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# THE FUTURE ADAPTATION OF THE PER SE RULE OF ILLEGALITY IN U.S. ANTITRUST LAW

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*Judicial interpretation of § 1 of the Sherman Act has categorically forbidden certain forms of behavior. The characterization of conduct as "illegal per se" has powerful consequences in the government's prosecution of civil and criminal cases under the Sherman Act and in the litigation of private claims for treble damages. The legitimacy and rationality of the U.S. antitrust system depend heavily upon the care and skill with which courts determine whether conduct is appropriate for summary condemnation or warrants a fuller assessment of its actual or likely effects. These determinations take place in a dynamic environment that features continuing adjustments in learning, in economics and law, about the competitive significance of specific practices. In light of antitrust law's changing intellectual context, courts over time have made important additions to and subtractions from the category of conduct deemed to be illegal per se. This Article considers the process by which courts previously have performed this process of*

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*adaptation—to discern whether challenged behavior deserves abbreviated or more elaborate analysis. The Article suggests measures that could improve the quality of judicial efforts to adapt the application of the rule of per se illegality in the future. Among other steps, the Article describes how public antitrust agencies can use various policy tools (including guidelines, rules, research, public consultations, amicus briefs, and the selection of cases) to inform judicial judgments about whether to characterize behavior as illegal per se.*

## I. INTRODUCTION

In a significant number of cases, judicial interpretation of § 1 of the Sherman Act[1] has prohibited certain forms of conduct with rules of per se illegality.[2] Per se illegality has powerful consequences in the U.S. antitrust regime. Per se rules underpin the criminal prosecution program of the Department of Justice, Antitrust Division (DOJ)[3] and often give decisive advantages to plaintiffs in civil antitrust matters.[4]

[1] 15 U.S.C. § 1 (2018).

[2] The Supreme Court first used this terminology in *United States v. Socony-Vacuum Oil Co.*, when it held: "Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." 310 U.S. 150, 223 (1940). In a footnote, the Court added an important qualification:

> Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction . . . . But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act.

*Id.* at 224 n.59. By this observation, the Court indicated that the bell of illegality rings at the moment the actors form an illicit agreement, without regard to its actual market impact.

[3] Roxann E. Henry, *Per Se Antitrust Offenses in Criminal Cases*, 2021 COLUM. BUS. L. REV. 114, 144; Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 450–52.

[4] As Paul Denis has observed:

> [C]haracterization of a practice as subject to the per se rule means that the plaintiff is more likely to win the case. The admissibility of evidence relating to purpose, effect, or

The legitimacy of a law that classifies conduct as conclusively forbidden hinges on how carefully it denominates behavior as pernicious. This enduring principle was recognized in the Sherman Act's first decade by this lecture's namesake, William Howard Taft. Writing for the court of appeals in *United States v. Addyston Pipe & Steel Co.*, Judge Taft distinguished restrictions whose "sole object" was to restrain competition[5] from those which were "merely ancillary" to the attainment of beneficial economic aims.[6] In a much-debated synthesis of antecedent common-law decisions, Judge Taft perceived that Congress meant for courts to observe this distinction in applying section 1 of the Sherman Act—to condemn unadorned restrictions categorically and to assess ancillary restraints according to their commercial reasonableness.[7] Judge Taft's analysis foreshadowed an analytical process that later cases would recognize as a foundation of § 1 jurisprudence: an initial stage of "characterization" in which a tribunal determines whether challenged conduct fits within a class of behavior categorically condemned as a naked trade restraint.[8]

U.S. antitrust jurisprudence relies mainly on common-law elaboration to give operational content to the command in § 1 of the Sherman Act that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

> potential defenses will be narrowly circumscribed. Defendants are more likely to win if the practice is characterized as subject to the rule of reason and such evidence is more readily admitted.

Paul T. Denis, *Focusing on the Characterization of Per Se Unlawful Horizontal Restraints*, 36 ANTITRUST BULL. 641, 644 (1991).

[5] United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898).

[6] *Id.* at 282.

[7] Judge Taft's synthesis brushed aside common-law decisions that had applied a more elaborate reasonableness analysis to non-ancillary trade restraints. *See* Mark F. Grady, *Toward a Positive Economic Theory of Antitrust*, 30 ECON. INQUIRY 225, 229–33 (1992).

[8] The Supreme Court used the concept of characterization to describe the process of deciding how to classify challenged behavior. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979).

. . . is declared to be illegal."[9] The Sherman Act's deliberately evolutionary scheme has what the Supreme Court has called a constitutional quality.[10] Its inherent adaptability reduces the constraining force that stare decisis ordinarily plays when judges decide cases in a common-law regime.[11] Thus, the courts and, after 1914, the Federal Trade Commission (FTC) have adapted doctrine in light of new learning in economics and law.[12]

A large, informative literature has examined the analytical methods developed by courts to apply the Sherman Act and other similarly broad mandates in the U.S. antitrust laws. Some commentary has studied the streams of jurisprudence that have defined the content of antitrust's chief analytical tool: the rule of reason.[13] Other contributions have reviewed

[9] 15 U.S.C. § 1 (2018).

[10] *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

[11] *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015) ("This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. . . . We have . . . felt relatively free to revise our legal analysis as economic understanding evolves[.]" (citation omitted)); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988) (noting the "changing content of the term 'restraint of trade,'" understood as a congressional directive to take account of the term's "dynamic potential").

[12] *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (noting the role of courts in U.S. antitrust law "in recognizing and adapting to changed circumstances and the lessons of accumulated experience"); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress . . . . expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition.").

[13] *See, e.g.*, GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST 235–65 (2020); *see also, e.g., generally* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81 (2018); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009); Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1989).

individual pivotal decisions.[14] Another body of work has surveyed trends in the disposition of cases that apply the rule of reason.[15] And a fourth distinct collection of papers assesses the strength of the economic foundations for existing per se rules or presents economically-oriented evidence suggesting that additions to the class of forbidden conduct are appropriate.[16]

Against this impressive backdrop of scholarship, this Article examines the processes by which common-law elaboration of per se rules takes place in U.S. antitrust law.[17] It discusses how courts go about concluding that certain forms of behavior, within the overall framework of the rule of reason, warrant per se prohibition. The Article suggests adjustments that would improve the basis on which courts specify what behavior is categorically forbidden. It seeks to improve and clarify the means by which courts receive information about ongoing learning in industrial organization economics and about what conduct deserves summary condemnation.[18] In

[14] *See, e.g., generally* Stephen Calkins, Broad. Music, Inc. v. Columbia Broad. Sys.§, Inc.*, 441 U.S. 1*, at 205, *in* ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane eds., 2007); Daniel A. Crane, *The Story of* United States v. Socony-Vacuum*: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES, *supra*, at 91.

[15] *See, e.g.*, *generally* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009); Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991).

[16] *See, e.g., generally* Yannis Katsoulacos & David Ulph, *On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis*, 57 J. INDUS. ECON. 410 (2009); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999).

[17] In addressing the topic, I benefitted greatly from joint work with Jonathan Baker, Andrew Gavil, Alison Jones, and Joshua Wright. *See generally* ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY (3d ed. 2017); Alison Jones & William E. Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework*, 62 ANTITRUST BULL. 254 (2017).

[18] *See also generally* Alan Grant & Chetan Sanghvi, *The Economic Foundations and Implications of the Per Se Rule*, 2021 COLUM. BUS. L. REV. 91.

particular, the Article proposes ways in which the DOJ, the FTC, state antitrust agencies, academic institutions, and civil society organizations can participate in a periodic redetermination of the boundaries of the per se rule.

The Article addresses the topic as follows. Part II considers the Supreme Court's delineation of per se antitrust offenses as an effort to determine what roles standards and rules should play in the design of antitrust commands. Part III draws upon that inquiry to describe the desirable characteristics of a classification system that treats certain forms of conduct as per se offenses. Part IV describes the process that the U.S. antitrust system has used to denominate conduct per se illegal. Part V suggests modifications to existing processes for classifying (or declassifying) conduct as illegal per se. Part VI concludes.

## II. RULES AND STANDARDS IN ANTITRUST LAW

With its succinct, open-ended commands, the Sherman Act gives courts extraordinary responsibility to devise operational criteria for identifying improper behavior and to adapt these criteria over time. The legislative debates surrounding the adoption of the Sherman Act and the other U.S. antitrust laws offered guidance about what ends the legislation meant to achieve,[19] but the statutes said little about how courts were to assess the legality of business conduct in practice.[20] The discussion below considers how courts have approached this challenging interpretational task.

[19] On the contentious, enduring question of what aims guided enactment of the U.S. antitrust laws, see generally Symposium, *The Goals of Antitrust*, 81 FORDHAM L. REV. 2151 (2013).

[20] In commenting upon the generality of the Sherman Act's provisions, the Supreme Court has noted that the statute "does not go into detailed definitions." Sugar Inst. v. United States, 297 U.S. 553, 600 (1936). In my experience teaching U.S. antitrust law to students trained in civil law systems, their frequent reaction in reading the general, terse terms of the Sherman Act is to ask, "Where is the rest of it?"

## A. The Debate Between Rules and Standards

A fundamental question of policy implementation in many fields of law is how much to rely, respectively, upon "rules" or "standards" to define legal commands.[21] As Professor Carol Rose vividly framed the concept in the context of property law, doctrine often wavers over time between the choice of "crystals" and "mud."[22] Rules resemble crystals in clarity, providing simplicity in implementation. Standards embrace more factors and greater information; their more nuanced, complete analysis can yield more accuracy, but at the cost of sometimes obscuring the basis for decisions and reducing predictability.[23]

Rules and standards differ in degree, and the line between them can blur. Rules migrate toward standards when, to attain more accuracy, they consider additional circumstances. Standards sometimes use presumptions to increase clarity. The convergence between rules and standards results from efforts to reduce errors that inevitably arise in the application of rules and standards, respectively. The imperfections of both

[21] *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258–59 (1974). As explained by Ehrlich and Posner, a "standard" refers to "a general criterion of social choice," *id.* at 258, such as a mandate to promote "competition." A "rule" more narrowly circumscribes the factors relevant to a decision according to the standard. *Id.* On the universality of the debate across fields of law about the relative efficacy of rules and standards, see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 52 & n.11, 54 (2007) (collecting sources); Antitrust Section, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 26 (1984) ("In establishing rules of general application, there is a necessary tension between the need for certainty on the one hand and the need to consider the peculiar facts of each case on the other."); *see also generally* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

[22] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–78 (1988).

[23] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984) ("When everything is relevant, nothing is dispositive . . . . Litigation costs are 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.").

techniques make it difficult to assert the superiority of either as a general proposition.[24]

The chief adverse attribute of rules of per se illegality is that they can be overinclusive: they may too often condemn conduct that is competitively benign or beneficial.[25] A perfect fit is not essential for a rule to be effective. Bright-line rules can serve important ends (e.g., procedural economy) when the rules reflect sound understanding, from theory and experience, that the practice in question typically causes harm.[26] It is not a convincing criticism of a traffic rule that

[24] *See* MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 656–57 (7th Cir. 2000) (Posner, J.) ("No sensible person supposes that rules are always superior to standards, or vice versa[.]"). *See also* Antitrust Section, MONOGRAPH NO. 12, *supra* note 21, at 50 (discussing how U.S. merger policy since 1950 "has witnessed a transition from flexible, multi-factored rules toward rigid, relatively simple rules and back toward flexible multi-factored rules"; observing that "Neither flexibility nor simplicity is unambiguously desirable. Each imposes its own costs on society.").

[25] Economists call overinclusiveness "Type I error." *See* Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11, 14–15 (2010). For an example of a court's concern about the potentially overinclusive reach of a per se antitrust prohibition, see United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (per curiam) (declining to condemn tying arrangement involving computer software products because there was "no close parallel in prior antitrust cases" and "simplistic application of per se tying rules carries a serious risk of harm").

[26] In the context of antitrust law, Professor Jonathan Baker has described the principle in the following terms:

> From a law and economics perspective, per se rules may be preferred to a rule of reason when violations are expensive for a court to observe but are strongly correlated with observable behaviors that are cheaply observed, and when it would be expensive for a violator to break the law without engaging in the observable behavior. Under such circumstances, the judicial system would minimize enforcement costs by conditioning liability on the cheaply observable behavior, and the resulting enforcement errors, corporate compliance costs, and social costs of deterring socially beneficial actions would not produce a substantial efficiency loss.

