IN PRAISE OF RULES-BASED ANTITRUST

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CPI ANTITRUST CHRONICLE
January 2024

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The rule of reason a useless analytical tool for determining whether a method of competition violates the antitrust laws. Comprehensive empirical reviews of antitrust cases have confirmed the stark reality that the rule of reason is a vacuous form of analysis that abrogates essential aspects of the antitrust laws and equates to de facto legality for many violations. This Article calls for the ineffective rule of reason to be abandoned and bright-line rules, whose per se rules and presumptive violations allow for numerous benefits to the public, enforcers, firms, and the judiciary, be restored as a predominant component of antitrust law.

I. INTRODUCTION

Far from being able to "adequately police" unfair conduct,[2] the rule of reason is a useless analytical tool for determining whether a method of competition violates the antitrust laws. Like rumors of a bountiful oasis in the middle of a desert, the legal analysis presented by the rule of reason is a mirage of judicial relief. Comprehensive empirical reviews of antitrust cases have confirmed the stark reality that the rule of reason is a vacuous form of analysis that abrogates essential aspects of the antitrust laws and equates to de facto legality for many violations.[3] Such a situation undermines the rule of law given that essential aspects of the democratically enacted Sherman Act are currently in a state of effective judicial nullification. This Article calls for the ineffective rule of reason to be abandoned and bright-line rules, whose per se rules and presumptive violations allow for numerous benefits to the public, enforcers, firms, and the judiciary, be restored as a predominant component of antitrust law.[4]

II. THE GENESIS OF THE MODERN RULE OF REASON

The rule of reason requires courts to review evidence presented by litigants and evaluate whether a method of competition is socially beneficial or harmful, but as this Article will show, the framework is flawed and subjective. Since 1977, the judiciary has positioned the rule of reason to be a fundamental component of the antitrust laws – unironically living up to its name as a "rule" rather than an "exception" to how federal courts review conduct under the antitrust laws in order to determine if a defendant has used an unlawful method of competition.[5] Indeed, the current jurisprudence requires that courts review most methods of competition challenged under the antitrust laws with the rule of reason.[6] But that is where the analogy of the rule of reason ends with being classified as a "rule" as it is the most amorphous and meaningless standard in antitrust law.

Due to the statute's broad language, the Supreme Court struggled with determining which methods of competition, and under what conditions, would violate the Sherman Act.[7] During the formative period before 1911, the Court ebbed and flowed from employing a literalist interpretation where it implemented the "plain meaning" of the text of the Sherman Act where "every" restraint of trade was unlawful.[8] The Court would subsequently adopt an approach where methods of competition that had a "direct and immediate effect…upon interstate commerce" were unlawful.[9]

Detailing the full history of the Court's early jurisprudence is beyond the scope of this Article.[10] In a telling circumstance, the Supreme Court rebuffed an arbitrary standard of "reasonableness" shortly after Congress enacted the Sherman Act. Consider the Supreme Court's early opinion in *Trans-Missouri* in 1897, when the Court expressly rejected a standard of reasonableness.[11] A standard of reasonableness, in the Court's opinion, would "materially alter [the Sherman Act's] meaning and effect" and amount to "judicial legislation [that is] wholly unjustifiable."[12] In other words, such a subjective analysis would subvert Congress's legislative directive.

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2 *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

3 Michael A. Carrier & Christopher L. Sagers, *The Alston Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 Geo. Mason L. Rev. 1461, 1476, 1476 n.114 (2021).

4 For purposes of simplicity, bright-line rules will refer to both *per se* rules and presumptive violations.

5 *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (detailing that the rule of reason is the default analytical framework to review whether conduct violates the antitrust laws); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("[G]uided by the premises of *GTE Sylvania* and *Monsanto:* that there is a presumption in favor of a rule-of-reason standard[.]"), *abrogated by Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

6 See e.g. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

7 Owen M. Fiss, Troubled Beginnings of the Modern State, 1888-1910, at 110 (1993) (stating between its enactment in 1890 and 1911 there were four distinct interpretations of the Sherman Act from the Supreme Court).

8 *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 325 (1897).

9 *United States v. Joint Traffic Assn.*, 171 U.S. 505, 568 (1898).

10 For a brief history of the origins of the rule of reason, see Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 Va. L. Rev. 23 (1964).

11 *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

12 *Id.* at 340.

Around the same time, then-Judge William Howard Taft issued a widely lauded opinion for the Sixth Circuit — subsequently affirmed by the Supreme Court in 1899.[13] Judge Taft wrote that judges who review conduct based on a standard of reasonableness allow them to employ their "vague and varying opinions" and "set sail on a sea of doubt, and…assume[] the power to say…how much restraint of competition is in the public interest, and how much is not."[14]

After another decade of turbulence, in 1911, Chief Justice White took the opportunity to issue two seminal opinions on how the Sherman Act would operate. Rejecting the Court's previous opinions, he established the rule of reason as the chosen framework (albeit in a primitive form).[15] In its *Standard Oil* opinion, the Court stated that a "standard of reason" was "embraced by" the Sherman Act and "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."[16] Soon after, the Supreme Court issued its opinion in *American Tobacco*, providing additional clarification.[17]

But even with its landmark pronouncements, there was still confusion as neither the *Standard Oil nor American Tobacco* decisions provided clear guidance to lower courts on how they were supposed to evaluate conduct. The Court's opinions resulted in profound backlash from lawmakers, which directly led to the enactment of the Clayton Act of 1914,[18] but it wasn't until 1918 when Justice Louis Brandeis presented the now often-quoted passage that serves as the baseline for any modern description of the rule of reason:

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.*[19]

Reviewing Justice Brandeis's statement reveals that the rule of reason is designed to operate as a burden-shifting framework, intended to present reviewing courts with information from the litigants regarding the benign or adverse effects of the allegedly violative conduct. At first glance, such a description appears to be impartial and fair with the aim of obtaining a just result. But Justice Brandeis's formulation, like the Court's previous attempts at refining the rule of reason, still left much to be desired. The Supreme Court did not provide additional guidance to the lower courts on how to weigh and review the evidence before them.

From its more refined description in 1918 until 1977, the rule of reason did not obtain a rigorous application or additional alteration from the Supreme Court.[20] This was partly because the extensive application of bright-line rules resulted in prohibiting a range of conduct. The Court took the position that it should "without doing violence to the congressional objective embodied in . . . [the antitrust law], to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration."[21] Before 1977, *per se* rules or

13 See e.g. Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 26 (1978) ("[Judge Taft's] *Addyston* [decision] must rank as one of the greatest, if not the greatest, antitrust opinions in the history of the law.").

