemn the association’s market allocation rule, but only because he felt constrained by *stare decisis*.¹¹¹ Blackmun stated that the consequences of striking down *Topco’s* rule would be harmful to the public interest, but conceded: “The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of

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

106. The *per se* rule against price fixing seems to have been established at least by 1927. *See United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). In *United States v. Topco Associates*, Justice Marshall cites Judge Taft’s 1899 decision in *Addyston Pipe*, among other cases, for the proposition that horizontal territorial allocations are *per se* offenses. 405 U.S. 596, 608 (1972). However, the concept of *per se* illegality in antitrust law did not crystallize until significantly later. Indeed, contrary to Justice Marshall’s view, Justice Burger actually dissented in *Topco* on the ground that the Court was creating a new *per se* rule.

107. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007).

108. *See supra* note 101.

109. *See supra* note 101.

110. Piraino, *supra* note 33, at 1757.

111. *Topco Assocs.*, 405 U.S. at 612-13.

legislation.”¹¹² The majority opinion in *Topco* also noted that there was considerable debate about the wisdom of *per se* rules, although most of the references were addressed to the application of *per se* prohibitions to vertical restraints – which the Court later abandoned.¹¹³

II. AN ANALYTICAL CRITIQUE OF THE RULE OF REASON

A. BOARD OF TRADE AND ITS CRITICS

The *Board of Trade* opinion and its rule of reason have been the target of a steady stream of scholarly criticism from all political perspectives. Indeed, it is hard to find a kind word about Justice Brandeis’ rule of reason. Robert Bork, whose *Antitrust Paradox* helped usher in the current restrained view of antitrust, argued that Brandeis had fashioned a “deviant” rule of reason.¹¹⁴ His primary objection was that the open-endedness of Brandeis’ rule allowed courts to condemn conduct on the basis of any number of factors that, in his view, had no connection with the narrow economic efficiency objective of antitrust.¹¹⁵ Bork argued that Brandeis was animated by a view of antitrust that not only protected consumers from private restraints, but also protected smaller and less efficient rivals.¹¹⁶ Thus, Bork analyzed the famous passage from *Board of Trade* as distinguishing “regulation” of trade from its “suppression” as reflecting an antitrust philosophy that permitted private restraints that protected the small and weak from the dominant.¹¹⁷ “A strong underlying policy orientation for Brandeis’ rule seems to have been sympathy for small, perhaps inefficient, traders who might go under in fully competitive markets.”¹¹⁸ His rule thus spoke for the tempering of competition by private agreement.”¹¹⁹ Thus one longstanding objection to *Board of Trade* has been that it reinforces the power of individual judges to impose their own philosophies on competitive markets.¹²⁰

112. *Id.*

113. *Id.* at 609, n.10.

114. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 817 (1965).

115. *Id.*

116. *Id.* at 815.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Judge Taft's objection to at least one version of a rule of reason is perhaps echoed in Bork's later critique of *Board of Trade*. In *Addyston Pipe*, Judge Taft rejected arguments that sought to invoke English case law for the proposition that some naked restraints on competition were permissible.¹²¹ In fashioning his ancillary restraints doctrine, Judge Taft rejected these arguments on the ground that judges should not be deciding how much competition is a good thing.¹²²

It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not. The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.¹²³

Others have expressed concerns about administrability of a rule that sets almost no meaningful boundaries around what antitrust courts can consider.¹²⁴ Professor Herbert Hovenkamp observed in his indictment of the rule: "Brandeis' statement of the rule of reason . . . has been one of the most damaging in the annals of antitrust" as it "has suggested to many courts that . . . nearly everything is relevant."¹²⁵ Richard Posner has similarly argued that *Board of Trade* fails to provide meaningful guidance, and thus can be interpreted to prohibit conduct that is efficient on balance.¹²⁶ Referring to Brandeis' formulation of the rule of reason, Posner observes: "This is not a helpful formulation. To be told to look to the history, circumstances, purposes and effects of a challenged restriction is not to be provided with usable criteria of illegality."¹²⁷

Most recently, Professor Maurice Stucke presented a thoughtful analysis of the rule of reason and concluded that it does not even

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

122. *Id.* at 283-84, 293.

123. *Id.*

124. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 255 (3d ed. 2005).

125. *Id.*

126. Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 15 (1977).

127. *Id.*

comport with internationally-recognized rule of law standards.¹²⁸ A primary concern in this regard is vagueness.¹²⁹ Even prior to *Board of Trade*, the rule of reason announced in *Standard Oil* had precipitated a policy battle between those who argued for clearer rules and those, including Justice White, who believed the legal standard should allow courts discretion to permit certain private arrangements.¹³⁰ *Board of Trade*, Stucke argues, set back President Wilson's legislative efforts to bring clarity to antitrust law through the enactments of the Clayton Act and the Federal Trade Commission Act.¹³¹ "Even if another court found a similar practice in a different industry anticompetitive, [*Board of Trade*'s] rule-of-reason factors would treat each challenged restraint as novel. Liability would turn on facts peculiar to the industry to which, and during the period when, the defendant applied the restraint."¹³² Years later, after the rule of reason came to predominate in antitrust law, little has been achieved to give it clarity.¹³³ Stucke posed the question: "So how does the rule of reason, the Court's 'prevailing,' 'usual' and 'accepted standard' for evaluating conduct under the Sherman Act, fare under these ruleof-law principles? Poorly."¹³⁴ Specifically, he points out that those who are subject to the law cannot effectively plan their affairs to conform to the demands of the coercive power of government; and that the rule is so obscure as to allow the power of government to be exercised arbitrarily.¹³⁵ That there is a plausible argument that a rule of this vintage is so devoid of predictable content as to violate ruleoflaw precepts is a rather stunning indictment, (although Stucke goes on to argue only for rather modest improvements at the margins of rule of reason doctrine).¹³⁶

Others have described the *Board of Trade* standard as "hardly illuminating,"¹³⁷ and as having "'legitimiz[ed] the 'big case' in

128. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1489 (2009).

129. *Id.*

130. *Id.*

131. *See generally*, Stucke, *supra* note 128.

132. *Id.* at 1398.

133. *Id.*

134. *Id.* at 1421.

135. *Id.* at 1466.

136. *Id.* at 1488-89.

137. 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).

antitrust.”¹³⁸ It would be a challenge to find a legal standard that has endured as long as *Board of Trade*’s rule of reason against so much scholarly objection from so many different points of view. A full catalogue of *Board of Trade*’s detractors would be difficult to assemble. The reader is invited to locate commentary championing the Brandeis standard. It works for no one.

B. A CRITIQUE OF *CAL. DENTAL*

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

1. *Cal. Dental*’s “Competition Doesn’t Work” Analysis

A troubling aspect of the analysis in *Cal. Dental* is that the Court strained to accept an argument that flies in the face of sound policy and previously unyielding precedent. The defense in *Cal. Dental* was that unfettered price competition by dentists, given the peculiarities of their business, would not work to consumers’ benefit and might actually harm them.¹³⁹ The Court indulged this defense at length, ultimately agreeing with the dentists that price competition in their industry might not work.¹⁴⁰ Noting the asymmetry of information between consumers and suppliers in the market for dental services, and leaning heavily on the “professional context,” the Court concluded that a horizontal agreement to restrict price advertising might, in the mind of the conspirators (i.e., the California Dental Association), spur consumers to consume more rather than fewer dental services.¹⁴¹ Justice Souter reasoned that the Association’s self-imposed prohibition of discount advertising “appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains

138. ABA Antitrust Sec., Monograph No. 23, The Rule of Reason 5 (1999).

139. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771-73 (1999).

140. *Id.* at 774-75.

141. *Id.* at 772-73, 774-75.

to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators).¹⁴² Thus, at least the conspirators' purpose might have been a benign one (although there was no evidence to that effect), but many industries honestly believe competition *for them* is rueful.¹⁴³ Proof that competition is a bad idea for this or that particular industry has never been admissible in antitrust cases.¹⁴⁴ Still, Justice Souter chastised the Ninth circuit for ignoring "the possibility that the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world . . ."¹⁴⁵ thus accepting the possibility that dentistry is an industry where price competition does not work.

This is precisely the defense based on a frontal assault on competition itself which the case law has roundly and soundly rejected. *Society of Professional Engineers* involved a similar, and more compelling defense.¹⁴⁶ That case involved a challenge to a professional society's ethical rule "prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."¹⁴⁷ Civil engineers' "study, design, and construction of all types of improvements to real property—bridges, office buildings, airports, and factories are examples."¹⁴⁸ In defense of that price advertising ban, it was argued that public safety was imperiled by free and unfettered price competition; i.e., that "competition among professional engineers was contrary to the public interest."¹⁴⁹ Civil engineers, if allowed to compete on price, might submit low-ball bids to obtain contracts and then be forced to oversee public works projects that were inadequately budgeted.¹⁵⁰ There defendants mounted a nearly identical argument to that of the California Dental Association: that price competition in that particular industry would not work because competition would lead to unethical deceptive practices and because "engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be

142. *Id.* at 775.

143. *Id.* at 775-76.

144. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 694 (1978).

145. *Id. Cal. Dental.*, 526 U.S. at 773.

146. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 683.

147. *Id.*

148. *Id.* at 682.

149. *Id.* at 684.

150. *Id.* at 684-85.

involved in the actual performance of the project.”¹⁵¹ Justice Stevens’ opinion laid bare that defense: “The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.”¹⁵² The Society’s defense “on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.”¹⁵³ In other words, “competition does not work” is not a defense. This same defense was rejected again unambiguously in *FTC v. Indiana Federation of Dentists*.¹⁵⁴ There, a dentists’ professional association argued that quality of care would be compromised if dentists were free to compete as to what information they would supply to payment plans in support of authorization requests.¹⁵⁵ Again, the Court said: “The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to ‘nothing less than a frontal assault on the basic policy of the Sherman Act.’”¹⁵⁶ These “competition does not work” arguments are indistinguishable from the one the Court accepted in *Cal. Dental*.

If dentistry cannot be practiced ethically in a competitive marketplace, an industry antitrust exemption could be sought from Congress;¹⁵⁷ it was inappropriate for the Court to overrule the Sherman Act itself as applied to a particular industry practice. The Court has done so only once, for professional baseball, with questionable wisdom, and Congress eventually reacted to undo much of the damage.¹⁵⁸ With the exception of professional baseball, whose antitrust exemption traces

151. *Id.* at 693.

152. *Id.* at 689.

153. *Id.* at 695.

154. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 463 (1986).

155. *Id.*

156. *Id.*

157. Industry-specific statutory exemptions from federal antitrust law include the Capper-Volstead Act, 7 U.S.C. §§ 291-292 (2006) (agricultural cooperatives); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (insurance); and the Newspaper Preservation Act, 15 U.S.C. § 1801, among others.