Jonathan B. Baker, *Per Se Rules in the Antitrust Analysis of Horizontal Restraints*, 36 ANTITRUST BULL. 733, 740 n.29 (1991); *see also* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("For the sake of

requires a full stop at a red light to say that in one case in a hundred a driver could transit an intersection safely by running the light. The value of a bright-line rule erodes, however, when it sweeps in too many instances of benign or beneficial behavior.

The chief weakness of standards is their potential underinclusiveness, especially when standards take the form of open-ended, multi-factor tests.[27] Owing to the cost associated with their use, the more elaborate variants of the rule of reason may discourage challenges to conduct that harms competition and that the application of less complex analytical methods could arrest.[28] This phenomenon can have damaging side effects. The burdens of establishing liability with elaborate reasonableness tests might be seen as impossible to bear and likely to favor exculpation. These burdens might lead plaintiffs to seek to fit competitively ambiguous conduct within bright-line prohibitions; courts may acquiesce if they believe an expansion of per se prohibitions is the only way to achieve effective implementation of the law. The sense that broad reasonableness standards invariably, or usually, serve to exonerate defendants can induce an exaggerated shift to the use of bright-line rules of prohibition.[29] The expansion of the class of forbidden acts precludes appropriate consideration of

business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.").

[27] Economists refer to underinclusiveness as "Type II error." *See* McChesney, *supra* note 25, at 14–15. A number of landmark U.S. antitrust decisions are famous for their recital of myriad factors to be examined in determining the legality of business practices. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 323–46 (1962); Bd. of Trade of Chi. v. United States (*CBOT*), 246 U.S. 231, 238–41 (1918).

[28] *See infra* note 41 and accompanying text (noting criticisms of the rule of reason's complexity).

[29] This arguably is what took place in the United States from the early 1940s through the early 1970s, when the Supreme Court expanded the range of conduct subject to per se condemnation. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43, 49–50 (2000) (describing increased reliance on per se rules to condemn business conduct).

the actual or likely beneficial effects of the challenged practices in more ambiguous cases.[30]

Judicial interpretation of the U.S. antitrust statutes can be seen as a struggle to resolve the tension between achieving accuracy through the application of standards and gaining, where appropriate, the clarity and predictability associated with rules.[31] The discussion below sets out highlights in the evolution of Supreme Court § 1 jurisprudence and variations in its reliance over time on rules or standards. As reflected in modern decisions, U.S. doctrine has recognized an analytical continuum whose boundaries are set by a rule of categorical condemnation (per se illegality) and an elaborate, fact-intensive assessment of reasonableness.[32] Within these

[30] *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1242 (2008) ("[A]ccording to the Court, restraints denominated as vertical should receive more deferential treatment than those adjudged to be horizontal. While such an approach is defensible as a theoretical matter, the practical effect has been to convert antitrust litigation into a laborious process of characterization and mischaracterization in which the actual economic effects of the challenged restraint play a minor role in the antitrust analysis." (footnote omitted)).

[31] *See* PolyGram Holding, Inc., 136 F.T.C. 310, 326 (2003) (Muris, Chairman) ("[A]djudicatory tribunals have struggled to attain an appropriate balance between achieving accuracy in individual cases, which generally requires fuller inquiry, and streamlining the law's administration, which usually involves making simplifying assumptions and foregoing elaborate analysis when the conduct at issue ordinarily poses grave competitive dangers."); Crane, *supra* note 21, at 52 n.11; Leon B. Greenfield & Daniel J. Matheson, *Rules Versus Standards and the Antitrust Jurisprudence of Justice Breyer*, ANTITRUST, Summer 2009, at 87, 87 (reviewing the rules versus standards debate in analyzing the opinions of a jurist who has focused on tradeoffs between the two approaches to formulating legal commands); Antitrust Section, MONOGRAPH NO. 12, *supra* note 21, at 50–55 (in context of formulation of rules for merger policy, discussing efforts to balance costs of flexibility and simplicity); *see also generally* Wolfgang Kerber, *'Rules vs. Standards' or Standards as Delegation of Authority for Making (Optimally Differentiated) Rules*, *in* INTERNATIONALISIERUNG DES RECHTS UND SEINE ÖKONOMISCHE ANALYSE [INTERNATIONALIZATION OF THE LAW AND ITS ECONOMIC ANALYSIS] 489 (Thomas Eger et al. eds., 2008).

[32] *See* Crane, *supra* note 21, at 50 ("Antitrust finds itself in the midst of a creeping transition from rules to standards.").

boundaries operate intermediate tests that employ hybrid adaptations of per se rules and more elaborate analytical methods. Although scholars have identified antecedents for the modern continuum model across 130 years of Sherman Act jurisprudence, Supreme Court decisions sometimes have wanted for nuance and precision in setting out the content of the rule of reason and its abbreviated treatment: rules of per se illegality for conduct that tends in most instances to destroy competition.[33]

## B. The Case Law

From the earliest days of the Sherman Act, the Supreme Court recognized that certain classes of behavior warranted condemnation without elaborate inquiry. In a seemingly sweeping statement of the principle in 1897, the Court in *United States v. Trans-Missouri Freight Ass'n* suggested that § 1 forbade all agreements that restrained trade without regard for their reasonableness.[34] In 1911, in *Standard Oil Co. of New Jersey v. United States*, the Supreme Court retreated from the absolute language of *Trans-Missouri Freight* and established the rule of reason as the baseline analytical method implementing the Sherman Act's ban on contracts in restraint of trade.[35] At the same time, *Standard Oil* suggested that not all conduct demanded an expansive inquiry to justify

[33] *See infra* Section II.B.

[34] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312–13 (1897).

[35] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) ("[T]he standard of reason . . . 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 [§ 1 of the Sherman Act] provided."). The Supreme Court's conclusion that § 1's ban on "every" contract in restraint of trade barred only *unreasonable* restraints, and its apparent indifference to the express legislative choice embodied in the statute, inspired an active debate about antitrust policy among the three candidates in the 1912 presidential election (Theodore Roosevelt, William Howard Taft, and Woodrow Wilson) and led Congress to adopt the Clayton Act and the Federal Trade Commission Act in 1914. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 3–5, 49 (2003).

its condemnation. Within "the standard of reason," the Court noted, some restraints might be so plainly injurious that courts could ban them out of hand.[36] The "nature and character" of certain agreements might create a "conclusive presumption" that the conduct violated § 1.[37] Thus, *Standard Oil* set the foundation for a dichotomy model that organized conduct into two distinct categories: conduct summarily condemned (per se illegal) and conduct assessed more fully for reasonableness.

In 1918, in *Board of Trade of the City of Chicago v. United States* (*CBOT*),[38] the Court set out what remains today perhaps its most influential expression of the rule of reason. In an opinion authored by Justice Louis Brandeis, the Court said "[t]he true test of legality [under § 1] 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."[39] In elaborating this principle and rejecting the DOJ's request that the conduct at issue be condemned summarily, the Court set out a wide range of factors relevant to assessing the reasonableness of defendants' behavior.[40] Over the decades, many observers have viewed the Court's enumeration of relevant considerations as requiring a hopelessly expensive and

[36] *See Standard Oil*, 221 U.S. at 60, 65. Earlier cases had applied the principle that the evaluation of practices within the coverage of § 1 did not invariably require extensive fact gathering or analysis. *See Trans-Missouri Freight Ass'n*, 166 U.S. at 312–13; *cf. also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898) (arguing that review had become no more lenient over time).

[37] *See Standard Oil*, 221 U.S. at 65 (explaining previous Court decisions).

[38] 246 U.S. 231 (1918).

[39] *CBOT*, 246 U.S. at 238.

[40] *Id.* ("[T]he 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.").

indeterminate inquiry.[41] Yet, to some scholars a more careful reading indicates that *CBOT* properly said that the arrangement at issue was ill-suited for summary condemnation without abandoning the principle that some conduct could be assessed with little or no examination of its surrounding market context.[42]

Less than a decade after *CBOT*, in *United States v. Trenton Potteries Co.*, the Court appeared to reaffirm the application of bright-line rules to condemn cartel agreements.[43] Then, in the early 1930s, as firms struggled to escape the grips of the Depression, the Court raised doubts about its intentions by allowing a group of coal producers to proceed with a plan to use a common sales agent to set the price for their output.[44]

After the collapse in 1935 of the National Industrial Recovery Act (NIRA) and its efforts to promote collective industrial planning,[45] Franklin Roosevelt's administration elevated competition and antitrust as economic policy instruments. The DOJ initiated a number of cartel cases that challenged the collusive schemes as categorically forbidden. One of these cases, *United States v. Socony-Vacuum Oil Co.*,[46] yielded a Supreme Court decision that remains a major fixture in § 1 jurisprudence. The *Socony* Court starkly affirmed the rule of per se illegality for horizontal price fixing and consciously repudiated vestiges of the government orchestration of output that prevailed in many sectors in the

[41] *See* Gavil, *supra* note 13, at 739, 743–44 (noting criticisms of *CBOT*'s approach as impractically complex).

[42] WERDEN, *supra* note 13, at 131–35.

[43] United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927). In *Trenton Potteries*, the Court condemned a cartel of sanitary pottery suppliers (which, the Court noted, collectively accounted for a dominant share of vitreous pottery "manufacturing and distribut[ion]") and rejected the defendants' argument that the prices they had set were reasonable. *Id.* at 394, 397–98.

[44] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 377–78 (1933). The Court responded favorably to the defendants' argument that their proposed plan sought to curtail the harms of destructive overproduction and depressed prices. *See id.* at 373–74.

[45] ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 283–303, 360–79, 420–55 (1966).

[46] 310 U.S. 150 (1940).

NIRA era.[47] Perhaps trying to underscore the clarity and severity of its new doctrinal stance, the Court claimed complete consistency with all of its earlier decisions notwithstanding its earlier acquiescence in the common coal sales program.[48]

*Socony* began a period, running into the early 1970s, in which the Supreme Court denominated a wide range of practices as worthy of per se condemnation. Among other forces, this development reflected the Court's evident belief that the fuller conception of the rule of reason that it had articulated in *CBOT* had become, in practice, a rule of per se legality. A number of opinions after *Socony* verge upon what Professor Andrew Gavil aptly has called caricature in their depiction of the impossibility of the burdens the rule of reason imposed upon plaintiffs.[49] In 1958, in *Northern Pacific Railway Co. v. United States*, the Court exalted the superiority of per se rules over the traditional formulation of the rule of reason:

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[50]

[47] *See id.* at 224–28.

[48] *See id.* at 214–18. *See also* Sheldon Kimmel, *How and Why the Per Se Rule Against Price-Fixing Went Wrong*, 19 SUP. CT. REV. 245, 249–50 (2011) (concluding that, based on a close examination of the trial court's decision in *Appalachian Coals*, the Supreme Court in *Socony* accurately characterized the Court's decision in *Appalachian Coals* as applying the prevailing form of the rule of reason—and not treating distressed industries as deserving exceptional treatment under the Sherman Act—and thus was consistent with the framework endorsed in *Socony*).

[49] Gavil, *supra* note 13.

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

In a later case that endorsed broad recourse to per se rules of illegality, the Supreme Court cautioned that "courts are of limited utility in examining difficult economic problems"[51] and reemphasized the predictability benefits, mentioned in *Northern Pacific*, that bright-line rules offer the business community.[52]

The Court's jurisprudence embraced an emphatically bipolar interpretation of the rule of reason. The Court portrayed itself as confronting a choice between clean, clear per se prohibitions that generate effective, predictable antitrust enforcement, and an "incredibly complicated," time consuming, and "often wholly fruitless" inquiry whose economic intricacies exceed the grasp of the typical judge. Framing the question this way, the solution was apparent: plaintiffs in § 1 litigation must be able to avail themselves of per se rules lest their claims disappear in the quicksand of the traditional rule of reason. From 1940 through the early 1970s, the Court extended the rule of per se illegality to horizontal customer or territory allocations,[53] some concerted refusals to deal,[54] and a wide range of vertical restraints.[55]

Since the mid-1970s, the Supreme Court has revisited these assumptions with dramatic effects. It has concluded that various practices once subject to categorical prohibition yield important economic benefits in too many cases to be condemned out of hand, and it has identified ways in which a more elaborate assessment could be undertaken without

[51] United States v. Topco Assocs., 405 U.S. 596, 609 (1972). The *Topco* Court warned against taking a "ramble through the wilds of economic theory in order to maintain a flexible approach." *See id.* at 609 n.10.