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

15 Justice White actually pulled a slight of hand when his opinion erroneously claimed that Peckham's standard of illegality was essentially "one and the same thing." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 66 (1911).

16 *Standard Oil Co. of New Jersey*, 221 U.S. at 60.

17 *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179-81 (1911).

18 Members of Congress believed the rule of reason as the Court, described in its *Standard Oil* opinion, gave the federal judiciary boundless discretion concerning the application of the Sherman Act. S. Rep. No. 62-1326, at xii (1913) (Cummins Report) (stating "[The Supreme Court's pronouncement of the rule of reason in its *Standard Oil* opinion gives the judiciary] vast and undefined power….[and] substitutes the court in the place of Congress, for whenever the rule [of reason] is invoked, the court does not administer the law, but makes the law."); see also *1912 Democratic Party Platform*, Am. Presidency Project, https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform (last visited Nov. 10, 2023) ("We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.").

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

20 According to a search on Westlaw, between the *Standard Oil* opinion in 1911 and the day before the Sylvania opinion in June 1977, the phrase "rule of reason" only appears in 53 Supreme Court decisions.

21 *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963).

some form of them under Section 1 of the Sherman Act governed horizontal price-fixing,[22] minimum vertical price-fixing,[23] maximum vertical price-fixing,[24] horizontal market division,[25] certain vertical market division arrangements,[26] tying,[27] and group boycotts/concerted refusals to deal.[28]

In conjunction with a lack of a refined definition, the proliferation of bright-line rules significantly limited the Supreme Court's application of the rule of reason.[29] Milton Handler, a prominent antitrust scholar, provided an apt description of the state of the rule of reason in 1969, writing, "[I continue to ask] myself whether the rule of reason continues to play any significant role in current antitrust adjudication. I suppose it is no more irreverent to question whether the rule is still alive than to inquire whether God is dead."[30]

Among other reasons,[31] bright-line rules rose to prominence due to their administrability and promotion of a specific conception of competition.[32] At the height of the development of various bright-line rules governing conduct under the antitrust laws, the Supreme Court prioritized protecting firms from undue coercion,[33] preventing firms from narrowing channels of competition,[34] incentivizing firms to internalize risks and use more socially desirable methods of competition,[35] and favoring small and independent businesses while curbing excessive corporate power.[36]

But the rule of reason entered a new paradigm with the Supreme Court's 1977 decision in *Sylvania*, which jettisoned the *per se* rule

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22 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

23 *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by *Leegin*, 551 U.S. 877.

24 *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

25 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

26 *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding that "Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is "unreasonably" restrictive of competition that a violation of § 1 [of the Sherman Act] results from such confinement, unencumbered by culpable price fixing."), overruled by *Sylvania*, 433 U.S. 36.

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

28 *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

29 Some of the other *per se* and bright-line presumptive violations of other sections of the antitrust laws include:

- Section 2(a) of the Robinson-Patman Act concerning Secondary-Line Discrimination. FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948) ("the [Federal Trade] Commission [or other plaintiff] need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors.").
- Section 2(c) of the Robinson-Patman Act. FTC v. Henry Broch & Co., 363 U.S. 166, 169 (1960).
- Section 3 of the Clayton Act which providing exclusive deals and tyings of commodities operated under a near-bright-line rule, which such conduct was illegal if "competition has been foreclosed in a substantial share of the line of commerce affected." Standard Oil Co. of California v. United States (*Standard Stations*), 337 U.S. 293, 300, 314 (1949), but see *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (weakening the rule pronounced in *Standard Stations*).
- Section 8 of the Clayton Act. 15 U.S.C. § 19 (detailing the *per se* prohibition of certain interlocking directorates).
- Section 7 of the Clayton Act. *Philadelphia Nat. Bank*, 374 U.S. at 363 (stating "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined[.]"). Specifically, the Court enjoined the merger that created a combined market share of 30 percent. *id.* at 364.

30 Milton Handler, *Through the Antitrust Looking Glass–Twenty-First Annual Antitrust Review*, 57 Cal. L. Rev. 182, 193 (1969).

31 One reason for the creation of some of the per se rules was the perception that certain conduct like horizontal price-fixing was similar to vertical price-fixing. *Compare Trenton Potteries*, 273 U.S. at 401, *with* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951), overruled by *Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752 (1984); *Leegin*, 551 U.S. at 888 (detailing that the Supreme Court created the *per se* rule against minimum vertical price-fixing in *Dr. Miles* because the conduct was analogous to horizontal price-fixing).

32 *Topco Assocs.*, 405 U.S. at 609-11, 609 n.10.

33 *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 465 (1941); *Kiefer-Stewart*, 340 U.S. at 213, overruled by *Copperweld Corp.*, 467 U.S. 752; *Times-Picayune Publ'g Co. v. United States,* 345 U.S. 594, 605 (1953); *N. Pac. R.R.*, 356 U.S. at 5-6, 8, 10; *Klor's*, 359 U.S. at 213; *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 16, 20-21 (1964); *Albrecht*, 390 U.S. at 151-53. See also *United States v. Richfield Oil Corp.,* 99. F. Supp. 280, 289 (S.D. Cal. 1951), *aff'd* 72 S. Ct. 168 (1951).

34 *Dr. Miles Med.,* 220 U.S. at 407, *overruled by Leegin*, 551 U.S. 877; *Int'l Bus. Machs. Corp. v. United States (IBM)*, 298 U.S. 131, 135-36 (1936); *Fashion Originators' Guild*, 312 U.S. at 465; *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *Standard Stations*, 337 U.S. at 300, 314; *N. Pac. R.R.*, 356 U.S. at 5-6; *Klor's,* 359 U.S. at 213; *Arnold, Schwinn & Co.*, 388 U.S. at 379; *Albrecht*, 390 U.S. at 151-53; *Topco Assocs.*, 405 U.S. at 610.

35 *Dr. Miles Med.,* 220 U.S. at 407, overruled by *Leegin*, 551 U.S. 877; *IBM*, 298 U.S. at 139-40; *N. Pac. R.R.*, 356 U.S. at 11; *Brown Shoe Co. v. United States*, 370 U.S. 294, 332-33, 345 n.72 (1962); *Simpson*, 377 U.S. at 16, 20-21; *Arnold, Schwinn & Co.,* 388 U.S. at 379.

36 *IBM*, 298 U.S. at 136; *Klor's*, 359 U.S. at 213; *Brown Shoe*, 370 U.S. at 333, 344; *United States v. Von's Grocery Co.*, 384 U.S. 270, 275-77 (1966).

proscribing certain vertical territorial restraints and instead held that such conduct would be reviewed with the rule of reason.[37] Except in a concurring opinion,[38] the justices signing onto the majority opinion did not consider establishing a less fanatical result, as it had done in the past, such as establishing a rebuttable presumption of illegality.[39] Instead, the Court radically adopted the rule of reason for vertical territorial restraints.