158. *Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding the industry-specific antitrust exemption for professional baseball). *But see* 15 U.S.C. § 26b (imposing statutory limits on the baseball exemption to extend antitrust law to restraints on player contracts).

back to an earlier era of commerce clause doctrine coupled with perceived congressional acquiescence over time, no industry has ever been singled out by the Court for specialized antitrust immunity.¹⁵⁹ As Justice Stevens pointed out in *Professional Engineers*, “this Court has never accepted such an argument.”¹⁶⁰

Moreover, by opening the door to industry-specific arguments against the desirability of price competition, the Court opened a Pandora’s box, further contributing to the uncertainty and unpredictability of the rule of reason.¹⁶¹ If dentistry is an industry not fit for price competition, what about the practice of law (where there is asymmetry of information between buyers and sellers coupled with the complexity of services that dwarfs anything in dentistry); or funeral services; health care generally; and so on? One sound reason for the holding in *Professional Engineers* is that the courts are ill-suited to become public utility commissions deciding the proper organization of every industry in the American and global economies.¹⁶² *Cal. Dental* took an ill-advised step toward remaking antitrust rules on an industry-specific basis, and indeed forging exemptions in response to industry complaints that competition is a bad idea for them.¹⁶³

2. Expanded Litigation Burdens and Social Costs

By demanding “an enquiry meet for the case,” *Cal. Dental* reflects the court’s continuing trend toward imposing ever greater burdens on antitrust plaintiffs in the interest of avoiding “false positives” so that

159. Non-statutory antitrust exemptions have been recognized by the courts for certain categories of conduct, but, aside from professional baseball, not for specific industries. Compare *Keogh v. Chi. & N.W. Ry.*, 260 U.S. 156 (1922) (generally exempting filed tariff rates from antitrust treble damages claims, without regard to any specific industry), with *Flood*, 407 U.S. 258 (reaffirming special industry antitrust exemption for major league baseball); 15 U.S.C. § 26b (limiting and codifying a special industry exemption for baseball).

160. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 694 (1978).

161. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771-73 (1999).

162. 435 U.S. at 695-96 (“Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy, the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.”).

163. *Cal. Dental*, 526 U.S. at 773.

case outcomes can better align with the economic objectives of antitrust.¹⁶⁴ The *per se* rules and abbreviated “look” rules can theoretically yield the wrong result in particular cases, possibly discouraging or penalizing procompetitive conduct — although the extent to which *per se* rules have ever actually discouraged desirable conduct is a matter of pure speculation.¹⁶⁵ By expanding the contexts in which antitrust defendants may advance evidence of economic efficiency justifications, the Court invites a potentially extensive economics-based inquiry to test whether a particular restraint, in its market context, might on balance benefit consumers.¹⁶⁶ This is why the Court has abandoned *per se* rules that previously condemned vertical price fixing and vertical territorial restraints.¹⁶⁷ As the Court noted in overturning the *per se* rule against maximum resale price fixing, “we have expressed reluctance to adopt *per se* rules with regard to ‘restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.’”¹⁶⁸

However, there are considerable economic costs that result from the shift from categorical *per se* rules to a more elaborate and less definite rule of reason analysis.¹⁶⁹ This is especially true because *Cal. Dental* abandoned any clear categorical approach and opened wide the rule of reason to an infinite range of standards.¹⁷⁰ Business planning, public and private enforcement and judicial decisions all have become more complex and costly.¹⁷¹

Cal. Dental's negative impact on antitrust compliance cannot be overstated. It is a truism that antitrust compliance efforts benefit

164. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

165. Purely theoretical attempts have been made purporting to evaluate the extent of the “false positive” problem. See Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Errors*, 20 CORNELL J.L. & PUB. POL’Y 1 (2010). However, there is no empirical evidence to support the proposition that antitrust plaintiffs in particular have won many more favorable settlements and verdicts than they should have.

166. *Cal. Dental*, 526 U.S. at 774-75.

167. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Cont’l T.V. v. GTE Sylvania*, 433 U.S. 36 (1977).

168. *State Oil Co.*, 522 U.S. at 3 (citing and quoting from *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986)).

169. See generally Posner, *supra* note 126.

170. *Cal. Dental*, 526 U.S. at 780-81.

171. See generally Posner, *supra* note 126.

consumers at considerably less social cost than antitrust litigation – a stitch in time saves nine. Businesses attempting to conform their conduct to the law need to know what the rules are – in advance. Risk-averse companies tend to avoid conduct if legal counsel cannot assure its lawfulness. Antitrust rules that are unclear, unpredictable and uncertain thus tend to discourage desirable conduct as well as undesirable conduct. A risk-averse and well-counseled company, having no basis for predicting how much or what sort of analysis a court might someday apply to evaluate the lawfulness of its conduct, will tend to steer clear of conduct that has anticompetitive elements but which a court might or might not find to produce net competitive benefits.¹⁷² Under the uncertainty created by *Cal. Dental*, predicting the outcome of an antitrust case that might be filed at some the future point would often require advance knowledge of such things as the relevant market definition that a court would ultimately accept for the case.¹⁷³ Corporate legal counsel cannot engage in detailed relevant market analysis *ex ante*, at least not the way litigants do in litigation with the aid of economics expertise and at an enormous expense.¹⁷⁴ Viewed from an economics perspective, the cost of making accurate predictions about conduct that is lawful but close to the line of legality – conduct that should not be discouraged – exceeds the expected returns.¹⁷⁵

Consequently, the “false positives” that the Supreme Court has so assiduously sought to prevent have to some degree merely shifted from the court room to the board room. The very leniency of modern antitrust law is buried in the obscurity and unpredictability of a rule of reason. Perversely, only the less risk averse firms will fail to be deterred from beneficial conduct, the very firms that will feel equally at liberty to indulge in harmful conduct.¹⁷⁶

Antitrust enforcement is also hampered by *Cal. Dental's* open-endedness. Enforcement agencies and private plaintiffs need to know what is permitted and what is not, which cases to pursue and which ones not to. Evaluating a particular enforcement initiative should not be a matter of guesswork. Just as vague rules discourage desirable business

172. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984).

173. Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007).

174. *Id.*

175. See generally Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (Dec. 1972).

176. See Calfee & Craswell, *supra* note 173.

conduct, uncertainty likewise begets agency reluctance to bring desirable cases.¹⁷⁷

Of course, vague antitrust rules impose significant burdens on the courts.¹⁷⁸ Courts expend considerable amounts of scarce resources on rule of reason antitrust litigation.¹⁷⁹ As the Supreme Court noted in *Superior Court Trial Lawyers*, among other cases: “The administrative efficiency interests in antitrust regulation are unusually compelling. The per se rules avoid ‘the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable.’”¹⁸⁰ True, a court *can* apply a truncated rule of reason if it finds it appropriate and thus avoid some of the protracted litigation.¹⁸¹ However, *Cal. Dental* and cases in its wake have done very little to explain the circumstances that should trigger abbreviated analyses, nor have these cases defined the extent of appropriate abbreviation.¹⁸² It is not unusual for trial courts to find their “incredibly complicated and prolonged” antitrust trial results reversed on appeal precisely because the trial engaged in too much or too little rule of reason evaluation of defendants’ conduct.¹⁸³ *Cal. Dental* is a good example.

Cal. Dental’s case-by-case approach thus relegates Section 1 analysis to the very “shifting, vague and indeterminate” standard that Judge Taft cautioned against more than 100 years ago.¹⁸⁴ The decision trumpets case-specific, individually-tailored, review to help ensure correct outcomes in particular cases at the expense of efficiency, predictability and uniformity in the administration of antitrust law.¹⁸⁵ Trial courts are directed not to fall prey to regarding rule of reason

177. Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC’Y REV. 291, 295-96 (1987).

178. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 430 (1990).

179. *Id.* at 419, n.7.

180. *Id.* at 430 (citing and quoting *N. Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

181. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

182. Indeed, *Cal. Dental* precludes formulaic categorization of cases, instead requiring in each instance a specialized, case-specific “enquiry meet for the case.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780-81(1999).

183. *See Superior Court Trial Lawyers Ass’n*, 493 U.S. at 430.

184. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

185. *Cal. Dental*, 526 U.S. at 780-81.

analysis as a “spectrum” of adequate reasonableness analysis, but at the same time admonished to find the right degree of reasonable analysis among the infinite possibilities.¹⁸⁶ Although there rather obviously *is* a spectrum of adequate analyses, the Court’s warning about the term “spectrum” as a metaphor is that the term “spectrum,” borrowed as it is from the scientific terminology of optics, suggests *too much* clarity, thereby deceptively suggesting “more precision than we can hope for.” All hope of precision is abandoned.

3. *The Empty Promise of Stare Decisis*

The Court seemed to acknowledge the need for transparency in the law, but resorted to a peculiar and unlikely mechanism to achieve even a small measure of it. Citing Professor Areeda, the Court acknowledged the “necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. By exposing their reasoning, judges . . . are subjected to others’ critical analyses, which in turn can lead to better understanding for the future.”¹⁸⁷ To achieve an increasingly predictable standard, Justice Souter thought that transparency in judicial decisions would create a body of case law that would eliminate ambiguity and doubt over time.¹⁸⁸ Justice Souter’s vision is for a future in which the accumulated experience of courts will eventually bring order as similar cases beget similar results after receiving similar levels of review.¹⁸⁹ The emergence of a body of well-reasoned and fully-articulated decisional law is anticipated to make antitrust decision making easier over time.¹⁹⁰ “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule of reason analyses in case after case reach identical conclusions.”¹⁹¹

This seems fanciful at best. The rule of reason is now 100 years old and the promise of clarification through judicial application has proven to be empty.¹⁹² The rule’s purported standard is devoid of substantive

186. *Id.*

187. *Id.* at 780.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Stucke, *supra* note 128, at 1466.

content that could guide judges to apply it consistently so that patterns could emerge.¹⁹³ Not only has the Court failed to give content to this legal standard, but it has indulged in shifting the standard around in response to the economic theory *du jour*.¹⁹⁴ Consider *Cal. Dental*: The Sherman Act was already more than 100 years old when the Court made a major adjustment to the application of the rule of reason.¹⁹⁵

In fact, *stare decisis* has not been a particularly strong force of stability in any aspect of antitrust jurisprudence.¹⁹⁶ The most unsettled period of antitrust law has been within the past three decades, which have brought outright reversals of at least three longstanding antitrust rules,¹⁹⁷ and a sea of change in the policy underpinnings that the Court attributes to the statute.¹⁹⁸ Time-honored conceptions about predatory pricing have been relegated to history,¹⁹⁹ *per se* rules of equally impressive vintage have been overruled,²⁰⁰ case law precedents from the heyday of merger enforcement have been roundly repudiated,²⁰¹ and even the procedural rules for testing antitrust complaints have been upended.²⁰²

Even if antitrust rules had more staying power, experience has shown that “similar” cases do not exist when every aspect of context is allowed to be taken into account, so that the promise that similar cases will yield a coherent body of law is unattainable.²⁰³ The vast universe of economic activity takes place in infinitely varying market contexts that may arguably have different likely effects in different markets at different times. For example, a fully and transparently explained judicial condemnation of an agreement among cast iron pipe producers

193. *Id.*

194. SULLIVAN & GRIMES, *supra* note 44, at 16-19.

195. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

196. *See supra* note 6.