[52] *Id.* at 609 n.10 ("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.").

[53] *Id.* at 608–10; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597–98 (1951).

[54] Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959).

[55] *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 152–54 (1968) (maximum resale price maintenance), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967) (vertical territorial restrictions), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

recourse to the indeterminate inquiry courts and commentators associated with *CBOT*. Pronounced concerns with overinclusiveness and greater confidence in administrability inspired the shift noted above: the withdrawal of numerous forms of behaviour from categorical bans[56] and the replacement of the dichotomy model of § 1 with a continuum along which intermediate tests—called "quick look" or "truncated" analysis—link per se liability and fuller reasonableness inquiries and permit phased, structured examinations of evidence bearing on efficiency.[57]

In 1979, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*. (*BMI*), the Supreme Court brought the process of characterization out of the shadows and recognized it as the starting point of the § 1 inquiry.[58] The blanket copyright licenses at issue in *BMI*, were, literally, agreements to fix prices, yet the Court said this fact by itself

[56] *See GTE Sylvania*, 433 U.S. at 58, *overruling Arnold, Schwinn*, 388 U.S. 365; *State Oil*, 522 U.S. at 7, *overruling Albrecht*, 390 U.S. 145; Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007) (withdrawing the categorial ban on minimum resale price maintenance), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[57] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (*NCAA*), 468 U.S. 85, 109 n.39 (1984) (quoting PHILLIP AREEDA, FED. JUD. CTR., THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (1981)); Fed. Trade Comm'n v. Ind. Fed'n of Dentists (*IFD*), 476 U.S. 447, 459 (1986); PolyGram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 35 (D.C. Cir. 2005); *cf. also* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–71 (1999) (summarizing quick look cases and permitting the quick look approach where "the likelihood of anticompetitive effects is . . . obvious").

[58] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc (*BMI*), 441 U.S. 1, 19–21 (1979). One year earlier, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Supreme Court had anticipated the characterization approach endorsed in *BMI*. The Court began its review of a professional society's code of ethics by observing that the restriction at issue "operates as an absolute ban on competitive bidding" and that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 692. The Court then considered and rejected the society's "affirmative defense" that competitive bidding would lead professional engineers to skimp on quality and design structures that endangered public safety. *Id.* at 693–96.

did not mean that the agreements warranted per se condemnation. Instead, before it decides that conduct belongs in a category of activity subject to per se prohibition, a court must engage in a process of characterization that requires the court to ask two related questions.[59] First, is the practice "plainly anticompetitive" in the sense that it "facially appears to be one that would always or almost always tend to restrict competition and decrease output"?[60] Second, does a cognizable justification support the practice—is the conduct at issue "designed to 'increase economic efficiency and render markets more, rather than less, competitive'"?[61] Thus, in a § 1 dispute, defendants always have the opportunity to challenge efforts to characterize their behavior as inherently pernicious.[62]

*BMI* provided a crucial foundation for modern § 1 analysis.[63] As Professor Daniel Crane has observed, the decision underscored how the application of the label of per se illegality required courts to undertake an initial assessment of the competitive significance of the challenged conduct:

> [A]s things developed, *Socony's* price fixing prohibition became a conclusion rather than a mode of analysis. If a court found a particular collaborative arrangement to be unjustifiably anticompetitive, it would condemn it as a per se illegal price fixing

[59] *See BMI*, 441 U.S. at 8–9.

[60] *Id.* at 9, 19–20 (internal quotation marks omitted).

[61] *Id.* at 19–20 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

[62] One practical step that a court might take in evaluating such a challenge is to consider whether the parties to the agreement informed their customers of their plan. Presumably the parties would not hesitate to consult the customer ex ante about an arrangement argued to be in the customer's interest. Conversely, there is good reason to infer that the firms that strive to hide their collaboration from public view and to avoid, at all costs, revelation of their plans to their customers, do not have the best interests of their customers in mind.

[63] Several commentators have highlighted the importance of this landmark. *See* Denis, *supra* note 4, at 643; Paul Scott, *Unresolved Issues in Price Fixing: Market Division, the Meaning of Control and Characterisation*, 12 CANTERBURY L. REV. 197, 216 (2006); Paul G. Scott, *Price Fixing and the Doctrine of Ancillary Restraints*, 7 CANTERBURY L. REV. 403, 425–28 (1999); *see also generally* Calkins, *supra* note 14.

> agreement. But the efficiency of the defendant's conduct would generally be admissible to determine whether the conduct was unjustifiably anticompetitive, bringing into the front end of the analysis the sort of efficiency criteria that *Socony* dictated should not be considered at the back end. In the wake of *BMI*, rule of reason/per se dualism survived, but a path was opened to avoid the "price fixing" label by characterizing the relevant conduct as efficient.[64]

Thus, *BMI* illuminated the analytical process that was the predicate for the decision to condemn behavior summarily with the per se rule.[65]

Two decisions in the 1980s recognized intermediate alternatives to summary condemnation and full-blown rule of reason inquiry. In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma* (*NCAA*),[66] the Supreme Court concluded that when the presence of plausible, cognizable efficiency justifications precluded summary prohibition under the per se rule, a full rule of reason analysis was not invariably necessary. Sometimes a restraint's competitive harm will be apparent from an abbreviated reasonableness analysis that avoids inquiry into the defendant's market power;[67] "when there is an agreement not to compete in terms of prices or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive

[64] Crane, *supra* note 14, at 115–16.

[65] *See* Calkins, *supra* note 14, at 224 ("[After *BMI*,] 'price fixing' is a label to be applied after some analysis, rather than a label that avoids the necessity of analysis.").

[66] 468 U.S. 85 (1984). *See also* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693, 704-07 (2009) (recounting effort by Justice Stevens on behalf of the Court majority in *NCAA* to articulate a "unitary rule of reason" that joined up previously distinct analytical categories).

[67] *See NCAA*, 468 U.S. at 110. The delineation of a relevant market and the measurement of market power often are the two exercises that give the full-blown rule of reason its elaborate character. Techniques that bypass these processes can simplify antitrust litigation substantially. GAVIL ET AL., *supra* note 17, at 196–99.

character of such an agreement.'"[68] The Court considered the defendant's efficiency claims but did so in a truncated analysis. It rejected the asserted justification that the challenged restrictions were needed to shield an inferior product from competition from a superior product, and it held that a restraint must be reasonably "tailored" to achieve a procompetitive aim.[69]

Two years later, in *Federal Trade Commission v. Indiana Federation of Dentists* (*IFD*),[70] the Supreme Court again recognized the existence of "quick look" or "truncated" variants of the rule of reason. The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive nature" of an agreement among members of a dental society to refuse to provide x-rays to insurers processing claims on behalf of consumers of dental care.[71] The Court explained:

> Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services—such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place" cannot be sustained under the Rule of Reason.[72]

As a group, *BMI*, *NCAA*, and *IFD* indicated that the assessment of horizontal agreements occurs along an analytical continuum: the court evaluates behavior in a level of detail necessary to comprehend its competitive effects.[73] In

[68] *NCAA*, 468 U.S. at 109 (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

[69] *See id.* at 113–20.

[70] 476 U.S. 447 (1986).

[71] *Id.* at 459 (quoting *Pro. Eng'rs*, 435 U.S. at 692).

[72] *Id.* (quoting *Pro. Eng'rs*, 435 U.S. at 692) (first citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); and then citing Bd. of Trade of Chi. v. United States (*CBOT*), 246 U.S. 231 (1918)).

[73] *See* PolyGram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 34 (D.C. Cir. 2005) ("Since *Professional Engineers* the Supreme Court has steadily moved away from the dichotomous approach—under which every restraint of trade is either unlawful *per se*, and hence not susceptible to a procompetitive justification, or subject to full-blown rule-of-reason

1999, in *California Dental Ass'n v. Federal Trade Commission*, the Supreme Court expressly acknowledged that its earlier cases recognized an abbreviated or "quick look" variant of the rule of reason.[74] The Court underscored the trend toward viewing the rule of reason as a continuum: "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."[75] The elaborateness of the analysis depends on the context:

> there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.[76]

## III. PROCESSES FOR DEFINING PER SE PROHIBITIONS: DESIRABLE CHARACTERISTICS

As described above, the Supreme Court's jurisprudence since the mid-1970s. recognizes that when an antitrust system employs a mix of bright-line rules and standards, the regime requires an initial sorting exercise that places observed behavior into one of two baskets: conduct suitable for summary condemnation and conduct requiring more elaborate inquiry.[77] This first step, often referred to as

analysis—toward one in which the extent of the inquiry is tailored to the suspect conduct in each particular case.").

[74] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 769–71 (1999).

[75] *Id.* at 779.

[76] *Id.* at 780–81.

[77] *See supra* text accompanying notes 58–62; PolyGram Holding, Inc., 136 F.T.C. 310, 332 (2003) ("*BMI* made explicit and transparent a characterization process that courts performed even during the dichotomy model's apex. The dichotomy model placed all horizontal restraints in two boxes—one containing *per se* illegal acts and the other containing conduct that warranted a full reasonableness inquiry. To apply that framework in an individual case, the court had to make a threshold decision whether the arrangement at issue belonged in one box or the other.").

"characterization," involves a preliminary assessment of the conduct's competitive consequences.

Some conduct is easily seen as inherently inimical to competition. An example is the conspiracy of lysine producers at issue in *United States v. Andreas*.[78] At trial the DOJ presented videotapes of company executives negotiating the allocation of market shares and exhorting each other to unite in defeating their common foe: the customer.[79] There was no doubt that the sole purpose of the concerted behavior was to raise prices by restricting output.[80]

Other scenarios are more ambiguous than the lysine conspiracy. In such cases, participants in the challenged agreements present arguments that the restrictions in question enable the parties to offer products or services that advance consumer interests and would not be available without the restrictions.[81] In an antitrust system that applies both bright-line rules and more fact-intensive standards, the decisionmaker must choose which to apply to the behavior. It is impossible to make this threshold choice sensibly without some assessment (perhaps a very abbreviated one) of whether the conduct has redeeming merit.

Because per se illegality has formidable effects in the resolution of antitrust cases, the process used to guide judicial inclusion and exclusion of conduct from the class of categorically prohibited conduct ideally should have five principal characteristics.[82]

[78] 216 F.3d 645, 650–54 (7th Cir. 2000) (describing the conspiracy).

[79] *See id.* at 670.

[80] *See id.*

[81] *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 21–22 (1979) (accepting such an argument).

[82] The characteristics identified here are inspired in part by the FTC's recognition in its *PolyGram* decision of "the need in modern competition policy to devise analytical tests that are sound in substance, transparent in revealing their operational criteria, and administrable in the routine analysis of antitrust disputes." *PolyGram*, 136 F.T.C. at 351–52.

## A. Sound Substantive Foundations

First, the process should generate confident theoretical and empirical bases for treating certain behavior as illegal per se. This requires a mechanism for canvassing relevant studies, gathering expert opinion from academics, enforcement officials, and practitioners, accurately distilling lessons from theory and experience about the actual or likely effects of challenged conduct, and making this body of knowledge accessible to judges sitting in antitrust cases.

## B. Administrability

A second desirable attribute of a classification process is administrability in the application of the rule of reason and its variants. In an ideal world, the framework for decisions about whether observed behavior should be condemned should enable a court to progress from consideration of more modest amounts of information toward a more elaborate inquiry, depending upon the nature of the conduct. In practice this means the adoption of a spectrum of analysis that identifies more suspicious conduct early on and then tests justifications before moving to a more elaborate assessment of effects.