However, the Court did not provide any additional guidance as to how courts were supposed to analyze conduct under the rule of reason. As Robert Pitofsky then presciently noted in 1978, the Court's Sylvania decision invigorated the "vaguely defined" rule of reason, which will likely "guarantee[] years of perplexing litigation."[40]

Over the long run, *Sylvania* also provided the jurisprudential hook the Supreme Court needed to overrule and narrow its bright-line rules.[41] Using the rationale detailed in *Sylvania*, the Court completely overruled some of its bright-line rules altogether. First, in *State Oil Co. v. Khan* in 1997, the Supreme Court overruled its *per se* rule proscribing maximum vertical price-fixing.[42] Second, in 2007, in *Leegin Creative Leather Products v. PSKS, Inc.*, the Supreme Court overruled its *per se* rule proscribing minimum vertical price-fixing.[43]

Fueled by the logic of the *Sylvania* opinion, the Court specifically sought to narrow the substantive reach of the bright-line rules that ostensibly remained on the books and heighten the procedural burdens on plaintiffs to successfully invoke them. First, the Court heightened procedural barriers on litigants and greatly empowered courts to discard antitrust cases on procedural grounds.[44] For example, in *Monsanto Co. v. Spray-Rite Service Corp.* (1985), the Supreme Court heightened the evidentiary requirements for a plaintiff to show concerted action under Section 1 of the Sherman Act by requiring evidence that "reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective."[45] In *Business Electronics Corp. v. Sharp Electronics Corp.* (1988), the Supreme Court heightened the evidentiary requirements for a plaintiff to show the existence of an agreement between firms that could violate Section 1 of the Sherman Act.[46]

Second, the Court narrowed the substantive aspects of its rules concerning what business conduct violated the antitrust laws using the *per se* rules. For example, concerning price-fixing, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), the Supreme Court allowed blanket licensing fees for music as a form of legal price-fixing.[47] In 1984, the Supreme Court also allowed firms to justify engaging in horizontal collusion as long as the conduct was justified on the basis that the product available would not exist but for the conduct.[48]

In general, the Supreme Court made the *per se* rules less applicable by requiring lower courts to evaluate the merits of the conduct at issue rather than viewing the conduct itself as presenting sufficient adverse effects worthy of condemnation. Consider that in *Fashion Originators' Guild of America, Inc. v. FTC* (1941) the Court stated that "it was not error [for the lower court] to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness

37 *Sylvania*, 433 U.S. at 58.

38 *Sylvania*, 433 U.S. at 66 (White, J., concurring).

39 See e.g. *Philadelphia Nat. Bank*, 374 U.S. at 363.

40 Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 2-3, 37-38 (1978).

41 While some newspapers considered it a significant ruling, a search of the Newspapers.com historical archive reveals that no national newspaper, including the New York Times or the Wall Street Journal at the time of the *Sylvania* opinion recognized just how reactionary the decision was. See Search Query for Mentions of "Sylvania," "antitrust," and "Supreme Court" in 1977, Newspapers.com, https://newscomwc.newspapers.com/search/?query=antitrust%20sylvania%20supreme%20court&p_country=us&dr_year=1977-1977. E.g. *Inmates Have no Union Rights, High Court Rules*, Sun-Telegram, June 24, 1977, at A3.

42 *State Oil*, 522 U.S. 3 (1997), *overruling Albrecht*, 390 U.S. 145 (1968).

43 *Leegin*, 551 U.S. 877 (2007), *overruling Dr. Miles Med.*, 220 U.S. 373 (1911).

44 *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) (heightening the requirements for plaintiff's claims to survive a motion to dismiss); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (imposing a proper standing requirement on antitrust plaintiffs); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (heightening the requirements for a plaintiff's claims to survive a motion for summary judgment). See also Jonathan Remy Nash & D. Daniel Sokol, *The Summary Judgment Revolution That Wasn't*, 65 Wm. & Mary L. Rev. (forthcoming 2024) (empirically finding that the Supreme Court's series of cases concerning summary judgment had an adverse effect on antitrust claims), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392898.

45 Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984) (internal quotations and citations removed).

46 *Bus. Elecs.*, 485 U.S. at 726-27, *abrogated by Leegin*, 551 U.S. 877 (2007).

47 *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

48 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101 (1984).

of the price fixed by unlawful combination."[49] Or in *Northern Pacific Railway co. v. United States* (1958) in which the Court stated that *per se* rules do not require an "elaborate inquiry as to the precise harm [the conduct has] caused or the business excuse for their use."[50] The Court made another cogent statement concerning the simplicity of the *per se* rules in *United States v. McKesson & Robbins, Inc.* (1956), in which it stated that:

> *It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.*[51]

Despite the forcefulness of these statements, the Court would later detail that even if a plaintiff can show that a method of competition is "plainly anticompetitive" such that it "facially appears to be one that would always or almost always tend to restrict competition and decrease output" where *per se* liability is warranted, defendants would nevertheless be offered the opportunity to argue that the conduct is "designed to 'increase economic efficiency and render markets more, rather than less, competitive."[52] In other words, defendants are always afforded the opportunity to justify their conduct regardless of whether a bright-line rule applies. Later, the Court would bolster this assertion in *Atlantic Richfield Co. v. USA Petroleum Co.* (1990) when it stated that "even in cases involving per se violations…. plaintiffs [are] still required to show that the conspiracy caused them an injury for which the antitrust laws provide relief."[53]

Over time, as opposed to viewing bright-line rules as an essential aspect of antitrust law, the Court came to view them as narrow avenues of liability that should only be applied in the most exceptional circumstances. In particular, it appears clear that if plaintiffs are seeking to obtain *per se* liability against any challenged conduct, they are practically required to look at previous applications of the per se rules and be able to clearly point out that the litigated conduct they are challenging is nearly identical to what the Court has historically condemned — otherwise the rule of reason (or some form of it) governs.[54] Lower courts appear to have gotten the message from the Supreme Court about the narrowness of the per se rules, adopting a "No true Scotsman" approach by moving the goalposts further away from defendant liability and requiring hyper similar conduct to past applications. For example, in a recent opinion analyzing the *per se* rule against bid-rigging, the Fourth Circuit has essentially nullified any unlawful horizontal conduct that has even a modicum of vertical element to it such that only "*purely* horizontal restraint[s] [are where] the *per se* rule[s] appl[y]."[55] Apparently, it is now insufficient for conduct to have horizontal elements; instead, for plaintiffs to successfully invoke any of the remaining *per se* rules under Section 1 of the Sherman Act, some circuit courts require the conduct to be a *purely* horizontal restraint in the strictest sense.