197. *Id.*

198. *See generally* HOVENKAMP, *supra* note 14, ch. 2.

199. Brooke Group, Inc. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

200. *See cases cited supra* note 6.

201. *See generally*, R.H. Lande, *Resurrecting Incipency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001).

202. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 573 (2007).

203. *See, e.g.*, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 8 (1979). In *Broadcast Music*, the court acknowledged that defendants had engaged in conduct that was “literally” price fixing, but found that the context required application of an analysis that was deeper and more nuanced than price-fixing cases normally involve.

representing 40% of their relevant markets in 2010 to refuse to produce products responsive to an amendment in the applicable safety code will shed no light on an agreement among 18% of aluminum can producers to do the “same thing” in 2020, let alone an agreement among patent licensors in the pharmaceutical market for certain blood pressure medications to do the “same thing” in 2050. In fact, it is not clear that any two conspiracies really “do the same thing” if all aspects of their respective contexts are weighed into the mix.

Cal. Dental itself is a case in point. There the Court managed to find reason to expect procompetitive net effects from a horizontal agreement among dentists to suppress advertising of discounts, thus requiring a “more sedulous” look than the true “quick look” analysis that had been applied by the Ninth Circuit.²⁰⁴ Prior to *Cal. Dental*, it seemed clear beyond dispute that an agreement among rival professionals to refrain from price competition by suppressing price information was subject to summary condemnation under a “quick look” analysis,²⁰⁵ and that an agreement among professionals that went further to coordinate price terms was *per se* unlawful.²⁰⁶ Yet a bare majority on the Court found the dentist’s agreement not to advertise such things as across-the-board discounts required more analysis.²⁰⁷ This is indicative of the problem. Cases cannot establish rules if they are all distinguishable on their facts.

Certainly, since *Cal. Dental* there has been no discernible trend in antitrust decisions that gives life to Justice Souter’s notion that an infinitely variable rule of reason would eventually settle into predictable pockets as similar cases begat similar analyses and results.²⁰⁸

4. *Aggravation of the Board of Trade Relevancy Problems*

Another problem with *Cal. Dental* is that it managed to further obscure a rule that was already so inclusive of relevant factors as to exclude almost nothing from consideration. *Board of Trade* instructs that the relevant evidence in a rule of reason case includes the history of the industry, its condition before the restraint was imposed and afterwards,

204. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769-71, 779-81 (1999).

205. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978).

206. *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332 (1982).

207. *Cal. Dental*, 526 U.S. at 779-81.

208. *Cal. ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1179-80, 1182-84 (9th Cir. 2010) (holding that none of the pre-existing categories of analysis could apply, and creating a new “quick-look-plus-per-se-minus” analysis).

facts that are peculiar to the business that might set the restraint on a different footing than in some other industry or business, the nature of the restraint, the purposes behind the imposition of the restraint including the problems it was intended to solve.²⁰⁹ All of this opens nearly everything to relevance. As one observer stated: “Justice Brandeis’ statement of the rule of reason in *Chicago Board of Trade* . . . has been one of the most damaging in the annals of antitrust. The statement has suggested to many lower courts that, if the analysis is under the rule of reason, then nearly everything is relevant.”²¹⁰

5. *Impairment of Settlements*

Settlement is more difficult under uncertainty about what “enquiry is meet for the case.” The substantive law of antitrust should facilitate reasonable settlements because they avoid the high costs of litigation, through trial and appeal, while vindicating the objectives of antitrust law. Most antitrust cases settle,²¹¹ but that does not mean that they settle early, or that the terms of settlement are reasonable. Indeed, the Supreme Court has expressed frustration that the huge exposures defendants face in antitrust cases can force them to pay extortionate amounts to settle weak cases just to keep them from heading into the unpredictable waters of a jury trial.²¹²

However, what the Supreme Court has not addressed are the reasons why defendants might regard those waters as riddled with reefs and shoals.²¹³ The unpredictability of antitrust litigation under the rule of reason is at least a contributor to this phenomenon.²¹⁴ In rule of reason cases counsel for each side have only a relatively weak basis for predicting how elaborate and costly the litigation will be and what outcome is most likely – both of which are much clearer in *per se* cases. Although plaintiffs may only rarely win rule of reason cases, that is cold

209. 246 U.S. 231, 238 (1918).

210. HOVENKAMP, *supra* note 14, at 225.

211. Edward D. Cavanaugh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 813 (1987) (citing Georgetown study of 2500 civil antitrust cases finding that 88.2% settled before trial).

212. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

213. The Supreme Court has also failed to allude to any empirical evidence for the assertion that extortionate settlements are a problem in antitrust cases, or that they are more particularly so in antitrust litigation than in other areas of the law.

214. *See Stucke, supra* note 10, at 1422-23.

comfort to a defendant faced with a small but unpredictable risk of enormous liability exposure. So the defendant-friendly rule of reason is in tension with one of its very objectives, leaving defendants with unpredictable outcomes and large exposures and thus actually promoting so-called extortionate settlements and prolonging litigation.

6. *Anti-Plaintiff Bias*

Plaintiffs necessarily bear the burden of proof of their case at trial. In the absence of a settlement, the variable rule of reason goes on to create problems for the plaintiff's presentation of its case: How much "enquiry is meet?"²¹⁵ A plaintiff cannot with assurance know what to allege or when to rest, since the amount of evidence that it must present in order to prove the contours of the relevant market, the defendants' market power, etc., are unknowable. *Cal. Dental* sets a trap for the unwary, and more or less assures unwitting mistakes. The Court's bias against private plaintiffs has barely been concealed, exposed by such references as "extortionate" settlements and the like. Even if one accepted the Court's apparently dim view of private antitrust plaintiffs, the rule of reason applies equally to governmental enforcement.

For example, the FTC lost the *Cal. Dental* case because it failed to prove enough about the relevant market, instead relying on the court to take a "quick look" approach since the challenged conduct involved an agreement not to advertise discounts.²¹⁶ Agreements by rivals not to compete via discount advertising seems like a familiar enough context, but the Supreme Court speculated that consumers might consume *more* dental services with such a restraint in place and on that basis required more proof than the FTC had presented.²¹⁷ Yet the Court left no sign posts that could guide future litigants.

The elephant in the room is the fact that plaintiffs rarely pursue, and even more rarely win, rule of reason cases.²¹⁸ As Posner pointed out

215. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

216. *Id.* at 769-71.

217. *Id.* at 776-78.

218. "The empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose. For example, in one recent survey of judicial resolutions of private section 2 Sherman Act claims, all of which are governed by the rule of reason, defendants prevailed ninety-seven percent of the time (335 of the 344 cases). Nearly all of the defendants' wins (313) came on motions to dismiss or summary judgment." Stucke, *supra* note 10, at 1423-24.

“[t]he content of the rule of reason is largely unknown; in practice it is little more than a euphemism for nonliability.”²¹⁹ Similarly, Lemley and Leslie observe that the “conventional wisdom is that vertical restraints evaluated under the rule of reason are essentially *de facto per se* legal since rule of reason cases are notoriously difficult for plaintiffs to win.”²²⁰ The Court’s shift away from *per se* rules toward an open-ended rule of reason is consistent with its broader pro-business agenda.²²¹ The Court’s unconcealed view is that Type I errors are generally to be preferred over Type II;²²² meaning that it is preferable to give a violator a pass than to condemn possible innocence. The rule of reason, as applied in this policy context, is generally a loss for plaintiffs, at least insofar as the rule of reason is a “little more than a euphemism for nonliability.”²²³

A scant few cases like *Polygram*²²⁴ and *North Texas Specialty Physicians*²²⁵ stand as notable exceptions, but these were cases brought by a public enforcement agency and represent stand-out exceptions to Posner’s observation that rule of reason equates generally to nonliability. Plaintiffs faced with this burden are likely to forego litigation because they “simply cannot afford” the investment in rule of reason cases.²²⁶ The litigation burden of defining relevant markets, establishing market power and proving anticompetitive marketplace effects exceeds the abilities and finances of many litigants.²²⁷ The

219. Posner, *supra* note 127, at 14.

220. Lemley & Leslie, *supra* note 19, at 1260-1261.

221. Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/19roberts.html?pagewanted=all>

222. Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010).

223. See Posner, *supra* note 126.

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

225. *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

226. *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1994).

227. William Kolasky has argued that *Cal. Dental* is “under-appreciated” and (rather optimistically) that the rule of reason works well for plaintiffs, citing the FTC’s victory in *Polygram Holdings, Inc.*, 416 F.3d 29 (D.C. Cir. 2005). See William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 85, 87 (2008). While Kolasky lays out an interesting model for applying the rule of reason, he neither cites any other rule-of-reason plaintiff victories, nor describes the rule of reason model that courts actually use. Indeed, by his own account, the court in *Polygram* came to the correct conclusion via wrong analytical avenue. *Id.* at

Supreme Court itself has acknowledged that a rule of reason inquiry in litigation imposes “the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable.”²²⁸

7. *An Analytical Critique of the Rule of Reason – Gaps and Inconsistencies*

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

First, it is not even clear when the rule of reason fully applies. Following *Cal. Dental*, it is no longer helpful to say that the rule of reason is the default,²²⁹ because there is no longer a clear delineation between that rule and *per se* illegality. All that is certain when a *per se* rule is not applicable is that some level of analysis is then required – but how much? And more importantly, in what cases must a truly full-blown case be made? Second, it is unclear whether, and at what stage of the case, a plaintiff is required to establish market power. Finally, there is no definitive distinction drawn in case law between actual and merely theoretical and conjectural effects. It is thus uncertain whether and when a party is put to the burden of proving actual effects rather than theorizing them without evidence of actual marketplace impact.

These represent enormous shortcomings. The decision to subject a plaintiff’s case to anything like a full-blown rule of reason analysis can have decisive implications for many antitrust cases, as does the imposition of a burden to establish the defendants’ collective market power.²³⁰ Conversely, if a defendant must defend by establishing that

88. In any event, the list of plaintiff successes in rule of reason cases under *Cal. Dental* is quite short.

228. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 430 (1990) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

229. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”).

230. *Stucke*, *supra* note 10, at 1425-26.

actual procompetitive virtues of offsetting value have benefitted consumers, that is a very different burden than merely presenting a theoretical case that the conduct under challenge might have a plausible tendency to foster efficiencies and consumer benefits.²³¹

These gaps cannot be blamed on *Cal. Dental*, but instead combined with the open-endedness of the *Cal. Dental* rule of reason to lend intolerable opacity and unpredictability to antitrust law. No one disputes the enormous difference in cost and complexity between a *per se* or even quick-look case and a more full-blown rule of reason case.²³² Nor ought it be argued that antitrust analysis should be structured to deter the very private enforcement that Section 4 of the Clayton Act was specifically tailored to encourage via the mechanism of trebling damages.²³³ Yet a litigant or court heading into a case that does not involve hard-core cartel activity often has no way of predicting the course the case might take, how complex or costly the case will be, nor the likelihood of success.²³⁴ It is self-evident that this state of the law inherently discourages private filings. The current doctrine governing the evaluation of restraints is thus not only unruly, but contrary to the clear intent of the law.