The U.S. experience shows that a framework that offers courts only two choices—per se condemnation or a fact-intensive reasonableness assessment—can create tremendous pressure for tribunals to place an inordinately large number of practices in the per se basket for the sake of having an effective enforcement system. The perception of the rule of reason as unmanageable and—as applied—permissive can introduce unfortunate distortions into a competition law system. This was the case in U.S. jurisprudence from the early 1940s through the early 1970s, when the Supreme Court, fearing that courts were "of limited utility in examining difficult economic problems" and weighing competing economic effects,[83] dramatically expanded the category of

[83] United States v. Topco Assocs., 405 U.S. 596, 609–10 (1972).

agreements deemed to be illegal per se[84]—in many cases with a likely cost to efficiency.[85]

## C. Periodic Adaptation

A third desirable trait for a classification process is adaptability. Antitrust enforcement takes place in a dynamic commercial and policy environment. Taken together, litigation of individual cases, studies about the effects of past enforcement, and research concerning new commercial phenomena and the theory of industrial organization provide a continuous flow of new insights about the significance of business practices. In some instances, the new insights unmask the competitive hazards of conduct previously deemed to be benign;[86] in other cases, theory and experience demonstrate important benefits from behavior previously thought to be pernicious.[87]

The dynamism in theory and empirical study dictates routine periodic reassessment of the assumptions that define

[84] *See supra* notes 50–55 and accompanying text.

[85] For perhaps the most striking example of the Supreme Court expanding per se liability, see United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (holding that vertical intrabrand non-price restraints were illegal per se), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). The Supreme Court's disavowal since the mid-1970s of per se rules to condemn "competitively harmless vertical contracting" inspired changes in distribution practices that "very likely increased consumer welfare and efficiency." Herbert Hovenkamp & Fiona Scott Morton, *Framing Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1848 (2020).

[86] For example, a number of recent scholarly papers have identified scenarios in which vertical restraints, including minimum resale price maintenance, should be scrutinized closely because they may facilitate horizontal collusion. *See* Patrick Rey, *Vertical Restraints and Collusion: Issues and Challenges*, 83 ANTITRUST L.J. 1, 2–4 (2020) (reviewing modern scholarship).

[87] The Supreme Court's *GTE Sylvania* decision in 1977 noted commentary that had attacked the assumption, reflected in the Court's earlier jurisprudence, that vertical restraints often served no purpose other than to suppress competition. *GTE Sylvania*, 433 U.S. at 47, 48 & n. 13. Doctrinal adjustments since *Sylvania* have repudiated per se condemnation for most distribution practices. GAVIL ET AL., *supra* note 17, at 897–1078.

the set of per se illegal conduct. Commentators generally agree that summary condemnation is appropriate for conduct manifestly anticompetitive and highly unlikely to have offsetting benefits, like unadorned, concerted commitments to restrict output, raise prices, or suppress rivalry on other dimensions of competition.[88] A properly-tailored rule of categorical illegality provides benefits of clarity and procedural economy which outweigh the cost of occasional (presumably rare) false positives.[89]

This category must, however, be confined narrowly and appropriately; otherwise, it will fall into disrepute, and decision-takers may seek ways of avoiding its consequences. Appropriate confinement requires regular efforts to assess whether the contours of the per se prohibition are well set in light of lessons learned from theory and experience. If the reassessment does not happen in an open, direct manner, it likely will occur quietly and obscurely. Such quiet means of evasion can include an antitrust agency's decision not to bring cases or a court's manipulation of the law in order to avoid finding an infringement, which might have broader implications and make other antitrust actions harder to bring. For example, some past cases, rather than altering the per se category, have made it more difficult for a claimant to bring an action or prove the existence of an agreement,[90] and others have modified or provided exceptions to preexisting rules.[91]

[88] *See, e.g.*, Hovenkamp, *supra* note 13, at 97; F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 335–39 (3d ed. 1990).

[89] *See supra* Section II.A.

[90] The U.S. courts have raised requirements that plaintiffs must satisfy to plead and prove concerted action. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596–97 (1986); Bell Atl. Corp. v. Twombly 550 U.S. 554, 556–57 (2007).

[91] In 1997, the Supreme Court eroded the per se ban against resale price maintenance by removing the setting of maximum resale prices from the coverage of the per se rule. State Oil Co. v. Khan, 522 U.S. 3, 22 (1997), *overruling* Albrecht v. Herald Co., 390 U.S. 145 (1968). Similarly, since the 1930s and 1940s, the Supreme Court has labeled tying arrangements as per se offenses even though a plaintiff now must demonstrate that the defendant has market power in the tying product—a factor which is irrelevant in the traditional *Socony* formulation of the per se offence. *See*

## D. Transparency

The fourth pillar of a sound classification process is transparency in judicial opinion-writing and in public enforcement policy. Decisions that determine what behavior will be treated as illegal per se should be explained clearly and honestly. For example, when a court premises its choice of a decisionmaking principle upon positive assumptions about the state of the world, it should specify the bases for these assumptions. Clarity in presenting the theoretical and empirical foundations for the choice of analytical frameworks and decisionmaking rules encourages informed debate about the choices made and helps guide the periodic process of reassessment.[92] A commitment by judges—whether sitting on courts of general jurisdiction or as members of specialist antitrust tribunals—to provide this clarity also can be a valuable discipline that presses toward reaching principled decisions and writing informative opinions.

## E. Accounting for Equilibrating Tendencies in the U.S. Antitrust System

In a number of important instances, doctrine and policy in the U.S. antitrust system have been shaped by "equilibrating tendencies" of courts and enforcement agencies which moderate the impact of the antitrust statutes' powerful congressional commands.[93] Courts and enforcement agencies have applied a number of techniques (equilibration devices) to diminish the perceived overinclusiveness of various commands.

Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–14 (1984). For tying arrangements, the Supreme Court also foreclosed recourse to certain analytical short cuts that plaintiffs previously had used to establish the existence of market power in the tying product. In Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006), the Court ruled that a firm's ownership of a patent does not confer, by itself, monopoly power upon it.

[92] On periodic reassessment, see *supra* Section III.C.

[93] Identification of this phenomenon in antitrust law originated in the work of Professor Stephen Calkins. *See generally* Stephen Calkins, *Summary Judgment, Motions To Dismiss, and Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

The possibility of criminal prosecution for Sherman Act violations is an important motivation for equilibration.[94] Over the past fifty years, Congress has enhanced the power of antitrust criminal enforcement mechanisms significantly.[95] Among other steps, it has changed the Sherman Act criminal offense from a misdemeanor to a felony[96] and has increased the maximum fines and prison sentences available under § 1 significantly.[97] This underscores the importance of firms having an adequate opportunity to contest the prosecutor's characterization of conduct as illegal per se—for example, by showing that a challenged restriction was necessary to the joint efforts of competitors to develop a new product or service.

In its criminal enforcement program, the DOJ uses prosecutorial discretion as an equilibration mechanism to avoid the overinclusive application of criminal sanctions. With one exception since the establishment of the felony offense in 1974, the DOJ has focused criminal enforcement exclusively on cartel offenses[98]—the category of behavior that most commentators regard as posing significant competitive dangers with few and rare offsetting benefits.[99] This approach has the benefit of presenting juries with cases involving the most serious competitive dangers and avoiding matters in which the presence of a plausible justification might lead the jury to exonerate the defendant.

The courts also have engaged in various forms of equilibration to curb the reach of their own decisions by means short of overruling precedents. The treatment of minimum

[94] 15 U.S.C. § 1 (2018) (authorizing fines and imprisonment).

[95] Henry, *supra* note 3, at 120.

[96] Antitrust Procedures and Penalties Act (APPA), Pub. L. No. 93-528, sec. 3, §§ 1–3, 88 Stat. 1706, 1708 (1974).

[97] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, sec. 215, § 1, 118 Stat. 661, 668.

[98] *See* Henry, *supra* note 3, at 147.

[99] *See, e.g.*, Stucke, *supra* note 3, at 450–52, 503; *Cartel Prosecution: Stopping Price Fixers and Protecting Consumers: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Sen. Amy Klobuchar, Chairman, Subcomm. on Antitrust, Competition Pol'y & Consumer Rights of the S. Comm. on the Judiciary).

resale price maintenance (RPM) illustrates equilibration as a phenomenon that, over time, can blunt the application of a rule of per se illegality. Established in 1911 in *Dr. Miles Medical Co. v John D. Park & Sons Co.*,[100] the per se ban on RPM had attracted growing criticism from the 1970s onward as being overinclusive in its tendency to forbid arrangements that, in a large number of cases, had important redeeming competitive features.[101]

For nearly a century, the Court sought to confine the reach of the *Dr. Miles* rule not by altering the substantive test directly, but through equilibration by manipulating the definition of agreement in the RPM context. One equilibration response to *Dr. Miles* came in *United States v. Colgate & Co.*[102] in 1919. Focusing on § 1's plurality requirement, the Court ruled that concerted action was lacking if a manufacturer announced its refusal to deal with discounters and then terminated any retailer that deviated from its policy.[103]

Sixty years later, in *Continental T. V., Inc. v. GTE Sylvania Inc.*, while holding that the rule of reason governed non-price vertical restraints, the Court left the per se prohibition on RPM intact.[104] The personal papers of Justice Lewis Powell indicate that, in 1983, he pondered the possibility of persuading the Court in *Monsanto Co. v. Spray-Rite Service Corp.*[105] to complete the task *Sylvania* had avoided and eliminate the per se ban on RPM.[106]

But Justice Powell feared that repudiation of *Dr. Miles* would lead Congress to amend § 1 to write the per se ban upon RPM into the Sherman Act.[107] He pursued another strategy.

[100] 220 U.S. 373, 408–09 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[101] *See, e.g.*, Robert H. Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171, 176–77.

[102] 250 U.S. 300 (1919).

[103] *Id.* at 306–07.

[104] 433 U.S. 36, 51 n.18, 59 (1977).

[105] 465 U.S. 752 (1984).

[106] Andrew I. Gavil, Sylvania *and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8, 10.

[107] *See id.*

First in *Monsanto*[108] and later in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court left the *Dr. Miles* rule in place but heightened the proof that plaintiffs must introduce to demonstrate an agreement to set a resale price.[109] By this strategy, the Court eroded the impact of a per se rule it perceived to be unwise by making it more difficult for plaintiffs to establish the key predicate to a successful suit—that the defendant had formed an agreement to set resale prices.

In a separate line of cases, the Court ruled that a private plaintiff could not recover damages for an admitted instance of maximum RPM unless it showed that the challenged conduct reduced competition.[110] This application of the antitrust injury requirement recognized in 1977 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[111] had the effect of converting a per se rule into a reasonableness test with respect to the entitlement to monetary relief.

These indirect forms of erosion of the per se ban on RPM ended in 2007. In *Leegin* the Court squarely overturned *Dr. Miles* and made minimum RPM a rule of reason offense.[112] The majority took some steps to suggest how a rule of reason might be applied to RPM in the future and thus preserve a genuine means for policing competitively harmful applications of RPM.[113]

A second example of judicial equilibration has involved the ban on horizontal output restrictions. In the modern era, the Supreme Court has not wavered from the principle that

[108] *Monsanto*, 465 U.S. at 763–64.

[109] Business Elecs. Corp. v. Sharp Elecs. Corp, 485 U.S. 717, 726–27 (1988), *abrogated by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (completing the elimination of the *Dr. Miles* rule).

[110] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334–35 (1990).

[111] 429 U.S. 477, 489 (1977).

[112] *Leegin*, 551 U.S. at 881–82, *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Nearly a decade earlier, the Court had eliminated per se condemnation for maximum RPM schemes. State Oil Co. v. Kahn, 522 U.S. 3 (1997), *overruling* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[113] *Leegin*, 551 U.S. at 897–99.

horizontal price-fixing, customer allocations, and territorial divisions, if unrelated to an integration of effort that yields efficiencies, warrant per se condemnation.[114] Nonetheless, the Court has expressed repeated concerns that the use of private rights of action in the U.S. system (which feature mandatory trebling of damages,[115] fee recovery by victorious plaintiffs,[116] the availability of class actions and jury trials, joint and several liability,[117] and recourse to extensive discovery tools) present a serious risk of overdeterrence in horizontal restraints cases and in matters involving single-firm conduct.[118] In *Matsushita* in 1986 and in *Twombly* in 2007, the Court heightened the tests that plaintiffs must satisfy to plead and prove concerted action.[119] In doing so, the Court made it more difficult for plaintiffs to avail themselves of a nominally powerful rule of liability.