Since 1977, the Supreme Court has spent decades attempting to refine the contours of the rule of reason.[56] Yet, despite its efforts, as explained in the next section, there is still immense variation as to what precisely the rule of reason entails. Should litigants successfully make it to the stage of litigation in which a court reviews conduct under the rule of reason, courts are generally required to observe the following four steps:

1) First, the plaintiff must show that a specific conduct has a significant adverse effect on competition — the most common of which

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49 *Fashion Originators' Guild*, 312 U.S. at 468.

50 *N. Pac. R.R.*, 356 U.S. at 5; see also *Socony-Vacuum Oil*, 310 U.S. at 224 n.59 (stating that "Whatever economic justification particular price-fixing agreements may be thought to have, *the law does not permit an inquiry into their reasonableness*. They are all banned because of their actual or potential threat to the central nervous system of the economy.") (emphasis added).

51 *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956); see also *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967) ("Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness.").

52 *Broad. Music*, 441 U.S. at 9, 19-21 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

53 *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990); *id.* at 334-35.

54 E.g. *Nw. Wholesale Stationers*, 472 U.S. at 296 ("The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect [similar to a traditional concerted refusal to deal]."); *id.* at 298; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the per se rule").

55 *United States v. Brewbaker*, No. 22-4544, 2023 WL 8286490, at *19 (4th Cir. Dec. 1, 2023).

56 For the Supreme Court decisions most prominently articulating and refining the contours of the rule of reason, see e.g. *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679 (1978); *Broad. Music*, 441 U.S. 1; *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Ohio v. Am. Express Co. (Amex),* 138 S. Ct. 2274 (2018); *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021).

include price increases, output reductions, or undue market power.

2) Second, if the plaintiff successfully demonstrates the adverse effects of the conduct, the burden shifts to the defendant to demonstrate the conduct has a legitimate justification.
3) Third, if the defendant successfully demonstrates a legitimate justification, the burden shifts back to the plaintiff to demonstrate: a) that the conduct is not reasonably necessary to achieve the defendant's stated justifications, or b) the defendant's justifications can be obtained through less restrictive means.
4) Fourth, the court then analyzes the asserted adverse effects of the conduct (from the plaintiffs) and its asserted benefits (from the defendant) and determines if the benefits of the conduct outweigh the asserted adverse effects.[57]

In all, the Supreme Court has summarized the rule of reason as "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition — especially its capacity to reduce output and increase price."[58]

III. THE FUNDAMENTAL PROBLEMS WITH THE RULE OF REASON

Given its nearly half-century of jurisprudence, the modern rule of reason can be subjected to an accurate evaluation. At least three fundamental problems with the rule of reason necessitate its wholesale abandonment or at least substantial curtailment in favor of bright-line rules.

First, the rule of reason lacks clarity as to what it is requiring lower courts to do. Federal courts appear confused about the number of steps the rule of reason requires. Courts seem bewildered as to whether there are three or four steps. Michael Carrier, a leading antitrust scholar, has had to publish articles explicitly detailing that there are four, not three, steps to the rule of reason.[59] Meanwhile, the Supreme Court frequently leaves out a step in its opinions.[60]

Courts also have different steps for the rule of reason in their specific circuit. In some circuits, courts determine that a method of competition is illegal based on whether it has both (in the court's opinion) a net procompetitive effect and if those procompetitive effects could not be obtained using alternative methods.[61] In other circuits, a method of competition violates Section 1 of the Sherman Act if there are less restrictive methods of competition available to achieve the same ends sought and it has a net adverse effect on competition (again, in the court's opinion).[62] And, in other circuits, courts only focus on whether the restraint is reasonably necessary to achieve the legitimate goals — in other words, there is no balancing of the effects of the conduct on competition, only if there are less restrictive means available.[63] A test with such a prominent position in antitrust law should at least have clearly established requirements guiding lower courts on how to analyze whether a method of competition violates the antitrust laws.

Second, the rule of reason lacks any defined boundaries. While the steps detail what lower courts are supposed to consider, the steps themselves lack boundaries detailing how much weight should be given to the evidence courts scrutinize at each step.[64] For example, does each step of the rule of reason require the same degree of evidence to advance to the next step? How much weight should be given to the evidence presented by litigants that courts evaluate? Should Step 2 or Step 3 have more of an evidentiary burden? With courts deciding 97% of cases at Step 1 of the rule of reason, it's evident that courts are placing too much weight on this initial step.[65] Without defined boundaries, the rule of reason is effectively a means for litigants to engage in judicially sanctioned Gish Galloping, allowing litigants to bombard a plethora of often

57 Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect,* 1999 B.Y.U. L. Rev. 1265, 1268-69.

58 *Alston*, 141 S. Ct. at 2155. See also *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1982) ("requir[ing] the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."); *Nat'l Soc. of Pro. Engineers*, 435 U.S. at 688 (the rule of reason is meant to "focus[] directly on the challenged restraints impact on competitive conditions.").

59 Michael A. Carrier, *The Four-Step Rule of Reason,* 33 Antitrust 50, 50-51 (2019).

60 In the Court's most recent pronouncements of the rule of reason, it failed to detail the fourth step. *Amex*, 138 S. Ct. at 2284; *Alston*, 141 S. Ct. 2141.

61 Gabe Feldman, *The Demise of the Rule of Reason*, 24 Lewis & Clark L. Rev. 951, 962-63 (2020) (citing cases from the second and third circuits).

62 *Id.* at 963-64 (citing cases from the eighth and tenth circuits).

63 *Id.* at 964-68 (citing cases from the second and third circuits). For details on the other tests the circuits use, see *id.* at 968-70.

64 Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 Bus. Law. 435 (2012) (stating the Courts have "provided no guidance for how [the rule of reason] factors should be analyzed or weighed so as to provide some semblance of clarity, predictability, and consistency in the application of antitrust standards.").