C. UNDER WHAT CIRCUMSTANCES DOES THE FULL-BLOWN RULE OF REASON APPLY?

Perhaps the most basic issue that lacks a consistent and comprehensive approach is the determination of what sorts of cases merit fulsome rule of reason analysis and what sorts of cases merit something more cursory. The introduction of *Cal. Dental's* sliding scale, with its obliteration of categorical analysis, makes this even more

231. In offering proof to refute the alleged anticompetitive effect of an agreement, defendants may not rely on evidence of procompetitive justifications that are found to be pretextual. *See, e.g.,* N. Cent. Watt Count, Inc. v. Watt Count Eng'g Sys., Inc., 678 F. Supp. 1305, 1314 (M.D. Tenn. 1988); *see also* Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1220 (9th Cir. 1997) (upholding jury instruction that required consideration of whether defendant's procompetitive business justifications were pretextual).

232. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430 (1990).

233. THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 167, Vol. I (Earl W. Kintner ed., 1978).

234. Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 60 (1988).

obscure, because the question is no longer simply “Rule of reason or *per se*?” but rather “Rule of reason, *per se* or something else?” Where along this infinite continuum does a case belong? This question has vexed the courts, leading them in a variety of directions.

Recently, for example, the Ninth Circuit articulated a standard of review that it dubbed “a *per se*-plus-or-quick-look-minus” analysis, “somewhere between pure *per se* and pure quick look.”²³⁵ In *California v. Safeway*, the Ninth Circuit wrestled at length with deciding whether an agreement by supermarkets to pool profits was illegal *per se* or should instead be subjected to more penetrating inquiry.²³⁶ Forty years ago the Supreme Court stated without qualification that “[p]ooling of profits pursuant to an inflexible ratio . . . runs afoul of the Sherman Act,” deeming the practice unlawful without elaboration.²³⁷ Every case to ever consider the matter had likewise condemned naked profit sharing arrangements among horizontal rivals.²³⁸ The Ninth Circuit distinguished the earlier cases on various grounds, including whether the defendants had market power and whether their arrangement was an enduring one or one of short duration.²³⁹ However, resort to these distinctions found no support in the controlling precedents.²⁴⁰ A short-lived *per se* violation is no less a *per se* violation because the irrebuttable presumption of harm has never been limited to restraints of any particular duration.²⁴¹ Moreover, the only purpose of the profit-sharing arrangement in *Safeway* was to avoid competition during labor strife.²⁴² The point was to block the labor union’s divide-and-conquer strategy by preventing any of the supermarkets from taking competitive advantage if one of its rivals was struck, and it was not.²⁴³ It is impossible to find any consumer benefit that could flow from such a temporary hiatus from price competition.

235. Cal. *ex rel.* *Brown v. Safeway, Inc.*, 615 F.3d 1171, 1180 (9th Cir. 2010), *vacated*, 633 F.3d 1210 (9th Cir. 2011), *superseded by sub nom.* Cal. *ex rel.* *Harris*, 651 F.3d 1118 (9th Cir. 2011).

236. *Id.*

237. *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 135 (1969).

238. See *United States v. Paramount Pictures*, 334 U.S. 131, 149 (1948) (profit sharing agreement a “bald effort to substitute monopoly for competition”); *N. Sec. Co. v. United States*, 193 U.S. 197 (1904); *Chi., M & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 61 F. 993 (8th Cir. 1894); *Anderson v. Jett*, 12 S.W. 670 (Ky. 1889).

239. *Brown*, 615 F.3d at 1177-80.

240. *Id.* at 1179.

241. *Id.* at 1185-89.

242. *Id.* at 1176.

243. *Id.* at 1175-76.

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

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

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

One reason, among others, that the rule of reason remains so obscure is that the Supreme Court has declined to articulate affirmative criteria for its full-blown application. Instead, it has relied on treating full-blown rule of reason as the default analysis to be applied unless the case presents certain attributes that eliminate or reduce the need to inquire into competitive effects of the alleged restraint.²⁴⁴ Where certain contextual traits surround the restraint, it is removed to some extent from full-blown review. By extension, then, the absence of these traits might require the application of a full-blown analysis.

It might be helpful if the categories of restraint that require truly full-blown analysis could be identified. The *per se* categories of horizontal price fixing, market allocations, and output limitations are

244. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.").

reasonably clear, even if the Court has obscured even these categories in cases like *BMI*. If the ends of the *Cal. Dental* spectrum were clarified, that would be an improvement.

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

a. Facially Anticompetitive Naked Restraints

One trait that removes a case from full-blown rule of reason analysis is where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”²⁴⁵ The decision to apply the *per se* rule turns on “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.”²⁴⁶ In *Cal. Dental*, the court explained that a truncated or “quick look” rule of reason analysis is appropriate in cases presenting restraints with obvious anticompetitive potential. Thus the court referred to its prior cases in which it had applied a truncated rule of reason analysis to condemn certain types of conduct summarily. These included a dentists’ concerted refusal to provide insurance companies with requested x-rays, which was deemed “a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire;”²⁴⁷ an agreement among civil engineers to refuse to discuss price terms with customers;²⁴⁸ and the NCAA’s restriction on the number of football games for which member colleges could sell television rights.²⁴⁹

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

This particular attribute has eluded consistent application because in practice observers with more than just a “rudimentary” economics

245. *Cal. Dental*, 526 U.S. at 770.

246. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (citations and quotation marks omitted).

247. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986).

248. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978).

249. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

comprehension do not seem to agree. For example, in *Cal. Dental* itself, the FTC, the Ninth Circuit, Justices Breyer, Kennedy, Stevens and Ginsburg, and the majority opinion signatories all disagreed about whether the agreement was facially invalid and on how much analysis was required to draw a conclusion. Indeed, two of the FTC Commissioners disagreed with the *per se* analysis of Chairman Pitofsky's opinion. The Commission (majority) regarded the agreement as *per se* unlawful on the basis of an unbroken line of cases treating agreements restricting price advertising as equivalent to price fixing.²⁵⁰ As Chairman Pitofsky observed: "This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*."²⁵¹ The Ninth Circuit retreated from *per se* analysis on the ground that the restraint was an ethical rule imposed by a professional society.²⁵² Given this context, coupled with the fact that a naked restriction on price advertising was involved, the Ninth Circuit concluded the "quick look" or truncated rule of reason analysis sufficed to support the FTC's ultimate condemnation of the rule. This approach also found support, since *Indiana Federation of Dentists* similarly involved a professional group's imposition of a naked restraint thus prompting quick-look review. A bare majority of the Supreme Court found "quick" was too abbreviated and thus demanded further "more sedulous" inquiry to determine whether the rule might have been competitively justified. However, in so analyzing the problem, the majority appears to have deviated from fundamental antitrust orthodoxy that a restraint cannot be defended on the ground that competition is a bad idea for a particular industry or business. The justification was that if dentists were left freely to compete with price advertising, consumers would be too unsophisticated to benefit and might on balance be harmed by the practice. Thus unfettered competition might be harmful, and a horizontal restraint to prevent the harm was sufficiently promising to require more than a quick-look review. The dissenting justices disagreed and found that the association's rule could not pass muster even under a rule of reason analysis.

Thus the Supreme Court's reliance on "rudimentary" economics understanding is misplaced. Without more guidance, this purported

250. *In re Cal. Dental Ass'n*, 121 F.T.C. 190, Docket No. 9259, op. (1996).

251. *Id.* at 79.

252. *Cal. Dental Ass'n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997).

standard fails to yield consistent, predictable outcomes in even the familiar context of price-advertising restraints. This standard for removing a case from full-blown rule of reason analysis is essentially useless in practice.

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

Another trait that has led the Supreme Court to remove a matter from full-blown rule of reason review is the absence of some measure of economic integration relating to the restraint. This is essentially the ancillary restraints rule that derives from the common law, and was made an enduring part of antitrust jurisprudence by Judge Taft in *Addyston Pipe*.²⁵³

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

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

c. Questionable Economic Self-Interest

Per se analysis has in certain cases been reserved for conspiratorial conduct that is in the economic self-interest of the conspirators. This is

253. In its most recent discussion of this approach, the Court declined to apply the doctrine to collaborative pricing by Shell Oil and Texaco in connection with the sale of gasoline to service stations out of the joint ventures the two had formed. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). The Court introduced the concept that “core activity” of a legitimate collaboration is not subject to the ancillary restraint doctrine. In its brief opinion, the Court offered no guidance for distinguishing core activity from non-core activity. It also left some confusion about why the ancillary restraint doctrine did not apply.

not a rule that has found much useful application. In *United States v. Brown University*,²⁵⁴ the Third Circuit applied a full rule of reason to an agreement among universities setting common financial aid awards for needy students. On its face, the restraint had attributes of price fixing, since the universities were plainly competing for high-quality students in the categories affected by the restraint, and fixing one dimension of their competitive efforts. Agreement on how much to “pay” these students (or discount their tuition) substantially limited the “price” dimension of this competition.²⁵⁵ The Antitrust Division had thus pursued the case as a *per se* violation akin to price fixing. The Third Circuit declined to apply the *per se* rule, noting that unlike cases such as *National Soc. of Professional Engineers v. United States*²⁵⁶ and *FTC v. Indiana Federation of Dentists*,²⁵⁷ the universities had no economic self-interest at stake.²⁵⁸ That is, in the absence of the agreement, each school would have expended the same amount on financial assistance to students. Thus, the agreement was unlike common price fixing, which alters the competitors’ economic outcomes.²⁵⁹

The Supreme Court endorsed the “self-interested” restraint distinction in *Cal. Dental*, citing *Brown University*.²⁶⁰ In a similar vein are cases declining to apply *per se* rules in the context of professional services markets. The court has adhered to the view that professions are not entirely profit-driven, so that professional conduct should generally not be condemned under *per se* rules. “The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.”²⁶¹ Thus *per se* rules are inapplicable where the economic incentives of the alleged conspirators cannot be presumed to be self-interested, because the actors are

254. 5 F.3d 658, 678 (3d Cir. 1993).

255. *Id.* at 664.

256. 435 U.S. 679 (1978).

257. 476 U.S. 447 (1986).

258. *Brown Univ.*, 5 F.3d at 672.

259. *Id.*

260. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (citing *United States v. Brown Univ.*, 5 F.3d 658, 677-78 (3d Cir. 1993) (finding full rule-of-reason analysis required where “embodied a strong economic self-interest of the parties to them”)).

261. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788-89, n.17 (1975); *see also Cal. Dental*, 526 U.S. at 773.

professionals imbued with a public interest, because the activity has overtones of charity, or for some other reason.