Serious distortions in antitrust doctrine can arise from efforts by courts to counterbalance imperfections in substantive rules through indirect means. The Supreme Court's adjustments of the agreement requirement to offset the perceived overinclusiveness of *Dr. Miles*'s per se rule provide an example. Concepts the Court used to cabin what it saw as an improvidently broad per se prohibition of RPM reshaped the definition of "agreement" in cases involving conduct (e.g., horizontal output restrictions) widely believed

[114] *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (per curiam).

[115] 15 USC § 15(a) (2018).

[116] *Id.*

[117] *See In re* Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980) ("Anti-trust liability under Section 1 of the Sherman Act is joint and several." (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *abrogated on other grounds by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

[118] In the 1970s, the work of Harvard School scholars such as Phillip Areeda and Donald Turner played a formative role in persuading courts to counterbalance perceived overreaching in the U.S. system of private rights of action by imposing more demanding evidentiary burdens on plaintiffs. William E. Kovacic, *The Intellectual DNA of modern U.S. Competition Law for Dominant Firm Conduct: The Chicago-Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 36–37, 51–64.

[119] *See supra* note 90.

to be damaging far more often than not.[120] Horizontal restraint cases that have imported agreement concepts from RPM equilibration cases arguably have undermined the effectiveness of a wise ban on various horizontal restraints.[121] This result reveals a hazard of resorting to bright-line rules to condemn conduct with ambiguous competitive effects.

## IV. EVOLUTION OF THE U.S. CLASSIFICATION PROCESS: MEANS FOR DISCERNMENT

As described in Section II.B, Sherman Act jurisprudence over time has featured important expansions and contractions regarding the category of behavior deemed worthy of summary condemnation. Sherman Act decisions also expressly recognize that the operation of any system that employs a concept of per se illegality invariably involves an initial step of classification or characterization—a sorting exercise that requires the decisionmaker (a government agency in deciding whether to prosecute or a court in deciding liability), before condemning it summarily, to assess whether behavior presents redeeming benefits.[122]

A key question for courts is how judges are to discern that the moment is right to include conduct in the per se category or to withdraw conduct previously thought to warrant categorical prohibition. This question focuses attention on the processes through which courts gather and absorb ideas and information about the competitive significance of various commercial practices. The discussion in this Part reviews approaches courts have used to discern whether behavior should be subject to a rule of per se illegality.

[120] GAVIL ET AL., *supra* note 17, at 335–38.

[121] *See id.*

[122] For example, in the *Addyston Pipe* ancillarity framework, the court must determine whether the restraint is naked (and subject to immediate prohibition) or "ancillary" to a legitimate integration of activity. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898).

## A. Textualism

One approach to discernment is to seek guidance from the statutory texts and the context in which Congress adopted them. This method has a checkered history in Supreme Court antitrust jurisprudence.[123] In his 1897 opinion for the Supreme Court in *Trans-Missouri Freight*, Justice Rufus Peckham concluded that the price-setting arrangement of the defendant railroads was illegal because § 1 barred *every* contract in restraint of trade without exception.[124] On behalf of the four-member dissent, Justice Edward White accused Justice Peckham of embracing an unrealistic literalism that robbed the Sherman Act of its capacity to make sensible distinctions between pernicious and beneficial agreements.[125]

One year later, Justice Peckham and his colleagues appeared to temper the seemingly absolute language of *Trans-Missouri Freight*. In one decision, the Court said § 1 condemned only arrangements whose "direct and immediate effect" was to restrain trade.[126] In a second case, the Court observed in dictum that the Act did not prohibit restraints related to the sale of a business or the formation of a partnership at common law.[127]

Then, as noted above, the Supreme Court in *Standard Oil* in 1911 placed a lasting mark on antitrust interpretation by declaring that § 1 prohibited only "unreasonable" trade restraints while leaving open the possibility that some restrictions might be banned because they were inherently unreasonable.[128]

[123] *See* Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1207 (2021). *See also* Robert H. Lande & Richard O. Zerbe, *The Sherman Act as a No-Fault Statute: A Textualist Demonstration*, 70 Am. U. L. Rev. 497, 509–18 (2020) (discussing challenges involved in using a textualist approach in determining the meaning of the Sherman Act).

[124] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312–13 (1897).

[125] *See id.* at 346–47 (White, J., dissenting).

[126] Hopkins v. United States, 171 U.S. 578, 592 (1898).

[127] United States v. Joint-Traffic Ass'n, 171 U.S. 505, 567 (1898).

[128] *See supra* notes 35–37 and accompanying text.

A more careful reading of the Court's decisions in the Sherman Act's first decades might have indicated that, by 1900, the Court was progressing toward a framework that distinguished between arrangements that restrained trade and those which promoted attainment of legitimate business aims.[129]

## B. Common-Law Antecedents

On a number of occasions, the Supreme Court has used common-law principles developed before 1890 to guide the designation of various forms of conduct as per se offenses. As described above, the Court's formative decisions in the early history of the Sherman Act examined common-law cases involving partnerships and sales of businesses in considering which agreements warranted condemnation under § 1.[130] Lower court decisions made similar references to pre-Sherman Act common-law cases. Perhaps the most notable example is Judge Taft's opinion for the Sixth Circuit in *Addyston Pipe*.[131] In a much-debated portrayal of common law jurisprudence, Judge Taft cited common-law decisions in deriving his distinction between naked and ancillary restraints.[132]

Another source of common-law guidance in framing per se rules has been property law. In its analysis of distribution practices, the Supreme Court at times has premised rules of per se illegality on property law doctrines that disfavored restraints upon alienation. For example, assessing the legality of resale price maintenance in its 1911 *Dr. Miles* decision, the Court took note of the common law's hostility

[129] *See* John R. Carter, *From Peckham to White: Economic Welfare and the Rule of Reason*, 25 ANTITRUST BULL. 275, 278–81 (1980). Some scholars have concluded that an evident aim of Congress in drafting § 1 was to condemn price setting pools prevalent in the period leading up to enactment of the Sherman Act. *See* WERDEN, *supra* note 13, at 63–65.

[130] *See Joint-Traffic Ass'n*, 171 U.S. at 567–68.

[131] *See generally* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[132] *See id.* at 281–82.

toward equitable servitudes on chattels.[133] Ruling that RPM was illegal per se, the Supreme Court said, "a general restraint upon alienation is ordinarily invalid," adding that such arrangements are "injurious to the public interest and void" when their purpose is to destroy competition by fixing prices.[134] Over a half-century later, in *United States v. Arnold, Schwinn & Co.*, the Supreme Court ruled that vertical territorial restrictions on distributors and retailers were illegal per se.[135] As it had in *Dr. Miles*, the Court invoked the common law's hostility toward restraints on alienation and said vertical contractual restrictions warranted condemnation "[o]nce the manufacturer has parted with title and risk."[136]

## C. Experience

The decision about what to place in the category of per se illegality requires a judgment about how often observed conduct has harmful effects.[137] U.S. doctrine now reserves the per se approach mainly for horizontal restraints (unless ancillary to a collaboration that enhances efficiency) and not for conduct with generally more ambiguous consequences, such as mergers and single-firm exclusionary behavior.[138] But the category of per se illegal behavior is adjustable, allowing

[133] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404–05 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[134] *Id.* at 404, 408.

[135] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[136] *Id.* at 382.

[137] *See supra* Section III.C.

[138] *Compare* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (per curiam) (applying the per se rule to a horizontal restraint), *with* Brown Shoe Co. v. United States 370 U.S. 294, 339–46 (1962) (condemning a merger only after examining competitive effects), *and* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, 540 U.S. 398, 407–10 (2004) (rejecting a claim of discriminatory dealing "in order to limit entry").

for the addition or subtraction of individual practices over time.[139]

Many decisions refer to the role of experience in helping courts discern whether conduct warrants categorical prohibition. The Supreme Court and other tribunals have indicated that the expansion of the category depends partly on the extent of "experience" that courts have had with a specific practice.[140] In speaking of experience, courts seem to have in mind several streams of knowledge. Two of these stand out. One is the learning that courts have distilled from the resolution of past cases which confronted classification questions.[141]

Another form of experience is the accumulation of knowledge generated by empirical and theoretical scholarship that addresses the operation of markets and the competitive significance of various commercial practices within them.[142]

[139] *See* PolyGram Holding, Inc. v. Fed. Trade Comm'n, , 416 F.3d 29, 37 (D.C. Cir. 2005) ("as economic learning and market experience evolve, so too will the class of restraints subject to summary adjudication").

[140] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) ("[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue." (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 9 (1979))); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958))); *In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011–12 (7th Cir. 2012) ("The per se rule is designed for cases in which experience has convinced the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever.").

[141] *See, e.g.*, *BMI*, 441 U.S. at 10 (rejecting per se classification in part because "[w]e have never examined a practice like this one before"); *Sulfuric Acid*, 703 F.3d at 1011 ("It is relevant here that we have never seen or heard of an antitrust case quite like this, combining such elements as involuntary production and potential antidumping exposure. It is a bad idea to subject a novel way of doing business (or an old way in a new and previously unexamined context, which may be a better description of this case) to per se treatment under antitrust law.").

[142] In its *PolyGram* decision, the FTC observed that "[d]ecisions about the appropriate form of inquiry would evolve over time as courts gained experience in evaluating specific business phenomena and accounted for commentary examining the rationale for and effects of various practices."

Since the mid-1970s, there has been an evident trend toward heavier Supreme Court reliance upon modern learning about economics to determine whether to treat conduct as illegal per se. In *Sylvania*, the Supreme Court cautioned that admission into the per se category must be based on assessments of a practice's "demonstrable economic effect."[143] The Supreme Court's decision regarding reverse payments in *Federal Trade Commission v. Actavis, Inc.* suggests that it will not be easy to satisfy this requirement and expand the per se illegal category in the future.[144]

Judicial decisions do not specify the quantum of experience needed to provide a confident basis for classification choices. In *BMI*, the Supreme Court said "it is only after *considerable* experience with certain business relationships that courts classify them as per se violations."[145] By what measure are courts to know if the judiciary has achieved the experience—or considerable experience—to denominate conduct as categorically forbidden? To a large degree, the invocation of "experience" as a basis for inclusion or exclusion has an impressionistic quality, as each tribunal states, often without explanation, that the requisite level of experience with a practice has been attained or is lacking.[146] This is readily understandable. There is no well-developed metric that tells courts when a critical mass of experience has formed to permit confident judgments about the classification of behavior as competitively dangerous. Nor do courts tend to identify clearly the sources of information that judges are drawing upon to discern lessons from past experience. Their obligation to resolve concrete disputes presented before them means that, unlike legislators or regulatory bodies, they take cases one at

PolyGram Holding, Inc., 136 F.T.C. 310, 327–28 (2003) (first citing State Oil Co. v. Khan, 522 U.S. 3, 21 (1997); and then citing *Maricopa*, 457 U.S. 332, 344 (1982)).

[143] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

[144] *See* Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 159 (2013).

[145] *BMI*, 441 U.S. at 9 (emphasis added).

[146] *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 265–66 (1963) (Brennan, J., concurring), *abrogated by* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by GTE Sylvania*, 433 U.S. 36.

a time and do not convene proceedings to discuss broader policy issues and examine the evolution of the law as a whole.

Our awareness of how judges discern lessons from experience is incomplete, but it is possible to identify some of the processes through which courts gather and assess information regarding "experience." The following subsections summarize four of these.