65 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828 (2009) (stating 97 percent of cases reviewed under the rule of reason were dismissed at the first step).

confusing, misleading, and contradictory evidence at district judges. On this point, Frank Easterbrook cogently stated that, "When everything is relevant, nothing is dispositive. Any one factor might or might not outweigh another, or all of the others, in the factfinder's contemplation. The formulation offers no help to businesses planning their conduct…[l]itigation costs [become] the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason."[66]

Third, the rule of reason fails to facilitate enforcement of the antitrust laws as it results in de facto legality for conduct reviewed under it. Even before its modern administration, Richard Posner in 1977 quipped that "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability."[67] Comprehensive empirical analysis reviewing all federal court opinions since the Supreme Court's *Sylvania* opinion in 1977 have confirmed Posner's description.[68] Given a cursory review of the legislative history of the Sherman Act or any of the scholarly literature and prior case law, it would be absurd for anyone to assert that the current form of the rule of reason comes close to what Congress intended when it enacted the Sherman Act.[69] So, not only does the rule of reason represent the judiciary setting sail on a sea of doubt, hopelessly striving to accurately analyze both the beneficial and adverse effects of a method of competition; it is also akin to a fisherman casting a net in the Sahara Desert, representing an utterly futile means of providing litigants relief for their legal claims.[70]

Congress mandated a national standard for market conduct, declaring that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade…[is] illegal," yet the rule of reason provides federal court judges a standard-less, opaque, and nonuniform means with which to analyze conduct. This amounts to the judiciary anointing itself as the nation's economic regulator.

Most telling of just how far the rule of reason has drifted from its original intent is that none of the Justices, including those who were part of the majority opinion in *Sylvania* and other conservative opinions that put the rule of reason at the center of antitrust litigation, envisioned enshrining an analytical framework that effectively nullifies a democratically enacted law. More to the point, the Justices in the majority opinion of *Sylvania* did not state that vertical territorial restraints are de facto legal. On the contrary, the justices stated that vertical restrictions could (without defining any conditions) still face *per se* condemnation under Section 1 of the Sherman Act and that the rule of reason would be able to "adequately police" such agreements if they become too unreasonable.[71]

In subsequent opinions, the Justices expressed that the rule of reason, while requiring a broad investigation into the adverse effects of a method competition, would offer a meaningful legal analysis that provided a real chance of defendants incurring liability. In *Broadcast Music, Inc. v. Columbia Broadcasting System Inc.* (1979), the Supreme Court's majority opinion stated that the unique price-fixing scheme engaged in by performance rights organizations required review under the "more discriminating examination under the rule of reason [which]…may not ultimately survive that attack[.]"[72] In Leegin (2007), the majority opinion stated that the rule of reason was "designed and used to eliminate anticompetitive transactions from the market" and that lower courts are required to apply it in a "diligent" manner (in this case to minimum vertical price-fixing arrangements).[73]

Even scholars who supported the Court's conservative bent in the 1970s and 1980s did not appear to believe that the rule of reason would result in de facto legality. Scholar Phillip Areeda made this point when he stated in 1981, "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful."[74]

But, with the rule of reason resulting in de facto legality for most conduct reviewed under it, the Court has effectively closed off what

66 Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex. L. Rev. 1, 12-13 (1984).

67 Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 14-15 (1977).

68 Carrier & Sagers, *supra* note 3, at 1476, 1476 n.114.

69 George W. Stocking & Myron Watkins, Monopoly and Free Enterprise 262 (1951) ("Nothing in the history of the Sherman Act or its language supports the view that Congress contemplated that the courts would discriminate between reasonable and unreasonable restraints of trade when the sole object of the combination is restriction of competition among the parties and control of the market."); *Standard Oil Co. of New Jersey*, 221 U.S. at 96-97 (Harlan, J., concurring and dissenting in part) (quoting Senator Nelson and Senate Judiciary repot authored in 1909 as stating "The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.").

70 *Addyston Pipe & Steel Co.,* 85 F. at 283-84 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899).

71 *Sylvania*, 433 U.S. at 59.

72 *Broad. Music*, 441 U.S. at 24; see also *Maricopa Cnty. Med. Soc.*, 457 U.S. at 344.

73 *Leegin*, 551 U.S. at 897-98.

74 Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues*, Fed. Jud. Ctr. 37 (1981).

appears to be the only means for the judiciary to fashion additional bright-line rules or expand its current ones. In *Leegin* (2007), the Supreme Court stated that "per se rule[s] [are] appropriate only after courts have had considerable experience with the type of restraint at issue and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[75] In other words, *per se* rules are dependent on the federal courts consistently condemning conduct reviewed under the rule of reason. Besides the fact that the Court has not precisely defined how much "experience" is sufficient to condemn the conduct eventually under a bright-line rule,[76] the current form of the rule of reason prevents the judiciary from gaining any experience at all, and as a result, quashes any hope that conduct can be converted from a rule of reason analysis to some form of a bright-line analysis.

Part of what transformed the rule of reason into its current defendant-friendly position was precisely its lack of definition between Congress's enactment of the Sherman Act in 1890 and the Supreme Court's conservative revolution in 1977. More specifically, the Court modified how it interpreted the Sherman Act. Rather than be a statute with a defined set of goals and principles that Congress wanted the federal courts to facilitate,[77] the Supreme Court instead interpreted the Sherman Act to have "dynamic potential" that allowed the judiciary to apply it however the Court saw fit.[78] Using this newfound interpretative avenue, the Court then leveraged the ill-defined rule of reason to fit its vision of how the Sherman Act should be enforced, unilaterally centralizing its power to establish the baseline rules for the entire economy. By affixing the application of the Sherman Act to its specific interpretation of the common law, the vaguely defined rule of reason became the essential legal vessel for the Supreme Court to advance its political objectives and mold antitrust doctrine in accordance with its newfound conservative viewpoint.[79]

IV. THE SUPERIORITY OF BRIGHT-LINE RULES

Bright-line rules provide many benefits for the public. Specifically, rules provide clarity to what the law is, promote enforcement of the law, and ensure fair enforcement of the antitrust laws.

A. Provides Clarity and Certainty

The most significant benefit of bright-line rules is that they can give clarity and certainty to the law.[80] With the rule of reason presiding over our current antitrust landscape, it is nearly impossible in all but the most extreme cases to determine when conduct such as tying, exclusive deals, territorial restraints, or non-competes is legal or not. As the Supreme Court stated in *Topco Associates* (1971), "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."[81]

Clearly delineating when conduct violates the antitrust laws — or not — assists business owners so that they can have both fair notice as to what conduct is illegal and channel their limited time and resources toward conduct that is actually beneficial for their business operations rather than that which might violate the antitrust laws. Indeed, merely planning for potential litigation incurs significant costs that bright-line rules can nullify.[82] In other words, bright-line rules allow businesses to optimally structure their operations toward creating value for the firm and the public.

75 *Leegin*, 551 U.S. at 886-87 (internal citations omitted and cleaned up).

76 See *Broad. Music*, 441 U.S. at 9 ("it is only after *considerable experience* with certain business relationships that courts classify them as per se violations.") (emphasis added).