This criterion only has narrow application and it also lacks certainty or predictability because there are cases that are flatly inconsistent with it or at least cast doubt on its universal applicability. The presumption in *Cal. Dental* that professionals are not economically self-interested is facially implausible, and runs counter to the application of *per se* rules in *Superior Court Trial Lawyers*²⁶² and *Maricopa County Medical Society*.²⁶³ If doctors could be presumed to have less interest than average in economic self-interest it would seem unnecessary for the Department of Justice and Federal Trade Commission to promulgate an entire set of antitrust guidelines just for their industry.²⁶⁴ Self-interested restraint of competition among professionals is hardly aberrational.

Additionally, even if the absence of economic self interest could guide cases away from the *per se* rules, that still does not indicate where on the continuum of rule of reason analysis to place a restraint.

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

After 100 years, it therefore remains the case that the courts have provided no reasonably predictable framework for determining just which cases are required to be evaluated fully under the rule of reason. This ought to be regarded as a very important failing.²⁶⁵

262. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (condemning as *per se* unlawful a concerted refusal to provide legal services for the express purpose of increasing rates for those professional services).

263. *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332 (1982) (Applying the *per se* rule against price fixing to doctors).

264. U.S. Dep't of Justice and Fed. Trade Comm.'s Statements of Antitrust Enforcement Policy in Health Care (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>.

265. *Stucke*, *supra* note 128.

2. *Is Market Power an Essential Element of a Rule of Reason Case?*

Possibly the most important turn of events in a rule of reason case is when the judge decides whether a plaintiff's burden includes proof of market power, yet the case law is inconsistent as to whether and when proof of market power is a requisite element of a plaintiff's antitrust conspiracy case.²⁶⁶ Also unclear are basic matters about what sort of proof is required, how much market power is relevant and, indeed, the meaning of the term itself.²⁶⁷ These are critical issues because of the cost, complexity and inherent tilt toward defendants that is implicit in making market power an element of a plaintiff's case.²⁶⁸

It is understandable why courts sometimes require plaintiffs to establish defendants' market power as an element of their case, since antitrust is fundamentally concerned with the power of market participants to distort markets and misallocate resources. If the defendants lack the economic power to bring about anticompetitive results, a private damages case is a waste of the parties' and the public's resources, regardless of the conduct involved.²⁶⁹ There is no question that market power is in many cases a critical issue that must be resolved by the tribunal.

However, as a practical matter, proof of market power is often the single most complex and expensive part of an antitrust case.²⁷⁰ It is also

266. See Mark R. Patterson, *The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History*, 37 SAN DIEGO L. REV. 1, 46 (2000); see also Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 312 (1987).

267. See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983) ("Market power is not well suited to presentation in an adversary proceeding."); *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

268. See, e.g., Patterson, *supra* note 275 at 39 ("Given the difficulties of proving market power and even of defining a market, it is not clear that the interests of litigation are best served by requiring a showing of market power."); see also Piraino, *supra* note 33, at 1754 ("Even in recent years, plaintiffs have been reluctant to bring a rule of reason case because its evidentiary hurdles are so difficult to meet. It is particularly burdensome for a plaintiff to prove that a defendant has sufficient market power to adversely affect competition in the relevant market.").

269. The same does not hold true in criminal prosecutions. A conspiracy, once formed, violates the Sherman Act, and it is not a defense that the unlawful conspiracy would not have achieved its objectives. Moreover, the types of cases brought under the rule of reason are not prosecuted criminally.

270. See *supra* notes 128, 274.

rife with potholes for plaintiffs, and with opportunities for guilty defendants to evade liability because of the plaintiffs' burden of persuasion on the murky and contestable issues involved. Proof of market power will frequently involve detailed analysis of the proper definition of the relevant product and geographic markets;²⁷¹ the defendant's market share;²⁷² the identities and market shares of other existing market participants;²⁷³ entry conditions and trends;²⁷⁴ the identity, proximity and relative strength of potential entrants;²⁷⁵ consumer substitution and cross-elasticities of demand;²⁷⁶ supply-side substitution;²⁷⁷ as well as inferences from subjective sources such as from the internal documents of market participants and opinions of expert observers.²⁷⁸ Economics experts are easily (if expensively) hired to disagree on nearly every aspect of this jigsaw puzzle of issues.²⁷⁹ Drawing a conclusion about the ability of defendants collectively to alter

271. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 470 (1992) (“[M]arket definition generally determines the result of the case.”); *see also* Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806-13 (1990).

272. *Kodak*, 504 U.S. at 470.

273. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 829 (6th Cir. 2011); *see also* JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 8 (2d ed. 1968) (“The condition of entry . . . determines the relative force of potential competition as an influence or regulator on the conduct and performance of sellers already established in a market.”).

274. *See* *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (“The courts generally allow the defendant to rebut inferences of market power by showing easy entry conditions.”) (citing and quoting 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 532a (1995)).

275. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628 (1974) (“The sight of a particular firm ‘waiting at the market’s edge’ may emphasize the entry threat, but it is ease of entry, not necessarily an identifiable potential entrant, that limits present market power by reminding existing firms that high profits will attract outsiders.”) (citing and quoting PHILLIP E. AREEDA, *ANTITRUST ANALYSIS* ¶ 517 (1967)).

276. *See generally* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); *see also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 (1984); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962).

277. *See, e.g.*, *Carter Hawley Hale Stores, Inc. v. Limited, Inc.*, 587 F. Supp. 246, 253 (C.D. Cal. 1984); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674 (9th Cir. 1974), *cert. denied*, 429 U.S. 940 (1976).

278. Andrew I. Gavil, *After Daubert: Discerning the Increasingly fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663 (1997).

279. On the use of expert testimony in antitrust litigation, *see generally id.*

market conditions to the detriment of consumers often involves a vast theoretical and empirical undertaking, if it can be accomplished at all. “Identifying market power in the markets encountered in litigation is often difficult, and *quantifying* market power with anything approaching precision is frequently impossible.”²⁸⁰

Aside from practical concerns, the conceptual difficulties associated with proof of market power in litigation are truly legion. First, the various definitions of the term “market power” can present problems because there is no single definition that courts employ. “Market power” and “monopoly power” are often conflated in the case law. The Supreme Court has defined monopoly power as “the power to control prices or exclude competition.”²⁸¹ Controlling prices and excluding competition are two different things, and especially the latter has received little attention in the case law and it is unclear if the concept applies in a Section 1 case.

One variant of the definition based on the power to control prices was offered by leading antitrust law and economics scholars Landes and Posner in their influential 1981 article, “Market Power in Antitrust Cases.”²⁸² Landes and Posner defined market power as a firm’s power to raise and maintain prices above competitive levels without losing so many sales that it must rescind the increase.²⁸³ Their definition proved influential and has often been used by the courts.²⁸⁴ Nevertheless, that definition contains well-recognized holes. A rival that introduces a new and better product often may profitably charge prices “above the competitive levels” for existing products, but that does not normally equate to any sort of market power that antitrust ought to be concerned with. For another example, even a perfect cartel (or monopolist) faces upper limits on its ability to raise prices – the sky is never the limit. Put somewhat differently, a monopolist can appear to face competition from products that would not be regarded as substitutes at competitive prices, but those products might nevertheless draw consumer substitution

280. HOVENKAMP, *supra* note 124, at 80.

281. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 426 n.26 (1956).

282. Landes & Posner, *supra* note 284, at 939; *see also* 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 501 (1985).

283. Landes & Posner, *supra* note 284, at 937.

284. *See, e.g.*, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 695 (7th Cir. 2006) (citing Landes & Posner, *supra* note 284).

simply because of the monopoly pricing: thus the monopolist appears not to be a monopolist precisely because it is one.²⁸⁵ Thus the definition yields both false positives, treating a new entrant with an innovative product's price advantage as having its market power, and false negatives, such as where a monopolist cannot raise prices simply because they are already at the monopolist's profit-maximizing levels. More often, though, the problem with the Landes/Posner definition is a more basic practical one: just what *is* the competitive price for a widget? The plaintiff's case presumes that actual prices have been inflated by collusion, but proving the "but for" competitive price that would have existed in the absence of collusion is likely to be theoretical and mostly conjectural.

As an alternative to power over price, market share thresholds have often been used as a marker for market power, and courts frequently treat high market shares as equating to market power.²⁸⁶ However, even if there were consensus about what percentage constitutes market power, market shares are simply a historic measure of past sales and not necessarily accurate in predicting the power of sellers to collude and control prices on current or future transactions. Even a 100% market share is not decisive: for example, presumably the last umbrella repair shop in Waterbury, Connecticut had a 100% market share until it too finally went out of business, but it probably had no dangerous power over consumers just before it did. Yet courts often rely heavily on market shares as determinative of market power,²⁸⁷ and the federal agencies' various articulations of antitrust law also emphasize market share calculations as supporting prima facie or preliminary assessments of market power, although courts and agencies explicitly also take other

285. This is commonly referred to as the "Cellophane Fallacy" based on the Supreme Court's erroneous analysis in *United States v. E.I. DuPont de Nemours*, 351 U.S. 377 (1956). *See, e.g.*, RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 128 (1976) (discussing the so-called "cellophane fallacy"); *see also* *United States v. Eastman Kodak Co.*, 63 F.3d 95, 103-05 (2d Cir. 1995).

286. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 470 (1992) ("Because market power is often inferred from market share, market definition generally determines the result of the case."); Pitofsky, *supra* note 279, at 1806-13.

287. *See, e.g., Eastman Kodak*, 504 U.S. at 470 ("Because market power is often inferred from market share, market definition generally determines the result of the case."); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) ("Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.").

factors into account.²⁸⁸ Market share as a marker for market power sometimes presents no practical problems, but in other cases it does. For example, a market during its research and development stage has by definition no sales from which to make such a calculation.

As another alternative, some have advocated that a “definition keyed to elasticity of demand is more accurate and comprehensive than any alternative.”²⁸⁹ Economic theory indicates that firms in competitive markets will price at levels where demand is elastic. Elasticity of demand takes into account the willingness of consumers to switch away from the seller’s products in response to price increases.²⁹⁰ However, even adherents of this approach, as a matter of theory, concede that it is often not a practical measure in the context of litigation, which drives the matter back to more observable measures that are less theoretically sound. Because “direct measurement of elasticity will often not be possible, surrogates are used and are important. The most widely used surrogate measure of market power is to . . . examine market shares, entry barriers and potential competition.”²⁹¹ Furthermore, to avoid the problem of the Cellophane fallacy, cross-elasticities need to be measured against a theoretical “competitive market price,” which is a speculative matter at best.

There are also other ways in which market power can be established, most notably by direct evidence.²⁹² The point here is not to debate the most practical and theoretically sound definition of market power for purposes of Section 1 litigation, but merely to indicate that if proof on this issue is required for a particular plaintiff’s case, it is far

288. ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS ¶ 3.33 (F.T.C. & U.S. Dep’t of Justice Antitrust Div. 2000) (“In assessing whether an agreement may cause anticompetitive harm, the Agencies typically calculate the market shares of the participants and of the collaboration.”); 1992 HORIZONTAL MERGER GUIDELINES § 1.4 (F.T.C. & U.S. Dep’t of Justice Antitrust Div.). See *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) (“[M]arket share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.”).