### 1. Briefs Filed by the Parties and Amici

Briefs provide an influential means for parties and friends of the court to assemble information about relevant experience and to present this information to the courts.[147] Sometimes this influence is evident from a published opinion whose arguments and authorities are directly traceable to briefs submitted in the case.[148] In other instances, the publicly available papers of jurists show how specific briefs helped shape a court's thinking about an issue.[149] Various collections of papers confirm that briefs in antitrust cases have played a crucial role in making judges aware of the larger context regarding the issues in question by reviewing developments—in commerce, in scholarship, and in the effect of previous judicial decisions—relevant to the resolution of the case at hand.[150]

### 2. Pre- and Post-Appointment Judicial Background

Professional experience before appointment to the bench may influence the understanding of judges regarding accumulated experience and their views about the utility of per se rules in antitrust law. For example, researchers have

[147] *See, e.g.*, *generally* Stephen Calkins, *The Antitrust Conversation*, 68 ANTITRUST L.J. 625 (2001) (discussing significance of amicus curiae filings in antitrust litigation).

[148] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (*NCAA*), 468 U.S. 85, 100 n.42 (1984) (expressly approving the Solicitor General's brief).

[149] *See, e.g.*, Gavil, *supra* note 106, at 11–12.

[150] *See, e.g.*, *id.*

documented that Justice Lewis Powell came to the Supreme Court in 1972 with deep skepticism about the existing framework of antitrust doctrine, which he regarded as far too intervention-minded.[151] One of his specific concerns was the breadth of existing per se prohibitions. The retrenchment of these rules became a focal point for his advocacy with colleagues inside the Supreme Court and an important aim of his opinion-writing.[152] Other judicial appointees have been academics whose own research and teaching in the field equipped them with considerable understanding of current developments and informed their views about the appropriate future path for doctrine. In some cases, the perspectives these judges developed before coming to the bench made their way directly into their opinions about the scope of per se rules.[153]

In their time on the bench, judges in various ways acquire knowledge relevant to the resolution of antitrust cases. Judges on some courts may hear a number of antitrust cases, and these matters become part of the base of "experience" that a tribunal including these judges possesses. Some judges, especially academics, continue to do research and publish papers on antitrust topics.[154] Some of this research deals with the design of antitrust rules and the use of per se prohibitions.[155] Another form of post-appointment learning

[151] *See* Camden Hutchison, *Law and Economics Scholarship and Supreme Court Antitrust Jurisprudence, 1950-2010*, 21 LEWIS & CLARK L. REV. 145, 192–93 (2017)

[152] *See* Gavil, *supra* note 106, at 9–10.

[153] *See* Rothery Storage Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230, 231 & n.2 (D.C. Cir. 1986) (Wald, J., concurring) (situating Judge Bork's opinion within an academic debate including contributions earlier made by Judge Bork as an academic); Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 188–89 (7th Cir. 1985) (Easterbrook, J.) (interpreting Supreme Court decisions delineating reach of per se ban on horizontal market divisions).

[154] *See, e.g.*, *generally* Ginsburg, *supra* note 15; Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005 (1987).

[155] *See, e.g., generally* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (published during the month of Judge Easterbrook's appointment to the Seventh Circuit).

comes from courses conducted by universities[156] and organized by bodies such as the Administrative Office of the U.S. Courts.

### 3. Agency Policy Guidance

Enforcement agency guidelines, notices, and speeches influence the efforts of courts to discern the lessons of experience. Collectively, courts have used these tools to clarify the policy goals of the antitrust laws, to specify the factors to be considered in antitrust analysis and the weight to assign to each, and to suggest the ordering of their analysis. In the United States, the influence has been most pronounced in the field of merger control, where judicial decisions frequently employ the methodology set out in agency guidelines.[157] Other U.S. guidelines specifically designed to shape the treatment of conduct involving concerted action, such as the 2000 DOJ and FTC Competitor Collaboration Guidelines,[158] have had less success in guiding judicial development of doctrine.

### 4. Public Agency Adjudication

Although guidelines and other supplemental tools are valuable elements of the U.S. antitrust system, the litigation of cases and the issuance of judicial decisions continue to

[156] *See, e.g.*, scalialaw, *GAI Antitrust Economics Institute for Federal Judges*, GLOB. ANTITRUST INST. (Oct. 22, 2019), https://gai.gmu.edu/2019/10/22/gai-economics-institute-for-competition-law-judges/ [https://perma.cc/6892-XZA8].

[157] *See, e.g.*, United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 51–52 (D.D.C. 2011) (endorsing the "hypothetical monopolist test" used by the FTC and the DOJ); United States v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 203966, at *28–29 (N.D. Cal. Jan. 8, 2014) (same).

[158] FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/PX3F-HCXY]. On these guidelines, see generally Robert A. Skitol, *Yes, the Competitor Collaboration Guidelines Are Ripe for Revision*, ANTITRUST, Summer 2016, at 42; W. Stephen Smith, Mark D. Whitener & Marcie Brimer, *Revising the Competitor Collaboration Guidelines: Three Easy Pieces*, ANTITRUST, Summer 2016, at 47.

supply the most important sources of policy development. A basic, sustaining level of litigation is necessary to give courts opportunities to upgrade doctrine as understanding about the competitive significance of individual practices evolves and as the state of the analytical art—reflected in commentary and enforcement agency practice—improves.

Public agencies occupy a special position; through their choice of cases they can shape doctrine and provide courts with opportunities to adjust the category of per se prohibitions. In particular, the FTC might resolve concerns about judicial capacity and about expertise in devising intermediate techniques for applying the rule of reason—reflected in decisions such as *Northern Pacific Railway* and *Topco*[159]—through greater use of its administrative process to adjudicate cases and engage in what Professor Daniel Crane has called "norm-creation."[160]

The Supreme Court's modern decisions have provided limited guidance about how to apply the new conception of the rule of reason and how to structure its abbreviated variants.[161] Lower court decisions have sought to add to this analytical architecture. A noteworthy example is the D.C. Circuit decision in *PolyGram Holding, Inc. v. Federal Trade Commission*, which endorsed a truncated analysis framework employed by the FTC to assess restrictions that rival record labels had imposed upon each other in connection with the introduction of a commonly-produced concert recording.[162] In the *PolyGram* framework, the plaintiff begins by demonstrating that defendant's conduct is "inherently suspect" based on a survey of its character and its similarity to other restraints found to present serious competitive

[159] *See supra* notes 50–52 and accompanying text.

[160] DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 131–43 (2011).

[161] On this conception, see *supra* notes 73–76 and accompanying text.

[162] PolyGram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 35–36 (D.C. Cir. 2005). *See also* North Texas Specialty Physicians v. Fed. Trade Comm'n, 528 F.3d 346, 358–70 (5thCir. 2008) (upholding FTC's use of an "inherently suspect" quick look analytical framework to challenge price-setting activities of a physicians group).

dangers.[163] The defendant then must come forward with plausible, legally cognizable justifications for its behavior.[164] If the defendant provides such justifications, the plaintiff must explain why the court may conclude, without further evidence, that anticompetitive effects are likely to predominate, or it must provide evidence suggesting that such effects are likely.[165] If the plaintiff meets this burden, the evidentiary burden shifts to the defendant to show that the restraint does not harm consumers or has net "procompetitive virtues."[166]

In a general way, *PolyGram*'s burden-shifting approach resembles the framework that the same court used to decide the monopolization suit prosecuted by the DOJ against Microsoft. In its per curiam opinion in *United States v. Microsoft Corp.*,[167] the D.C. Circuit described the Sherman Act § 2[168] inquiry as having the following basic steps: the plaintiff first presents a theory of anticompetitive harm (which typically entails a demonstration that the defendant possesses substantial market power),[169] and the defendant then offers justifications for its behaviour.[170] If the defendant presents sufficient justification evidence, the burden shifts to the plaintiff to rebut the justification evidence.[171] If the parties have presented evidence of both procompetitive and anticompetitive effects, the court ultimately balances the proof to determine liability.[172]

The FTC's litigation of *PolyGram* and other cases that sought to define intermediate analytical approaches within the rule of reason was not accidental. Following the Supreme

[163] *See id.* at 35–36.
[164] *Id.* at 36.
[165] *Id.*
[166] *Id.* (internal quotation marks omitted).
[167] 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).
[168] 15 U.S.C. § 2 (2018) (prohibiting monopolization).
[169] *Microsoft*, 253 F.3d at 58–59.
[170] *Id.* at 59.
[171] *Id.*
[172] *Id.*

Court's decision in *California Dental*,[173] the Commission's leadership team assigned a high priority to identifying cases that provided good vehicles for developing doctrine through the agency's administrative adjudication process.[174] The FTC's effort after *California Dental* to clarify the content of the quick look illustrates how the public agencies can engage in a dialogue with the courts that refines the application of the rule of reason and its variants. More specifically, the examination of behavior in the "inherently suspect" variation of the quick look that the FTC developed in *PolyGram* provides one method for evaluating conduct which, after further examination in later cases, courts might discern to be appropriate for inclusion in the class of per se illegal restraints.

[173] At the time it was issued, the Supreme Court's decision in *California Dental* raised questions about the future efficacy of quick look methods of analysis. Stephen Calkins, California Dental Association*: Not the Quick Look, but Not the Full Monty*, 67 ANTITRUST L.J. 495, 531–35 (2000).

[174] This observation is based on the author's experience from 2001 to 2004 as the FTC's General Counsel. The author participated in discussions which developed an internal consensus that the Commission should use its administrative adjudication process to issue opinions that clarified the way ahead for quick look analytical techniques and underscored their importance by setting out the evolution of rule of reason jurisprudence. A number of individuals in the FTC's leadership group believed that the agency could play an important role in guiding the developing of antitrust doctrine by using its administrative adjudication mechanism more extensively. *See generally* William E. Kovacic, *Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 GEO. MASON L. REV. 313 (1997). In the 2000s, four cases that involved the application of the rule of reason and were developed through the FTC's administrative adjudication process reached the courts of appeals. Three of the court of appeals decisions upheld the FTC's administrative decision. *See* PolyGram Holdings, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 36 (D.C. Cir. 2005); North Texas Specialty Physicians v. Fed. Trade Comm'n, 528 F.3d 346, 370 (5th Cir. 2008); Realcomp II, Ltd. v. Fed. Trade Comm'n, 635 F.3d 815, 836 (6th Cir. 2011). One decision set aside and vacated the FTC's order. Schering Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1058 (11th Cir. 2005),

## V. SUGGESTED CLASSIFICATION PROCESS REFINEMENTS

A variety of mechanisms assist courts in discerning how to define rules of per se illegality. This Part considers steps the government competition agencies can take to enhance the ability of courts to discern which behaviors warrant per se condemnation. Through a variety of mechanisms, including the litigation of cases and trade regulation rules, the preparation of reports, and the preparation of guidelines, competition agencies are engaged in what might be called an ongoing conversation with the courts before which they appear regularly. Given the prominent role of courts in the interpretation of the antitrust laws, all of these interactions are opportunities for the DOJ and the FTC to enhance the efforts of judges to determine what behavior warrants per se condemnation.

The proposals presented below suggest how the public antitrust agencies can help improve the efforts of courts to delineate per se rules and carry out the characterization exercise that is essential to their application. The measures seek to align the definition of per se rules more closely with the desired system characteristics set out in Part III—namely to:

- Strengthen the informational foundations of per se illegality classifications;
- Increase the administrability of more elaborate reasonableness inquiries as a way of avoiding pressure to distort the antitrust laws in service of effective enforcement;
- Facilitate ongoing adaptation of per se rules;
- Make the system's operational criteria and discernment process more transparent; and
- Identify and account for the equilibrating tendencies that the operation of per se rules can set in motion.

## A. Periodic Reassessment Proceedings

The public antitrust agencies—the DOJ, the FTC, and the state attorneys general—from time to time have convened public gatherings to examine developments in antitrust law.[175] The agencies could apply their capability as convenors to conduct periodic assessments of the operation of per se rules of illegality and to build a consensus about what types of behavior are appropriate subjects for categorical prohibition.[176] They could host proceedings in which academics, business officials, judges, policymakers, and practitioners analyze the existing set of per se prohibitions and discuss possibilities for expanding or reducing the set. One could imagine that such proceedings might take place on a regular basis—perhaps every five years. As a recent example, the FTC in 2020 held a public workshop on noncompete covenants as part of a larger set of deliberations on modern competition law and policy.[177]

[175] *See, e.g.*, *Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM'N, www.ftc.gov/policy/hearings-competition-consumer-protection [https://perma.cc/RUW9-KFBR] (last visited Dec. 21, 2020) (collecting recordings of public FTC hearings). On the value of hearings as policymaking instruments, see William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy Norms Without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 27–29 (2015); *More than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 774–76 (2005) (discussing the FTC's historical role in convening hearings to address important competition policy issues).