77 See Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 Yale L.J. 175 (2022) (detailing the moral economy foundations of the Sherman Act).

78 *Bus. Elecs.*, 485 U.S. at 732.

79 Despite the clear break with precedent and philosophy regarding the antitrust laws, even Robert Bork, the architect of the modern conservative antitrust movement, was skeptical about the potential impact of Sylvania. It was not a foregone conclusion that *Sylvania* would usher in a new paradigm in antitrust. Robert H. Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 Sup. Ct. Rev. 171 ("[The *Sylvania* opinion] is either the most important and promising antitrust decision of the past two or three decades or merely the latest inconclusive episode in the Court's continuing travail in the wilderness of the law of vertical restraints.").

80 *Maricopa Cnty. Med. Soc.*, 457 U.S. at 344 (rule provide "business certainty"); *N. Pac. R.R.*, 356 U.S. at 5 ("[Per se rules] make[] the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned").

81 *Topco Assocs.*, 405 U.S. at 609 n.10; see also *United States Gypsum*, 438 U.S. at 440-41 (Under the rule of reason, it is "difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."); *Sylvania*, 433 U.S. at 50 n.16.

82 E.g. Stephen Rhoades, Power, Empire Building, and Mergers 110 (1983) ("Focusing on short-term financial factors, especially mergers, carries significant costs. The long-run costs are reflected in our declining productivity and lack of competitiveness with foreign companies. There are some immediate costs as well. Particularly obvious among the short-term costs is the waste of talent of many top business executives. Their time is devoted to masterminding acquisition campaigns rather than to designing and building better products."); *id.* at 103, 111.

Consider the beneficial effects of similar bright-line rules in society. Rather than clearly proscribing the purchase of alcohol products to individuals younger than 21, imagine if retailers were required to determine whether a potential purchaser "obtained a sufficient level of maturity" or had to evaluate whether a purchaser demonstrated an "adequate understanding" of the products' health risks. No doubt a coterie of experts can formulate a series of factors that retailers can use to evaluate each purchaser, but those factors would lead to confusion, deep unfairness, impose burdensome administrative costs, significantly increase the duration of each transaction, and ultimately offer zero clarity as to when someone is allowed to purchase alcoholic beverages. Of course, too, the process becomes exceptionally more complicated if youths were afforded the opportunity to plead their case concerning whether they meet the vague standard.

Importantly, by providing both clarity and consistency, rules can tailor firm behavior toward specific, socially beneficial ends. Consider that, by proscribing certain conduct, firms are encouraged to engage in other conduct that achieves similar ends but also benefits the public. For example, proponents of noncompete agreements, which allow firms to unfairly restrict worker mobility, frequently assert that such agreements are necessary to protect a firm's intellectual property. Besides being the "wrong tool for the job," by proscribing all noncompetes as the Federal Trade Commission is currently trying to do,[83] firms are encouraged to engage in more socially desirable conduct such as raising salaries and increasing benefits to persuade their employees to stay at their company and protect their trade secrets.[84] Similarly, antitrust enforcement against certain unfair methods of competition can channel firm investment into alternative fair methods of competition such as increased spending on research and development and productive capacity.[85] But, given the arbitrary and unpredictable application of the rule of reason, as well as the lack of clarity around when a business might be subject to antitrust litigation, the rule of reason almost certainly limits more socially beneficial conduct by firms.[86]

B. Promotes Enforcement

Bright-line rules can promote enforcement of the antitrust laws on several grounds. First, bright-line rules lower procedural burdens for litigants. Rather than "rambl[ing] through the wilds of economic theory,"[87] antitrust violations can be quickly resolved since they can be reduced to simple facts such as the presence of violating conduct, a fixed nominal market share or foreclosure percentage, or a financial metric such as the size of a transaction or a firm's revenue.[88] With such clearly and readily accessible variables to determine whether conduct violates (or presumptively violates) the antitrust laws, litigants would not need expensive economists or a battalion of lawyers to initiate or defend a lawsuit.[89]

For the judiciary, bright-line rules can not only speed up adjudication but avoid it altogether.[90] In *Standard Stations* (1949), the Supreme Court announced a bright-line rule delineating between illegal and legal exclusive deals that foreclosed competition in "a substantial share of the line of commerce affected," implying that one of the reasons was to prevent repeat litigation.[91] Indeed, many lower courts quickly dispensed

83 Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Fed. Trade Comm'n proposed Jan. 19, 2023).

84 Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873 (2010).

85 See e.g. David M. Hart, Forged Consensus: Science, Technology, and Economic Policy in the United States, 1921-1953, at 96 (1998) (describing how antitrust enforcement led to Dupont investing more into research and development); James W. McKie, Tin Cans and Tin Plate A Study of Competition in Two Related Markets 88-89 (1957) (describing how antitrust litigation in the metal-container manufacturing industry in the early 20th century subsequently led to more growth by internal expansion).

86 *Simpson*, 377 U.S. at 29-30 (Stewart, J., dissenting) ("We cannot be blind to the fact that commercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust laws."); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2074 (2015) ("A situation of low total enforcement risk, in contrast, still shapes business strategies as some companies will mitigate business behavior which they find may lead to potential suits.").

87 *Topco Assocs.*, 405 U.S. at 622.

88 See e.g. Daniel A. Hanley, *Per Se Illegality of Exclusive Deals and Tyings As Fair Competition*, 37 Berkeley Tech. L.J. 1057, 1062-63 (2022) (calling for a bright-line rule concerning tyings and exclusive deals); Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 Ariz. St. L.J. 75, 75 (2020) (calling for a per se rule proscribing all conglomerate mergers between firms with a value of $10 billion or more).

89 *Sylvania*, 433 U.S. at 50 n.16. Economists can charge thousands of dollars an hour. Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, ProPublica (Nov. 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

90 See, e.g. Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 Cal. L. Rev. 263, 323-24 (1986) (citing Richard A. Posner & Frank H. Easterbrook: Antitrust: Cases, Economic Notes And Other Materials 597 (2d ed. 1981) (stating "When the stakes of a case are substantial, and no one knows what considerations are dispositive, then everything becomes relevant. No stone can be left unturned with safety. The less certain the rule, the greater the number of cases that must be litigated; only the opinion of a judge is authoritative guidance on the legality of a business practice. Clearer rules produce compliance without litigation")); *Sylvania*, 433 U.S. at 50 n.16.