289. See, e.g., SULLIVAN & GRIMES, *supra* note 44, at 29.

290. See *Eastman Kodak*, 504 U.S. at 469 (“[T]he extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i. e., the “cross-elasticity of demand.”)

291. See SULLIVAN & GRIMES, *supra* note 44.

292. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

from clear just what the plaintiff is supposed to prove or how he is supposed to prove it. In some cases this will not matter, such as where the defendants obviously have exerted control over the market through collusion. In many other cases it will be decisive and yet elusive.

It seems a simple enough question: Does a rule of reason plaintiff need to prove market power? 100 years of jurisprudence has failed to deliver a coherent answer. Although there are arguments for and against such a requirement, leaving the matter unsettled undermines antitrust as a legal regime by deterring meritorious claims when litigation costs cannot be predicted with reasonable certainty and by undermining the rule of law.²⁹³

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

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. *Whether the businesses involved have market power is a further, significant consideration* (emphasis added).²⁹⁴

Does this mean that a plaintiff in a vertical restraints case is required to prove that the defendants had market power, or not? Market power is a "significant consideration" among other "factors," which suggests that proof is not required, but may be merely useful. Given the cost and complexity of introducing this issue into all vertical restraints cases, this is not the clearest or most desirable way to leave the matter.

In *Cal. Dental*, the Court's most expansive recent application of the rule of reason, neither the majority nor Justice Breyer's dissent sheds any light on this issue. In his dissent, Justice Breyer analyzed the dental association's ban on price and quality advertising under "a rule of reason" and identified as one of the four "classical, subsidiary antitrust questions" whether the parties have enough market power to make a

293. Additional litigation burdens for cases requiring proof of market power are also well-known. Defining product and geographic dimensions of competition is, again, a complex theoretical and evidentiary matter on which paid experts will disagree.

294. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007) (emphasis added) (quotations and citations omitted).

difference. However, when he approached that issue, he expressed some uncertainty about whether market power is really an element of a rule of reason case, instead stating: “*I shall assume* that the Commission must prove one additional circumstance, namely, that the Association’s restraints would likely have made a real difference in the marketplace.”²⁹⁵ He cites a solitary authority in support of this assumption.²⁹⁶ The cited authority hardly supports the notion that proof of “market power” is a requisite element of a rule of reason case, but instead observes that proof is generally required of the defendants’ “significant role” in the market, but also observing that “what constitutes sufficient proof for this purpose will vary enormously...”²⁹⁷ Thus this cite was presumably in support of Justice Breyer’s own doubts about whether market power is indeed a requisite element of proof in a rule of reason case, and thus the assumption for rhetorical purposes. Proceeding from this assumption, Justice Breyer easily found market power, citing from the record evidence that the association had a market share exceeding 90% in one region, and generally over 75% throughout the state of California and that there were high entry barriers.²⁹⁸

In contrast to Justice Breyer’s dissent, the majority paid almost no attention to the issue of market power. The opinion recited the ALJ’s determination that market power was not shown attrial but did not need to be,²⁹⁹ the Commission’s contrary finding that market power was established, a dissenting Commissioner’s finding that market power was not shown, and the Ninth Circuit’s conclusion that substantial evidence supported the Commission’s finding of market power.³⁰⁰ The majority opinion made no selection among these diverse views as to whether market power had in fact been established by the FTC, or, more importantly, whether it needed to be established.

The very fact of this disagreement among so many justices (the Court was split five-to-four on the appropriate mode of antitrust analysis) in the *Cal. Dental* litigation is not surprising when one considers that the Supreme Court has never unequivocally established

295. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 782, 788 (1999) (emphasis added).

296. *Id.* (citing AREEDA, *supra* note 2 ¶ 1503)

297. *See* AREEDA, *supra* note 2 ¶ 1503.

298. *Cal. Dental*, 526 U.S. at 782.

299. *Id.* at 762.

300. *In re Cal. Dental Ass’n*, 121 F.T.C. 190, 272 (March 25, 1996); *Cal. Dental Ass’n v. FTC*, 128 F.3d 720, 725, 729-30 (9th Cir. 1997); *Cal. Dental Ass’n v. FTC*, 526 U.S. at 762-63.

whether market power is or is not an essential element of a rule of reason case. (It is of interest, of course, that so many disagreed not only as to whether the issue needed resolution, but also on how it came out.)

Lower courts and the federal agencies have thus taken disparate views. Some courts have seized on market power as a surrogate for proof of actual anticompetitive effects, citing language to that effect in *FTC v. Indiana Federation of Dentists*.³⁰¹ There, the Supreme Court was adjudicating a concerted refusal by dentists to provide certain services, which the Court found to be a “naked” restraint but subject to some degree of rule of reason analysis in light of the professional context. The extent of rule of reason analysis, however, was slight, or as the Court put it, “not a matter of any great difficulty.”³⁰² In that particular context, the Court stated:

Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, “proof of actual detrimental effects, such as a reduction of output,” can obviate the need for an inquiry into market power, which is but a “surrogate for detrimental effects.”³⁰³

The lower courts are confused by this. Some, but not all, lower courts have taken this to mean that in any case in which anticompetitive effects must be shown, proof of market power is an alternative method of proof, rather than an independently required element of plaintiff’s case. For example, in *United States v. Brown University*,³⁰⁴ the Third Circuit took the view that once plaintiff has established anticompetitive effects or market power, the burden then shifts to the defendant “to show that the challenged conduct promotes a sufficiently pro-competitive objective.”³⁰⁵ The market power alternative is likely to dominate in courts that follow this rule. Courts have recognized that the inability to prove actual anticompetitive effects is not uncommon. As Professor Areeda observed, “[e]ven an elaborate trial will seldom enable the tribunal to reach confident judgments about the past or future. We cannot realistically hope to know and to weigh confidently all that bears on competitive impact.”³⁰⁶ However, the alternative mode of proof at

301. 476 U.S. 447, 460-61 (1986).

302. *Id.* at 459.

303. *Id.* at 460 (citing and quoting AREEDA, *supra* note 2, ¶ 151).

304. 5 F.3d 658 (1993).

305. *Id.*

306. AREEDA, *supra* note 2, ¶ 1500.

least allows for the possibility of avoiding the complex theoretical and evidentiary issues involved in proof of the contours of relevant markets and the defendant's power.

The Second Circuit has devised a different approach that defers the market power issue until (at least) after the defendants have countered plaintiff's proof of anticompetitive effects with their own evidence of procompetitive offsetting benefits.³⁰⁷ At that point: "the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition. Typically, the starting point is to define the relevant market . . . and to determine whether the defendants possess market power in the relevant market."³⁰⁸ However, even then the Second Circuit acknowledges that "the precise role that market power plays in the rule of reason analysis is unclear."³⁰⁹ Indeed, another Second Circuit case endorsed an entirely different analysis that puts proof of market power at the very beginning of rule of reason proof:

For the government to prevail in a rule of reason case under Section 1, the district court concluded, and the parties do not argue otherwise, that the following must be shown: As an initial matter, the government must demonstrate that the defendant conspirators have 'market power' in a particular market for goods or services. Next, the government must demonstrate that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. Once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint.³¹⁰

307. Ark. Carpenters Health & Welfare Fund v. Bayer AG (*In re* Ciprofloxacin Hydrochloride Antitrust Litig.), 544 F.3d 1323, 1332 (Fed. Cir. 2008).

308. *Id.* at 1332 (citing *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (internal citations omitted)).

309. *Id.*; see also *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993) (stating that "[t]he precise role that market power plays in rule of reason analysis of horizontal combinations or conspiracies is a matter of some dispute").

310. *United States v. Visa USA, Inc.*, 344 F.3d 229, 238 (2d Cir. 2003), accord *New York by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 871 (E.D.N.Y. 1993) (indicating that the purpose of condemning a restraint is only served where it has the potential to bring about adverse market-wide harm to consumers).

Thus the Second Circuit, which did not take issue with the trial court's approach in *Visa*, appears not to have resolved the matter.

Still other Circuits take additional and diverse approaches. The Seventh Circuit has established a rigid "rule that substantial market power is a threshold requirement of all rule of reason (as well as some per se) cases."³¹¹ The D.C. Circuit also appears to follow this approach. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, Judge Bork wrote:

We might well rest, therefore, upon the absence of market power as demonstrated both by Atlas' 6% national market share and by the structure of the market. If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself.³¹²

Judge Bork's analysis in *Rothery Storage* has been taken to establish a "safe harbor" rule under which a defendant's conduct will under no circumstances be condemned in the absence of proof of market power, a position advocated by some commentators.³¹³

The Seventh Circuit approach finds support from the American Bar Association Section of Antitrust law, whose Sample Jury Instructions require all plaintiffs to prove the relevant market, and also provide: "In determining if the restraint here substantially harmed competition you should consider defendant's market power and how much of the relevant market was affected by defendant's restraint."³¹⁴ By requiring the jury to find that plaintiff proved a relevant market, and also requiring it to consider the defendant's market power, the Instructions essentially

311. *Hardy v. City Optical Inc.*, 39 F.3d 765, 767 (7th Cir. 1994) (citing *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 673 (7th Cir. 1992); see also *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984) (plaintiff's showing of defendants' market power is a prerequisite to recovery).

312. 792 F.2d 210, 221 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

313. See Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Agreements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 ANTITRUST L.J. 579, 606 (1993) (advocating for the "safe harbor" approach).

314. SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES A-6 (A.B.A. 1999 ed.); see also *id.* at A-7, n.2 (noting that "'the meaning of market power' in rule of reason cases has not been clearly explained or defined by the Supreme Court"). The authors do not, however, question whether proof of market power, on some definition or other, is required.

import a market power requirement for rule of reason cases. Notably, other elements of proof are non-mandatory, such as that the jury “may consider defendant’s purpose in imposing the restraint.”³¹⁵

The result: Courts and commentators have, after 100 years, failed to coalesce around any single view, and some Circuits appear to have expressed no view at all.³¹⁶

3. *Theoretical or Actual Effects as a Business Justification Defense?*

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

The ultimate and separate issue under *any* antitrust review is the restraint’s *actual net* effects – does the restraint actually impair competition and harm consumers.³¹⁷ Actual effects and plausible ones ought to be kept separate but they have become muddled in antitrust decisions. The theoretically plausible effects arguments ought to be front-loaded in the litigation, and merely to serve the court as it establishes how much inquiry is required to resolve the case. Proof of actual anticompetitive and procompetitive effects should be reserved for

315. *Id.* at A-7.

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

317. The only exception is that *per se* rules allow for the possibility that conduct without anticompetitive effects will at times be condemned. *See* *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

later on because it makes no sense to require that parties to prove the ultimate issue in the case merely to determine how much they must prove.