[176] Antitrust agencies might consider forming partnerships with universities and other academic institutions with significant research programs to perform the convening function. These academic hubs can draw upon their expertise in antitrust economics and law to help frame the agenda for proceedings and to serve as trusted venues for policy debate. *See generally* William E. Kovacic, *Academic Hubs and the Intellectual Infrastructure of Economic Regulation*, in THE CONTRIBUTION OF POSTAL AND DELIVERY SERVICES 1 (2018).

[177] *See Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues [https://perma.cc/4HTD-CHJZ] (last visited Dec. 21, 2020) (describing the workshop).

An important aim of the periodic reassessment would be to take stock of ongoing advances in economic theory and in learning about business practices. This stock-taking would help illuminate the impact of existing per se rules and help interpret the experience that courts use as a basis for adjusting the class of conduct subject to per se condemnation. The agencies could prepare reports that distill the results of the reassessment proceedings and thus provide accessible means for courts to consider future adaptions to the per se rule.

## B. Research Agenda

The public antitrust agencies routinely carry out research that explores the competitive significance of contemporary commercial developments and evaluates the effects of past programs.[178] On their research agendas, the agencies could include topics relevant to the future elaboration of the per se rule. Possible focal points include:

- The strategies by which firms seek to collude in the shadow of strict prohibitions and criminal enforcement against price-fixing, bid-rigging, and the allocation of customers and territories;[179]
- The effects of restrictions, such as noncompetition covenants and no-poaching agreements, that diminish worker mobility and limit competition in labor markets;[180] and
- The role that restrictions on price or other dimensions of rivalry can play in facilitating collaborative ventures

[178] *See, e.g.*, *Overview of the Merger Retrospective Program in the Bureau of Economics*, FED. TRADE COMM'N, https://www.ftc.gov/policy/studies/merger-retrospectives/overview [https://perma.cc/UY3R-F6YJ] (last visited Dec. 21, 2020) (discussing the FTC's merger research).

[179] *See* William E. Kovacic, Robert C. Marshall & Michael J. Meurer, *Serial Collusion by Multi-Product Firms*, 6 J. ANTITRUST ENF'T 296, 320–24 (2018).

[180] *See* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 866–67 (2013).

> designed to provide previously unavailable products or services.[181]

The FTC is uniquely well-positioned to lead antitrust agency research efforts by reason of its information-gathering authority under section 6 of the Federal Trade Commission Act[182] and its longstanding role in performing competition policy research and development.[183]

The research program sketched above also could provide a valuable historical perspective on the elaboration of the per se rule and guide the mapping and priority-setting efforts described below. Historical research could examine the expansion and contraction of per se rules and study the forces that motivated adjustments.[184] In particular, this line of research could examine how judges (often encouraged by enforcement agencies) gradually extended the reach of the per se rule involving horizontal restraints—beginning with a ban on concerted action to set the entire price of a product or service,[185] and then extending per se condemnation to other joint activities that affected one dimension of the total price (e.g., setting credit terms)[186] or determined the quality of a

[181] *See, e.g.*, Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1052–54 (9th Cir. 1983) (describing restrictions that may have facilitated the development of a new aircraft).

[182] 15 U.S.C. § 46 (2018).

[183] *See* Special Comm. To Study the Role of the Fed. Trade Comm'n, Section of Antitrust L., Am. Bar Ass'n, *Report of the American Bar Association Section of Antitrust Law Special Committee To Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 96–97, 101–02 (1989); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 176–77 (2005) (discussing the importance of "competition policy research and development" to competition agency effectiveness and describing FTC research and policy analysis functions).

[184] The benefits of increased historical awareness as a guide for policy development in antitrust law are examined in William E. Kovacic, *Keeping Score: Improving the Positive Foundations for Antitrust Policy*, 23 U. PA. J. BUS. L. 1 (2020).

[185] United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927).

[186] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648–49 (1980) (per curiam).

product (e.g., restricting inputs that firms could use to manufacture an end product).[187]

Historical research also could trace the evolution of the DOJ criminal enforcement program and the impact of that program on the definition of the per se offense.[188] For much of the history of the Sherman Act, the DOJ prosecuted antitrust infringements other than cartels as crimes.[189] As late as the 1960s, the DOJ brought some § 2 claims of attempted monopolization and monopolization as criminal cases and in one speech in the late 1970s suggested that it might continue to do so.[190]

As Roxann Henry recounts in her paper for this volume, the passage in 1974 of the Antitrust Procedures and Penalties Act (APPA) upgraded the criminal offense to a felony and raised criminal sanctions substantially,[191] but the DOJ's self-restraint in criminal prosecution has mitigated the APPA's harshness.[192] The APPA led the DOJ to ask basic questions about which offenses warranted criminal punishment: for what conduct would juries convict individual defendants, and for which offenses would judges impose severe custodial sentences?[193]

One consequence of this reassessment was that the DOJ focused attention on the existing boundaries of per se

[187] Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n, 345 F.2d 421, 426 (7th Cir. 1965).

[188] For one study of this type, see generally Donald I Baker, *Punishment for Cartel Participants in the US: A Special Model?*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 27 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

[189] *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 17–18.

[190] *See id.* at 17–18, 44–45.

[191] Antitrust Procedures and Penalties Act (APPA), Pub. L. No. 93-528, sec. 3, §§ 1–3, 88 Stat. 1706, 1708 (1974).

[192] *See* Henry, *supra* note 3, at 147.

[193] *See* William E. Kovacic, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT, *supra* note 188, at 45, 55.

illegality.[194] If existing doctrine denominated conduct as illegal per se—i.e., as posing serious competitive dangers and rarely having redeeming features—then why not prosecute all per se offenses—including price and nonprice vertical restraints—as crimes? At one level, it seemed anomalous for the public prosecutor to visit the full force of the criminal enforcement process on one set of per se offenses but to address others with civil sanctions only. The DOJ's actual experience in challenging vertical restraints suggested its unease with the economic foundations for the per se ban on RPM and, from 1968 up to 1977, for various nonprice distribution restrictions.[195] Between the 1974 adoption of the APPA and 2007, the DOJ brought only a single criminal case against minimum RPM even though existing doctrine banned the practice categorically.[196]

Denominating conduct as illegal per se will always raise the question whether the DOJ will challenge such conduct as a crime. Because the status of per se illegality carries with it a suggestion of grave danger to the competitive process, one might expect that all such offenses deserve criminal punishment. This expectation could act as a barrier to the extension of per se illegality beyond its current boundaries to encompass conduct now subject to a more elaborate rule of reason analysis. If the DOJ decides to treat new forms of behavior as categorically forbidden, it must be prepared to explain why it would not use criminal punishment to sanction it in the ordinary case.

## C. Litigation

The public antitrust agencies could work together to identify priorities for the development of cases that could serve to clarify the boundaries of existing rules of per se illegality, to improve analytical methodologies—such as the

[194] *See* WERDEN, *supra* note 13, at 296–97.

[195] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 461 (2003).

[196] *See* United States v. Cuisinarts, Inc., No. H80-559, 1981 WL 2062 (D. Conn. Mar. 27, 1981).

characterization process and the quick look approach—related to its practical operation, and to consider adjustments in the existing set of per se prohibitions.[197] A program of deeper interagency collaboration could begin by mapping out the evolution of doctrine, setting out its existing contours, and identifying areas in which the agencies might strengthen the existing framework.[198] This exercise also might involve closer study of what considerations have motivated courts in individual cases to expand the application of per se prohibition to additional forms of conduct.[199] A better understanding of the foundations for previous doctrinal extensions could help guide agency efforts to gain judicial acceptance for new adjustments.

The collaboration described here might generate cases that the agencies, acting individually or jointly, could pursue to advance doctrine. The agencies also could use amicus

[197] The possibilities for federal and state agencies with competition law responsibilities to coordinate activities more completely and devise common programs more extensively are examined in William E. Kovacic, *Toward a Domestic Competition Network*, *in* COMPETITION LAWS IN CONFLICT 316 (Richard A. Epstein & Michael S. Greve eds., 2004); David A. Hyman & William E. Kovacic, *State Enforcement in a Polycentric World*, 2019 BYU L. REV. 1447; William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097, 1103–17 (2012).

[198] One focal point for this form of analysis would be a historically-oriented examination of how the boundaries of the per se rule have moved over time. For horizontal price fixing, this exercise would document how and why the zone of per se illegality has expanded to cover a wider range of conduct, from its origin as a ban on setting the price for a product or service, see, for example, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312–13 (1897), to encompass restrictions on output, see, for example, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223–24 (1940), a restriction on one term (credit) that affects the price of a transaction, see, for example, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648–49 (1980) (per curiam), and an agreement to restrict the use of inputs that improve product quality. *See, e.g.*, Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n, 345 F.2d 421, 426 (7th Cir. 1965).

[199] *See* GAVIL ET AL., *supra* note 17, at 191–92 (observing that Supreme Court cases that have applied the per se rule to various horizontal restraints have "frequently involved well-developed records" containing some evidence that defendants had the capacity to raise prices and that their concerted actions actually harmed competition").

appearances in private litigation to provide courts with the benefit of experience, which judges have found valuable in deciding when to recognize and apply per se rules.[200] Amicus briefs could give the agencies opportunities to encourage the extension of per se condemnation to practices not yet deemed to be categorically forbidden but believed, in light of current knowledge, to have dangerous anticompetitive effects without countervailing efficiency benefits. One candidate practice is the use of "no-poaching" agreements by which firms restrict competition for talented employees.[201]

## D. Rulemaking

The FTC's authority to promulgate trade regulation rules[202] provides another mechanism for adjusting the application of rules of per se illegality. The FTC could draw upon the reassessment proceedings and research programs suggested above,[203] along with antitrust agency experience in enforcing section 1 of the Sherman Act, to clarify existing per se principles and adjust the scope of their coverage. For example, the FTC might choose to distill the learning from its proceedings involving employment covenants[204] to develop a rule restricting their use, perhaps with proscriptions against the use of such covenants in specific circumstances.

[200] *See supra* Section IV.C.

[201] *See No-Poach Approach*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [https://perma.cc/77ZT-JP7F] (last updated Sept. 30, 2019) (describing the DOJ's attempts to apply a per se rule to no-poaching agreements); Press Release, Antitrust Div., U.S. Dep't of Just., Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion [https://perma.cc/QPS9-9N9P] (announcing indictment charging Surgical Health Care Affiliates LLC for agreeing with rivals not to solicit senior-level employees).

[202] *See* 15 U.S.C. § 57a(a) (2018). On the possibilities for expanded FTC recourse to competition rulemaking, see generally Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

[203] *See supra* Sections V.A–.B.

[204] *See, e.g.*, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, *supra* note 177.

## E. Policy Guidance

As noted above, antitrust agencies influence the development of doctrine in the courts by means other than litigation. The issuance of enforcement guidelines and related policy commentary is part of the conversation that agencies conduct with judges. Guidelines that offer a compelling intellectual vision based on a synthesis of theory and practice have supplied an influential way of translating enforcement experience into concepts that courts can use to interpret the antitrust laws.[205] Twenty years after the issuance of the DOJ and FTC Competitor Collaboration Guidelines,[206] this is an opportune time for the Agencies to reformulate their visions of the rule of reason and of the role of per se rules in its implementation.

New collaboration guidelines might enhance the state of the art in several ways. One way involves the terminology of antitrust analysis, including the term "per se illegality." The analysis in *BMI* raises the possibility that the label of per se illegality itself is a misnomer.[207] *BMI* contemplates that the defendant always has an opportunity to present cognizable justifications, such as the value of a challenged restraint in facilitating cooperation that leads to the introduction of a product that would not be available without the facilitating restraint.[208] Professor Thomas Krattenmaker has argued persuasively that the Supreme Court has not established rules of per se illegality so much as it has declared certain

[205] *See supra* Section IV.C.3. On the factors that determine the influence of antitrust agency guidelines in shaping the development of antitrust doctrine and policy, see generally Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 Antitrust L.J. 1039 (2005); William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 Antitrust L.J. 5 (2000).