91 *Standard Stations*, 337 U.S. at 300, 314 ("Since the Clayton Act became effective, this Court has passed on the applicability of § 3 in eight cases, in five of which it upheld determinations that the challenged agreement was violative of that Section.").

with litigation involving exclusive deals after its decision.[92] Such a result would address the Court's frequent lament over the burden and lengthy duration of antitrust litigation.[93]

Rather than concern itself with a hodgepodge of factors and balance considerable (often conflicting and confusing) evidence,[94] the judiciary simply has fewer variables to analyze when bright-line rules govern the conduct it reviews — streamlining and speeding up enforcement. As the Supreme Court stated in *Northern Pacific Railway* (1958), such rules "avoid[] the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved…an inquiry so often wholly fruitless when undertaken."[95]

By lowering the cost of litigation, bright-line rules also help overcome persistent funding limitations faced by the Department of Justice and Federal Trade Commission.[96] Similarly, rules can also broaden the agency's enforcement priorities. With so much uncertainty concerning the outcome, the rule of reason inherently deters enforcement and undoubtedly causes enforcers to focus on ostensibly easier cases to litigate.[97] Indeed, the enforcement data shows just that. For example, Richard Posner's comprehensive statistical analysis of all federal antitrust enforcement actions between 1890 and 1970 shows that nearly 64 percent of antitrust charges from the Department of Justice involved price-fixing which, prior to the Supreme Court decisions of the 1970s and 1980s, was once reviewed under a heavy and broad *per se* rule.[98] But Congress wanted to suppress all unfair methods of competition, but the substantial burden of the rule of reason makes Congress's legislative directive nearly impossible to fully implement.

C. Ensures Fair Enforcement of the Antitrust Laws

As alluded to above, just as rules can tailor business behavior, they can also influence enforcement behavior. In particular, rules can channel enforcement to prevent applications of the antitrust laws that are contrary to Congress's intentions. For example, on many occasions, the FTC has wielded its enforcement capabilities at non-dominant parties and workers when the antitrust laws were intended to protect them. In a series of lawsuits, the FTC pursued antitrust litigation against music teachers, ice skating teachers, public defenders, and other smaller parties.[99] During the height of its enforcement of the Robinson-Patman Act between 1961 and 1974, the FTC initiated more than 500 lawsuits, however, only 36, or 6.4 percent of the cases, had annual sales of $100 million dollars or more at the time of the complaint.[100] In other words, even though Congress specifically enacted the Robinson-Patman Act to support small businesses, the law's open language prohibiting price discrimination

92 E.g. *Mytinger & Casselberry, Inc.*, 57 F.T.C. 717 (1960), aff'd, 301 F.2d 534 (D.C. Cir. 1962); *Dictograph Prods., Inc. v. FTC*, 217 F.2d 821 (2d Cir. 1954); *Richfield Oil Corp.*, 99 F. Supp. 280, aff'd, 343 U.S. 922 (1952).

93 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 414 (2004) (stating that antitrust law is "interminable litigation"); *Twombly*, 127 S. Ct. at 1967 n.6 (2007) (stating that antitrust litigation forces litigants to incur "sprawling, costly, and hugely time-consuming [discovery]").

94 See Thomas W. Dunfee, Louis W. Stern & Frederick D. Sturdivant, *Bounding Markets in Merger Cases: Identifying Relevant Competitors,* 78 Nw. U. L. Rev. 733, 754 (1983-1984) (detailing the confusing econometric evidence judges are presented with when defining a relevant market).

95 *N. Pac. R.R.,* 356 U.S. at 5. Administrability has been an essential justification for the creation of antitrust rules and remedies. *Philadelphia Nat. Bank*, 374 U.S. at 362 ("We must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation."). The same justification applies to remedies. See *United States v. E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 329-331 (1961) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer[.]").

96 See Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 152-53 (2005) ("Congress created the private right of action to supplement public enforcement because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of the antitrust laws."); E. Thomas Sullivan, *The Antitrust Division As A Regulatory Agency: An Enforcement Policy in Transition*, 64 Wash. U. L.Q. 997, 1005 (1986) ("That the Department did not enforce the statute regularly or consistently throughout its early life does not undercut the statute's litigation focus. Irregular enforcement was not due to a lack of authorization or statutory clarity, but rather to discretion and budget constraints.").

97 David Alan Sklansky, *The Problems with Prosecutors*, 1 Ann. Rev. Criminology 451, 453 (2017) ("Empirical research suggests, not surprisingly, that prosecutors are motivated by a combination of public-spirited and narrower, career-oriented considerations. The career considerations have traditionally been thought to push prosecutors to more punitive behavior[.]") (internal citations omitted).

98 Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 398, 400 (1970). See also Lee Loevinger, *Antitrust in 1961 and 1962*, 8 Antitrust Bull. 349, 356 (1963) ("Of the cases filed during the years 1961 and 1962, about two-thirds involved price-fixing."). Compare *Socony-Vacuum Oil,* 310 U.S. at 224 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.") with *Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 99, 103 ("It is also undeniable that these [price and output] practices share characteristics of restraints we have previously held unreasonable…a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.").

99 Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages,* 78 Md.L. Rev. 766, 812 (2019) (listing cases the FTC initiated against smaller parties).

100 Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 Antitrust L.J. 921, 924 (1985).

for the sale of commodities allowed the FTC to wield the law in certain aspects that were contrary to Congress's intentions.[101] Bright-line rules, therefore, can help align antitrust enforcement against the specific kinds of parties Congress intended them to be used against.

Similarly, bright-line rules prevent enforcement agencies from modifying the law based on the prevailing political ideology of the presidential party in power.[102] Consider the Department of Justice's (DOJ) 1968 merger guidelines. While the 1968 guidelines were meant to provide the public with clarity on how the DOJ would enforce Section 7 of the Clayton Act against mergers, federal officials also wrote them to restrict the Supreme Court's then faithful application of Section 7 of the Clayton Act.[103] Later, in 1982, reactionary conservatives recognized the merger guidelines as a "unique opportunity to prune an area of luxuriant and pernicious federal regulation"[104] and convinced officials in the Reagan administration to modify them to significantly restrict merger enforcement, effectively smuggling Chicago School econometrics into the process of determining violations of Section 7 of the Clayton Act.[105] The 1982 merger guidelines, in all but the most egregious and narrow circumstances, effectively permitted all mergers in direct opposition to the text and legislative history of Section 7 of the Clayton Act, as amended by the Celler-Kefauver Act, and the controlling jurisprudence.[106] Enacting more bright-line rules would limit or entirely prevent enforcers from imprinting their ideological views onto the antitrust law and instead focus on enforcing the law in the image Congress intended.[107]

Enacting more bright-line rules would also fundamentally limit prosecutorial discretion and prevent or at least substantially inhibit the government from using antitrust laws as a political bargaining chip against firms.[108] Historical examples show that presidents are more than willing to initiate or withhold antitrust litigation as a cudgel to gain political favors or punish those whom they view as in opposition to their political agenda. In the 1960s, President Lyndon Johnson specifically urged delaying an antitrust lawsuit against billionaire Howard Hughes because he was a donor to Senator Alan Bible, an important conservative democrat critical in helping Johnson appoint favorable Supreme Court nominees.[109] Johnson also allowed a merger between two newspapers in exchange for favorable news coverage.[110] On the opposite end of the ideological spectrum, President Richard Nixon specifically initiated antitrust litigation against television networks to punish their unfavorable coverage of his administration.[111] While antitrust enforcement has an inseparable relationship with politics, such blatantly corrupt applications should be condemned and prohibited. Bright-line per se rules clearly delineating unlawful conduct can prevent such misconduct.