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

[B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered *whether the effects actually are anticompetitive*.(emphasis added)³¹⁸

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

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

318. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 775 (1999) (emphasis added).

theoretical basis for the anticompetitive effects and . . . whether the effects actually are anticompetitive.”³¹⁹

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

As thus structured in *Cal. Dental*, to determine whether a quick look is “meet for the case,” plaintiff presents a theory of competitive harm, defendant may counter with a theory of competitive justification or offsetting efficiencies, and then plaintiff must proceed with an evidentiary presentation to establish actual anticompetitive effects, possibly followed by defendants’ factual rebuttal. The parties are thus drawn into a potentially full-blown rule of reason case that is triggered by a purely theoretical, abstract and conjectural defense.

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

III. THE FTC’S ATTEMPT AT REFORM – THE “INHERENTLY SUSPECT” FRAMEWORK

The FTC has devised a model for the rule of reason that begins by categorizing the challenged restraint, and then proceeds according to a decision tree based upon that categorization. The analysis derives from cases dating as far back as 1988,³²⁰ and finds its first full exposition in *PolyGram Holdings*.³²¹

Under *PolyGram Holdings*, the first step in the analysis involves the determination of whether the alleged restraint is one that is

319. *Id.*

320. *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

321. *See* 416 F.3d 29 (D.C. Cir. 2005).

“inherently suspect.”³²² This determination is focused on proof of the agreement itself rather than its effects, which are presumed based upon the nature of the restraint. A restraint is categorized as inherently suspect if, “based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition.”³²³ Unlike *per se* offenses, inherently suspect conduct is subject to a rebuttable presumption of illegality. Thus, the categories of conduct that may be deemed to be inherently suspect are not limited to the narrow categories of price fixing, market allocations and group boycotts. However, courts that have followed the FTC’s framework have described the classes of “inherently suspect” conduct as bearing a “close family resemblance” to *per se* offenses. Thus, the particular conduct that has fallen under this approach has included an agreement between joint venturers not to price compete on related products outside the joint venture for a period leading up to the venture’s own product launch;³²⁴ coordination of bidding to payment plans by independent physicians;³²⁵ and a multiple listing service rule restricting the listing of limited-service options and excluding discount listings from default search results.³²⁶

If the restraint is so characterized, the next step requires the defendant to rebut the presumption of illegality by establishing a plausible and legally permissible justification. This requires proof that either the context of the particular market in question deflects the presumption that would normally apply, or that there are offsetting competitive benefits flowing from the restraint. If defendants offer such a rebuttal, the court (or FTC) can either reject it on its face if the tribunal “can confidently conclude, without adducing evidence, that the restraint very likely harmed consumers.”³²⁷ Alternatively, the plaintiff can provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. Finally, the defendants can produce evidence that consumers are not harmed at all or that the restraint’s net effects are competitively virtuous.³²⁸

322. *Id.* at 32-33, 35-36 (citing *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549 (1988)).

323. *Id.* at 36.

324. PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005), *aff’g* *In re* Polygram Holding, Inc., No. 9298, 136 F.T.C. 310 (2003).

325. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008), *aff’g in part* *In re* N. Tex. Specialty Physicians, 140 F.T.C. 715 (2005).

326. *In re Realcomp II, Ltd.*, F.T.C. Docket No. 9320 (Oct. 30, 2009).

327. *Id.*

328. *Id.*

What is useful in the FTC's "inherently suspect" mode of analysis is that for certain rule of reason cases it provides an avenue to resolve claims without resort to litigation over market effects, which is often speculative, indeed generally inherently so. The proof of marketplace impact is tested with so-called "but-for" analysis, which requires the fact-finder to weigh the prognostications of competing hired experts about the world as it would have been absent the alleged restraint. This aspect of antitrust litigation is high-cost, low-return. Where a claim falls short of suitable application of a *per se* rule, the "inherently suspect" model allows the court to weigh the defendants' proffered justifications against the inherent anticompetitive effects.³²⁹

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

There are frailties, however, with the FTC's "inherently suspect" framework. First, it is limited to restraints that are so obviously offensive as to be arguably *per se* violations. The agreement in *PolyGram* not to discount or advertise competing products that were not part of the joint venture was the sort of joint venture spillover collusion that the D.C. Circuit observed "looks suspiciously like a naked price fixing agreement between competitors."³³⁰ The agreement in *Realcomp II* had no apparent purpose other than to impair innovative competition from discount providers of real estate brokerage services. One element of the FTC's case, for example, was that the Realcomp members' rule imposed a "minimum service requirement" which directly eliminated competition along an important dimension of consumer choice with the obvious potential for forcing more services on them at higher cost

329. *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 32-33 (D.C. Cir. 2005).

330. *Id.* at 37.

(which was not surprisingly found to have been the intent).³³¹ Thus, “inherently suspect” as a category has in its quite limited experience applied a truncated analysis only to conduct that might plausibly be condemned without any analysis at all.

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

Here, for completeness, we address all three of these modes of analysis. Moreover, and perhaps more significantly, although it is convenient to treat each of these modes of analysis separately, the Court’s decisions, particularly *California Dental*, also make clear that all of these forms of analysis are simply different means to pursue the same ‘essential inquiry. . . - whether or not the challenged restraint enhances competition.’³³²

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

331. *In re Realcomp II, Ltd.*, F.T.C. Docket No. 9320 op., 27 (Oct. 30, 2009).

332. *Id.* at 20 (quotation marks omitted).

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

IV. A PROPOSAL FOR REFORM

There are three steps that the Supreme Court (or Congress) could take to alleviate the problems that have been identified with the rule of reason. First, *Board of Trade* should be abandoned. Its articulation of the rule of reason standard is too open-ended to guide courts through the maze of issues it includes as relevant to antitrust conspiracy analysis. Second, *Cal. Dental* should also be overruled as setting an unworkable standard, indeed as having abandoned standards altogether. Finally, the Court should return Section 1 to categorical analysis. If the categories of "per se," "truncated or quick look," and "full-blown" are deemed too likely to generate false outcomes, then the solution is not necessarily to abandon all hope of predictability and transparency in antitrust law. Instead, the courts should begin the task of generating categories that work.

A. ABANDONING *BOARD OF TRADE*

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

There is no particular reason why the articulation of the rule of reason in this one case should be left in place. The Court has not hesitated to repudiate what it comes to regard as ill-advised articulations of legal standards, however well-worn they may be. In *Bell Atlantic*

Corp. v. Twombly,³³³ the Court repudiated the time-honored language that had summarized the notice pleading standard from *Conley v. Gibson*.³³⁴ The language from the *Conley* decision that drew the *Twombly* court's particular consternation was its most frequently quoted standard for evaluating a complaint under Rule 8:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.³³⁵

That “no set of facts” language had been relied in the vast majority of published rulings on motions to dismiss federal complaints.³³⁶ The Court in *Twombly* not only adjusted the standards for notice pleading, but explicitly denounced and “interred” its language: “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough”³³⁷

Any legal standard should at a minimum be articulated with sufficient clarity to guide the conduct of those who are subject to its requirements. *Board of Trade* does no such thing. It instead invites judicial inquiry into a nearly limitless array of obscure factors, it offers no prescription for how any of those ought to be weighed, and it has failed after more than ninety years to yield consistent answers to some of the most basic questions presented in Section 1 litigation, and it has no discernible scholarly support. To the contrary, the Court has ignored a steady drumbeat of criticism of this precedent.³³⁸ It has been “questioned and criticized” long enough.

B. OVERRULING *CAL. DENTAL*

If scholars agree that *Board of Trade*’s articulation of the rule of reason is confusing, there ought to be at least an equal consensus that *Cal. Dental* only made matters worse. It too should be discarded insofar

333. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

334. *See Conley v. Gibson*, 355 U.S. 41, (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

335. *Id.* at 45-46 (emphasis added).

336. A LEXIS search of *Conley*’s “no set of facts” language yields in excess of 3,000 cases.

337. *Twombly*, 550 U.S. at 562.

338. *See supra* text accompanying notes 124-128.

as it lays out an ill-conceived burden shifting process, and also as to the empty standard it prescribes for determining how much of an inquiry is appropriate in antitrust cases under Section 1. Flexibility in antitrust analysis has its value, but that value is not limitless and nor should the flexibility of substantive standards be limitless. An “enquiry meet for the case” goes too far in the direction of devoiding the rule of reason of any standard whatsoever. Along with “no set of facts” and the liturgy from *Board of Trade*, “an enquiry meet for the case” should be interred.

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

As Professor Stucke has argued, the rule of reason does not even comply with rule of law standards and *Cal. Dental* actually aggravated matters.³³⁹ As Stucke points out, the rule of reason undermines the rule of law in the context of antitrust by providing market participants with inadequate advance assurance about how the power of government will be exerted upon them.³⁴⁰ *Cal. Dental* moves the rule of reason further from rule of law norms by obscuring until after the fact the legal

339. Stucke, *supra* note 10.

340. *Id.* at 1422-29, 1446-60.

standard that will apply to conduct. Conduct that might be found to be permissible under one level of review can easily be condemned under a more stringent one, as the tortured path of the litigation in *Cal. Dental* itself makes clear. An “enquiry meet for the case” amounts to *ex post facto* regulation because what is “meet” is indeterminate until the conduct has already been engaged in; until it gets evaluated by a tribunal. Thus the substantive standard of review announced in *Cal. Dental* ought to be repudiated.

The procedural structuring of civil antitrust litigation should also achieve predictability, administrability and fairness in the resolution of cases. *Cal. Dental* achieves none of these ends. It’s shifting of an unspecified evidentiary burden to the plaintiff in response to defendants’ purely theoretical articulation of a plausible and conjectural justification makes no sense as part of a litigation process for determining what the evidentiary burdens of the parties should be. For one thing, it is far too easy for defendants to articulate some sort of efficiency justification that *might have* had something to do with their collusive conduct. The litigation process becomes unjustifiably skewed if the plaintiff must bear the burden of adducing evidence sufficient to show “actual anticompetitive effects” – possibly before pre-trial discovery has even proceeded.³⁴¹

Cal. Dental and the Court’s recent aversion to “false positives” have made perfection the enemy of the good. Recall Areeda’s admonition that “[e]ven an elaborate trial will seldom enable the tribunal to reach confident judgments about the past or future. We cannot realistically hope to know and to weigh confidently all that bears on competitive impact.”³⁴² Moreover, from the court’s perspective, the whole point of limiting rule of reason evidence is to advance the efficient use of judicial resources. That is not the result of *Cal. Dental*’s process. Thus from a procedural vantage point, as well as the substantive one, this decision causes mischief and should be overruled.

C. RESTRUCTURING THE RULE OF REASON

The rule of reason should be reinvigorated in the interest of both predictability and the underlying social value of antitrust enforcement. The ultimate substantive law standards of conduct are not in doubt: Section 1 prohibits private non-immune conduct that restrains

341. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 775 (1999).