[206] FED. TRADE COMM'N & U.S. DEP'T OF JUST., *supra* note 158.

[207] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979).

[208] *See* Thomas G. Krattenmaker, Commentary, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 171 n.34 (1988).

justifications to be per se unacceptable.[209] By this interpretation, the courts have specified justifications that, when raised as part of the threshold characterization process, do not entitle defendants to a fuller reasonableness inquiry. As determined in cases from *Trans-Missouri Freight* onward, noncognizable justifications include claims that defendants set reasonable prices,[210] that competition destroys commerce by depriving firms of needed levels of profitability,[211] that defendants lack the market power needed for an output restriction to affect prices,[212] that defendants never actually implemented their output restriction scheme,[213] or that the challenged restrictions were necessary to support the success of a product that consumers regarded as inferior to a product whose availability the defendants sought to limit.[214]

Similarly, the guidelines might clarify the use of per se terminology to condemn certain tying arrangements. In *Jefferson Parish Hospital District No. 2 v. Hyde*, a Supreme Court majority rejected the suggestion of four concurring justices that the per se label badly fit a rule that required a showing of market power in the tying product to establish the defendant's capacity to coerce buyers to acquire the tied product, as well.[215] The majority said that it was too late for the Supreme Court to suggest that tying was not per se illegal.[216] In light of developments described above, one can anticipate confidently that the Supreme Court in a future

[209] *See id.* at 178.

[210] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341–42 (1897).

[211] *See* United States v. Topco Assocs., 405 U.S. 596, 611 (1972).

[212] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

[213] *See id.* at 224.

[214] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (*NCAA*), 468 U.S. 85, 115–17 (1984).

[215] *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–14 (1984); *id.* at 34–35 (O'Connor, J., concurring in the judgment). In Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 29 (2006), the Court abandoned the view, previously expressed in *Jefferson Parish*, that possession of a patent created a presumption that a firm possessed market power in the market for the tying product.

[216] *Id.* at 9 (majority opinion).

tying case will take the opportunity to change the vocabulary it has used to describe the tying offense.[217] It may say that courts should evaluate tying with a structured rule of reason analysis that uses, among other techniques, a market power screen to determine liability and an assessment of efficiency justifications.

## F. Policy Guidance: The Special Case of Criminal Enforcement

There is no paucity of publicly available information about the DOJ's criminal enforcement program.[218] Since the mid-1970s, the DOJ has said a great deal about what it has done and what it means to do. In policy statements and speeches, it has provided considerable information about its enforcement intentions and the operation of key criminal enforcement tools, such as its Leniency Program.[219] Business managers and their advisors can derive still further information about the DOJ's criminal program in materials related to the litigation of specific cases, including criminal indictments[220] and sentencing statements. Judicial decisions in criminal cartel cases afford yet another informative perspective, as do articles and books that have examined individual DOJ decisions to prosecute.

Additional DOJ disclosure nonetheless could improve policymaking and implementation of the per se rule. For

[217] This would not be the first time that the Court has considered the question of how to label the tying offense. During the Supreme Court's deliberations regarding *Jefferson Parish*, Justice Sandra Day O'Connor undertook an unsuccessful effort to persuade a majority of her colleagues to stop describing tying as a per se offense. William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 ANTITRUST BULL. 93, 97–99 (1997).

[218] The Antitrust Division's criminal enforcement guidance materials are collected at *Criminal Enforcement*, U.S. Dep't of Just., https://www.justice.gov/atr/criminal-enforcement [https://perma.cc/T6PV-DJHH] (last updated Feb. 24, 2021).

[219] U.S. DEP'T OF JUST., CORPORATE LENIENCY POLICY (1993), https://www.justice.gov/atr/file/810281/download [https://perma.cc/WAT9-FF7T].

[220] *See* Henry, *supra* note 3, at 163.

example, the DOJ might explain its own version of the characterization process used to decide whether to proceed with a criminal case or a civil case where conduct might seem to be per se illegal. In the Apple e-books prosecution, the DOJ's complaint recited the behavior of the book publishers and Apple in a way that, at times, seemed to be setting the predicate for a criminal case.[221] Yet the DOJ brought civil charges only.[222] The e-books case underscores the crucial role of prosecutorial discretion in the enforcement of per se rules. In a potential criminal matter, the first, and perhaps most important, arena where the characterization debate takes place is in the offices of the DOJ. This is where the potential defendants have their opportunity to contest the DOJ's hypothesis that defendants' conduct is illegal per se.

At a suitable time, the DOJ also might disclose more information about its characterization decisions in individual cases and the factors that led it to proceed with criminal or civil charges. A decision to bring a civil, and not criminal, complaint would seem to reveal some uncertainty about the quality of the defendant's asserted justifications for its conduct—at least with respect to the jury's likely perception of them. It would be helpful to know whether the DOJ perceives there to be essentially three categories of § 1 infringements: conduct that poses serious competitive dangers with no conceivable justifications, such that the only issue at trial will be the existence of the requisite concerted action,[223] conduct that the DOJ believes to be per se illegal but challenges as a civil violation because the defendant will raise justifications that may resonate with jurors in a hypothetical criminal case,[224] and conduct that the DOJ sees as presenting

[221] *See* Complaint at 31–32, United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013) (No. 12-cv-02826-UA), *aff'd*, 791 F.3d 290 (2d Cir. 2015). For a comprehensive examination of the Apple e-books prosecution, see generally CHRIS SAGERS, UNITED STATES V. APPLE: COMPETITION IN AMERICA (2019).

[222] Complaint, *supra* note 221, at 7.

[223] *See, e.g.*, United States v. Andreas, 216 F.3d 645, 668 (7th Cir. 2000).

[224] The Apple e-books case may have involved such conduct.

efficiency rationales requiring a more elaborate (but perhaps abbreviated) reasonableness inquiry.

## G. Possible Changes to the U.S. Antitrust Goals Framework

Since the late 1970s, the U.S. courts and enforcement agencies have accepted that antitrust law is "a 'consumer welfare prescription.'"[225] Thus, U.S. doctrine concerns itself with claims by individual firms only to the extent that their injuries correspond to harm to consumer interests. The suffering of firms which cannot establish a connection between their grief and injury to consumer interests is irrelevant to modern U.S. antitrust analysis. The consumer welfare focus generally distinguishes U.S. law from what economists refer to as a "total welfare" test, which is indifferent to redistributions of wealth from consumers to producers, so long as challenged business practices have positive efficiency effects.[226] As applied by U.S. enforcement agencies and courts, the consumer welfare standard ordinarily recognizes efficiency claims only if defendants pass the asserted efficiencies along to consumers.[227]

[225] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (*NCAA*), 468 U.S. 85, 107–08 (1984) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)); Makan Delrahim, Antitrust Div., U.S. Dep't of Just., All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets 5 (May 22, 2018) (citing United States v. Anthem, 855 F.3d 345, 371 (D.C. Cir. 2017) (Millett, J., concurring)), https://www.justice.gov/opa/speech/file/1065096/download [https://perma.cc/F9BD-KQSX].

[226] *See* GAVIL ET AL., *supra* note 17, at 81–82 (describing the "total welfare" concept and its relevance to antitrust analysis); Albertina Albors-Llorens & Alison Jones, *The Images of the 'Consumer' in EU Competition Law*, *in* THE IMAGES OF THE CONSUMER IN EU LAW 43, 46–48 (Dorota Leczykiewicz & Stephen Weatherill eds., 2016) (discussing U.S. antitrust goals).

[227] *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUST., *supra* note 158, at 24–25 ("To . . . determin[e] [a merger's overall competitive effect,] the Agencies consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market[.]").

The modern consumer welfare and efficiency orientation of U.S. doctrine departs significantly from earlier jurisprudence, which willingly sacrificed efficiency considerations in order to protect smaller firms and preserve a more egalitarian business environment.[228] As Professors Roger Blair and Daniel Sokol observe, the modern U.S. approach reflects the view that the pursuit of non-efficiency goals is best left to other fields of public policy. The U.S. antitrust system is

> technocratic in the sense that antitrust be defined narrowly to examine only those issues that are purely without antitrust's ability to be measured and understood using industrial organization as the basis for economic analysis. This technocratic approach moves noncompetition economic considerations to areas such as sector regulation, the legislative process, or executive fiat. Such areas are better equipped than antitrust to deal with political trade-offs between law and policy.[229]

This consensus is not immutable. In recent years, many commentators have argued that the consumer welfare orientation improperly disregards other valid policy aims, including the protection of the interests of small businesses and workers and the correction of disparities in wealth within U.S. society.[230] References to this broader, egalitarian

[228] *See, e.g.*, United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to . . . preserve the right of freedom to trade."); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 213 (1959) ("[Defendants'] combination takes from Klor's its freedom to buy appliances in an open competitive market . . . . [I]t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[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 those competing considerations in favor of decentralization. We must give effect to that decision.").

[229] Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2505–06 (2013).

[230] *See, e.g.*, KRISTA BROWN ET AL., AM. ECON. LIBERTIES PROJECT, THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION

conception of antitrust law have yet to enter the language of modern judicial decisions, but appeals to reassert this vision of antitrust law's aims have appeared frequently in recent U.S. political discourse about future antitrust enforcement. For example, a 2020 legislative report advocates a reformulation of the existing goals framework: "the Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[231]

Adjustments in the longstanding commitment to the consumer welfare objective are hardly impossible. The reassessment proceedings mentioned above[232] might discuss how a reframing of the goals of U.S. antitrust policy could affect the application of rules of per se illegality. A practical way to approach this question is to consider how a citizen welfare standard might affect modern precedents. Might the courts and enforcement agencies adapt the per se rule, for example, to recognize exceptions for collective efforts by workers to achieve higher wages[233] or by smaller firms to cooperate for the purpose of challenging large commercial enterprises?[234]

POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH 137 (2021) (recommending that federal antitrust agencies "reject[] the consumer welfare standard and embrac[e] an approach that seeks to promote fair competition" and "empowers workers and supports small business"); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 237 (2017).

[231] SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, MAJORITY STAFF REPORT, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 392 (2020).

[232] *See supra* Section V.A.

[233] The Supreme Court has struck down one such scheme. *See* Fed. Trade Comm'n v. Superior Ct. Trial Laws., 493 U.S. 411, 422–24 (1990).

[234] The Court has explicitly rejected this justification. *See* United States v. Topco Assocs., 405 U.S. 596, 610–11 (1972).

## VI. CONCLUSION

The rule of reason is a vital element of the U.S. antitrust system. Its application requires a continuing process of reassessment and refinement in light of improvements in learning about the competitive significance of specific business practices. Dynamism in commerce and improvements in the theoretical and empirical foundations for competition law require courts and enforcement agencies to revisit, on a regular basis, the assumptions that guide the application of this fundamental analytical tool.

Within the overall framework of the rule of reason, powerful consequences often flow from decisions by prosecutors and courts to denominate conduct as categorically forbidden. The application of a per se rule of illegality typically forecloses inquiry into the market power of the defendants, the effects of their collective action (e.g., on prices, quality, and other dimensions of commerce), and the justifications offered for the practice at issue (e.g., whether the allocation agreement enabled weaker firms to survive). When a plaintiff establishes a per se infringement in a private treble damages action, the analysis turns completely to the calculation of injury. In criminal cases, the per se rule allows the DOJ to portray certain forms of conduct as presenting competitive dangers so unmistakeable and widely understood that their use justifies juries in convicting firms and individuals who resort to them.

In light of these consequences, the wisdom of denominating conduct as illegal per se depends heavily on how one defines the class of behavior subject to summary condemnation and how one goes about determining, in individual cases, whether the acts of the defendants fall within the class. The principles that guide classification should have strong theoretical and empirical foundations and should adapt regularly in light of past litigation experience and new learning about the competitive significance of business practices. Experience derived from exposure to individual cases provides a useful but limited basis upon which courts may discern the classification of practices as deserving per se condemnation or a more elaborate inquiry. The public antitrust agencies in the

United States can take a number of further steps to improve the bases on which courts denominate conduct as illegal per se and to ensure that the courts revisit and test regularly the assumptions supporting rules of per se illegality.