To the extent the judiciary is confronted with litigation concerning the application of bright-line rules, they also limit judicial discretion. Rules prevent judges from embossing their views and ideology on the national economy. Under our current enforcement regime, one judge's opinion that a specific method of competition is "anticompetitive" may differ from another judge's opinion that such conduct is the type Congress wants to promote. Bright-line rules simplify the process by making it clear that the public's democratically elected representatives in Congress, rather than judges, should structure the economy. As the Court cogently stated in its Topco Associates opinion, "The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector

101 See e.g. 80 Cong. Rec. 6282(1936) (statement of Sen. Logan); 80 Cong. Rec. 9415 (1936) (statement of Rep. Utterback); *Morton Salt*, 334 U.S. at 43 ("[By enacting the Robinson-Patman Act,] Congress considered it to be an evil that a larger buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability."). 15 U.S.C. § 13(a) (stating the conditions to violate the Robinson-Patman Act's prohibitions of price discrimination).

102 See e.g. Cory Lewis Sparks, Locally Owned and Operated: Opposition to Chain Stores, 1925-1940, at 38-39 (Dec. 2000) (Ph.D. dissertation, Louisiana State University) ("During the Republican administrations of the 1920s, the [Federal Trade] [C]ommission came under the control of administrators who were friendly with business.").

103 Donald I. Baker, *Donald Turner's Merger Guidelines as an Antitrust Watershed,* 53 Rev. Indus. Org. 435, 439 (2018).

104 *A Richard Posner and George Stigler Memo: "Throttling Back on Antitrust: A Practical Proposal for Deregulation,"* ProMarket (Apr. 28, 2022), https://www.promarket.org/2022/04/28/a-richard-posner-and-george-stigler-memo-throttling-back-on-antitrust-a-practical-proposal-for-deregulation/.

105 Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 Cal. L. Rev. 575, 579 (1983)

106 Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 Antitrust Bull. 211, 228 (1988); see *Philadelphia Nat. Bank,* 374 U.S. at 365 n.42 ("[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."); *Brown Shoe,* 370 U.S. at 344 ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

107 Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla. L. Rev. 1, 6 (2004).

108 Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1448 (2009) ("[T]he vague rule of reason…can [be used to] selectively enforce the Sherman Act to achieve its political (or personal) ends.").

109 Laura Kalman, The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court 75, 146 (2017).

110 Michael R. Beschloss, Taking Charge: The Johnson White House Tapes, 1963-64, at 141-42 (1997).

111 Scott A. Samuels, *Intermedia Discrimination in the Information Age: The Implications of Turner Broadcasting System, Inc. v. FCC*, 3 Geo. Mason Indep. L. Rev. 403, 431 (1995).

of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules."[112]

Critically, rules do not have to be inflexible. There is a false notion that bright-line rules create an inflexible environment or do not recognize the complex dynamics of firm rivalry. The historical application and development of the *per se* rules directly contradicts this assertion. First, the Court developed bright-line rules that did not apply to all uses and instances of a particular method of competition. For example, according to the Court's bright-line rule concerning exclusive deals, not all such conduct was condemned. In its *Standard Stations* (1949) opinion, the Court acknowledged the beneficial uses of exclusive deals and fashioned a rule that allowed their use in limited circumstances (generally if they caused six percent foreclosure or less).[113] A similar circumstance existed with vertical territorial restraints under the Court's *Schwinn* (1967) opinion. The Court did not proscribe all vertical territorial restraints but instead prohibited them only if legal title of the product being sold was not retained by the firm imposing the restraint.[114] Concerning tying arrangements, the Court has not proscribed all of them, but instead requires a firm to have "appreciable economic power" in the tying product market.[115]

Rules can also be modified to prevent them from being circumvented. The Court most clearly confronted this issue in its *Simpson v. Union Oil* (1964) decision, where the Court made it clear that a firm using consignment agreements cannot circumvent the prohibitions detailed in Section 3 of the Clayton Act and Section 1 of the Sherman Act.[116] The Court stated that such a circumvention would allow a firm to avoid violating the antitrust laws "merely by clever manipulation of words, not by differences in substance"[117] and subsequently condemned the usage of vertical price-fixing contracts.[118]

V. CONCLUSION

Of course, simply deciding that there should be more bright-line rules is only half the battle. Future debates are necessary over what conduct should be subject to such a designation.[119] Nevertheless, the evidence is clear that the rule of reason is too unworkable, too open-ended, creates unclear business obligations, and does not facilitate Congress's vision of a robust enforcement environment. The rule of reason should be abandoned, and bright-line rules should be restored to their historical prominence.

112 *Topco Assocs.*, 405 U.S. at 609-10.

113 *Standard Stations*, 337 U.S. at 300, 314.

114 *Arnold, Schwinn & Co.*, 388 U.S. at 379-82, *overruled by Sylvania,* 433 U.S. 36.

115 *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992) (quoting *Fortner Enters., Inc. v. U. S. Steel Corp. (Fortner I)*, 394 U.S. 495, 503 (1969)); see also *Ill. Tool Works, Inc. v. Indep. Ink, Inc.,* 547 U.S. 28, 42–43 (2006) (holding tying arrangements are per se illegal when a plaintiff presents "proof of power in the relevant market"). See also *N. Pac. R.R.*, 356 U.S. at 6-7 ("Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.").

116 *Simpson*, 377 U.S. at 18-19.

117 *Id.* at 22 (1964); Hanley, *supra* note 87, at 1067 n.47 (noting the historical importance of "substance" over "form" to prevent circumvention of the antitrust laws).

118 *Simpson*, 377 U.S. at 25.

119 See e.g. Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 Cornell L. Rev. Online 27, 52-53 (2023) (calling for vertical price restraints and territorial restrictions to be presumptively illegal).

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