342. *AREEDA*, *supra* note 2.

competition more than it promotes it. This substantive standard should equate to, or at least conform quite closely to, the results of litigation under the rule of reason. That is, conduct that, on balance, promotes competition should be adjudicated as lawful, and conduct that, on balance, harms competition should be adjudicated as unlawful. That the current rule of reason is widely regarded as “euphemism for non-liability”³⁴³ indicates just how poorly the rule performs in promoting the value of antitrust. At a time that has witnessed an historic explosion of global adoption of antitrust as a legal paradigm, the United States has managed to undermine its own framework by eroding any content that the rule of reason ever had, while subjecting nearly all concerted activity to this unguided evaluation. That a reasoned argument has been made that the rule of reason does not even live up to the modest demands of the rule of law indicates just how little predictability the rule of reason provides.

There needs to be a simplified, consistent and predictable substantive legal framework for Section 1 that is capable of sorting good or neutral conduct from bad in an administrable manner. The demise of categorical analysis under Section 1 has made this impossible. It thus stands to reason that categorical analysis needs to be restored. It is no answer to say that the “rigid” categories of yesterday yielded false positives. Not only is there no empirical evidence to support that contention, but *every* rule of law is capable of some mischief – which is not to say laws should be abandoned.

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

The *Per Se* Illegal Category (Irrebuttably Presumed Anticompetitive). The *per se* category includes naked horizontal restraints on price, output, innovation and market access.

- a. These require no inquiry into market context or effects, and are irrebuttably presumed to be illegal.
- b. Defendants should be able to challenge the characterization of their conduct as falling into one of these *per se* forbidden categories in an orderly, predictable fashion. For example,

343. Posner, *supra* note 126, at 14.

the wisdom of the *BMI* decision³⁴⁴ could be accommodated by allowing defendants to articulate (as was done in that case) how the restraint benefits consumers in a way that cannot be achieved via other less restrictive alternatives. Sufficient proof on this point should divert the case to the “inherently suspect” category below.

The Inherently Suspect Category (Rebuttable Presumption of Illegality). Inherently suspect horizontal restraints include conduct similar to *per se* offenses in joint venture, league sports, and professional contexts.

- a. This category should follow the framework set out in *PolyGram*³⁴⁵ without the unnecessary and duplicative resort to more complex modes of analysis applied in *Realcomp II*.³⁴⁶ These restraints are rebuttably presumed to be anticompetitive, subject to defendants’ proffering sufficient, non-pretextual justifications to show net procompetitive effects.
- b. Market definition, market power and anticompetitive effects are irrelevant to this mode of analysis.

Presumptively Lawful Category (Rebuttable Presumption of Legality). In the modern economic context, it is likely that most interaction among rivals does not adversely affect the marketplace, and much collaboration is essential for competition to exist. Standard setting (including safety, interoperability and other standards established with horizontal collaboration), patent licensing, collaborative research and development are just a few examples.

- a. Conduct falling into this category should be presumed lawful, and the burden should thus shift to the plaintiff to establish that the agreement is anticompetitive.
- b. Courts should clarify that proof of anticompetitive effects can be established alternatively by proof of market power (and thus relevant market definition) or direct proof so that not all cases will be weighed down with the complexities of cross-elasticity analysis implicit in market power evidence.

***Per Se* Lawful Category.** Commentators have toyed with the idea that courts should develop a category for conduct that is irrebuttably

344. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

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

346. *In re Realcomp II, Ltd.*, F.T.C. Docket No. 9320 (Oct. 30, 2009).

presumed to be lawful, although the argument has been limited to vertical restraints.³⁴⁷

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

1. *A Partial Response to Lemley and Leslie*

Lemley and Leslie have argued that categories are ill-suited to antitrust analysis and should be largely abandoned altogether; that “enthusiasm for taxonomy has run amok in antitrust law, with pernicious consequences.”³⁴⁸ Aside from a very small category of *per se* offenses, they argue that categorical analysis has infected antitrust law with a strong tendency toward error. The central concern behind their argument is consistent with the thrust here, which is that antitrust law has become intolerably muddled. Yet they come to a seemingly opposite conclusion and advocate jettisoning categories from the rule of reason.

Their argument starts from the questionable premise that categories continue to dominate in antitrust notwithstanding *Cal. Dental*;³⁴⁹ and they then argue that categorical analysis in antitrust has become so incoherent that it should be even more thoroughly abandoned. In

347. See, e.g., Richard A. Posner, *The Next Step In The Antitrust Treatment Of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

348. Lemley & Leslie, *supra* note 19, at 1210.

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

particular, the dividing line between “quick look” and “full blown” rule of reason analysis is in their view untenable:

The evolution of quick look analysis has made matters worse, as confusion over whether a challenged restraint falls within the “quick look” or requires “full-blown rule of reason analysis” introduces significant uncertainty into antitrust litigation.³⁵⁰

Furthermore, they argue, categorical analysis is subject to manipulation by plaintiffs, who try to force conduct into a forbidden category; and (relatedly) categorical analysis also produces false positives, or condemnation of benign conduct. At the heart, their objection to resort to categories in antitrust analysis is that it may lead to error, through manipulation or otherwise. “When courts focus on categorization instead of competitive effects, it increases the probability of mistakes.”³⁵¹

Lemley and Leslie then argue that antitrust law should operate much like tort negligence law, relying on broad standards rather than categories. The standard that they argue should apply is whether competition is harmed by the alleged conduct. They would therefore place substantial or even decisive weight on the court’s determination of market power, on the ground that an absence of market power signals an inability for the defendant or defendants to adversely affect competition or consumers. Their conclusion that antitrust law is now muddled is consistent with the argument here, but their solution seems flawed.

First, it is doubtful whether Lemley and Leslie are correct in asserting that categorical antitrust analysis within the rule of reason survived *Cal Dental*, which (as they acknowledge) explicitly moved in another direction: “The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” Most observers agree that the Court dismantled the boundaries between categories of conduct in favor of a continuum; that “quick look” and “full blown” are merely part of a continuum between *per se* illegality at one end and efficient or competitively neutral conduct at the other. Indeed, Lemley and Leslie are virtually alone in attacking *Cal Dental* as having *maintained* categories of analysis. Prof. Hovenkamp, for example,

350. *Id.* at 1225 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007)).

351. *Id.* at 1260.

concludes that “[i]n its *California Dental Association* . . . decision the Supreme Court observed that there is no bright line between per se and rule of reason analysis, but rather a continuum.”³⁵² The lower courts have also understood the Supreme Court to have shifted rule of reason analysis to a continuum. In *PolyGram*, for example, the Court explained that the categories of analysis courts refer to as “per se,” “quick look” and “rule of reason” do not represent discrete categories of analysis, but rather define a continuum:

It would be somewhat misleading, however, to say the “quick look” is just a new category of analysis intermediate in complexity between “per se” condemnation and full-blown “rule of reason” treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum.³⁵³

More importantly, even if they read *Cal. Dental* correctly, Lemley and Leslie seem to understate the problems of moving antitrust to a broad standards approach like negligence law. Virtually every problem they identify as stemming from the application of categories in antitrust law becomes aggravated by shifting to a standards approach. Their core concern that antitrust categorical analysis is prone to uncertainty and shifting standards seems odd to address by replacing categories of review with none. Yet the more obscure antitrust law becomes, the more (not less) likely that courts will misapply the law. A review that is “meet for the case” provides no basis for businesses to conform their conduct to the law’s requirements, or for judges and juries to render consistent and predictable adjudications.

The authors’ reliance on tort law as a model for antitrust also seems misplaced. Negligence law, unlike antitrust law, is state common law, with standards that are responsive to local community norms of behavior. In a negligence trial, jurors selected from a pool of local residents are asked to judge a defendant’s conduct using the “reasonable person” standard as their guide. Lemley and Leslie argue that this

352. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 116 (2005).

353. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005); *see also* *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (stating that rule of reason and *per se* modes of analysis are “best viewed as a continuum, on which the ‘amount and range of information needed’ to evaluate a restraint varies depending on how ‘highly suspicious’ and how ‘unique’ the restraint is.”).

“reasonableness” standard can also work in antitrust cases. But negligence law is to some unavoidable and desirable extent local and responsive to current customs.³⁵⁴ If a lot of people locally engage in conduct of a certain sort, such as shooting guns to celebrate New Year’s Eve, a local jury is unlikely to find that conduct unreasonable. Similarly, as people become accustomed to talking on telephones while walking down the street, such customs which at one time would have been thought bizarre become normal and acceptable. Tort law adopts both to these local standards and to evolving norms more generally. Antitrust standards are supposed to work differently. Customs, particularly local ones, are not supposed to set antitrust standards. Even if (as was at one time the case) many producers of hardwood flooring operated in cartels with rivals, that would not redeem the conduct or have any admissible impact on the antitrust evaluation of the conduct. “Reasonableness” in antitrust law sets neither localized standards nor ones that bend to popular behaviors. There is no valid reason to submit the national economy to such a mosaic of differing and changing value schemes that may be found in different regions or depending on current business practices. Instead, antitrust sets standards according to the objective economic consequences of conduct.

Finally, their reliance on a market power screen to prevent error ignores the great problems associated with proof of market power in antitrust cases. Their legitimate concerns about error in antitrust adjudication are poorly addressed by relying on juries or even lay judges to define relevant markets accurately enough. Furthermore, proof of market power more than any other single issue raises the cost of litigation. So while in an ideal sense it would be preferable to screen out cases where defendants lack the ability to do any harm, the practical ability of courts to do that is limited, reaching questionable results at enormous cost.

354. See DAN B. DOBBS, *THE LAW OF TORTS* 395 (West 2000) (“Customs of a society at any given time are often important in tort law . . . Courts sometimes consciously depart from the community’s standards, as where the Constitution demanded an end to segregated schools. But law follows as often as it leads, so courts sometimes show a strong reluctance to depart from strong community customs or practices.”).

CONCLUSION

Outside the *per se*/rule of reason dichotomy, antitrust law should develop categories of analysis that are more, rather than less, definite. The rule of reason has never done this, and, as it is currently understood, is at a historic nadir. The soft dichotomy that once existed between “full blown” and “quick look” rule of reason analysis was never enough. However, instead of abandoning the cause of clarification, courts should embark on a process of refining categories of analysis based on presumptions and shifting burdens of proof.

The rule of reason never worked well and has been subject to nearly uniform criticism by scholarly observers. Its expanded role via reversals of *per se* rules, coupled with the abandonment of categorical analysis heralded by *Cal. Dental*, have only made matters worse. The courts should adopt a scheme of presumptions, such as the one outlined here, to bring some degree of order to antitrust litigation and analysis. Categories of conduct should evolve to fall under a particular presumption, thus treated as “presumptively lawful,” “presumptively unlawful,” etc. By shifting the burden of proof to the party resisting a presumption and allowing them to overcome it, the likelihood of error is reduced. Over time, conduct types would emerge as falling within these categories, which could simplify antitrust analysis for purposes of both litigation and business planning.