

## ISSUE PAPER: DOES THE RULE OF REASON VIOLATE THE RULE OF LAW?

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A “key feature” of all industrial market systems, according to the World Bank, “is a strong state that can support a formal legal system that complements existing norms and a state that itself respects the law and refrains from arbitrary actions.”<sup>1</sup> Under the rule of law, enforcement authorities apply clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly. The law should be sufficiently specific and its enforcement predictable and fair. With clear standards, market participants can channel behavior in welfare-enhancing directions and better predict their rivals’ behavior. Clear standards reduce transaction costs, rent-seeking behavior by market participants, and decision errors by the antitrust agencies and courts. The rules are sufficiently prospective, accessible and clear to constrain the government (both the executive and judiciary) from exercising its power arbitrarily. Impartial courts can quickly and economically enforce the law, which applies to all persons equally, offering equal protection without prejudicial discrimination.

### *A. Rule of Law as a Precondition for Effective Antitrust Enforcement*

If the rule of law is a necessary prerequisite for an effective free market, then the competition laws, which seek to maximize the benefits from a free market economy while minimizing the attendant risks of (and correcting any) market failure, should comport with these rule-of-law principles. (To argue otherwise renders this illogical conclusion: The law generally must comport with these rule-of-law principles for our market economy to function properly; but competition law, which directly governs market behavior, is somehow exempt.)

Competition laws help create the rules of the game. If the competition rules enhance welfare and outline with sufficient clarity what is impermissible, then all can rely on these rules in channeling their behavior in welfare-enhancing directions. Firms have expectations of the boundaries of their competitors’ behavior. Suppose, for example, a competitor abides by the competition rules (and incurs costs to do so), while its rival cheats (and seeks a competitive advantage). Failure to enforce uniformly the rules will invite others to cheat. Without rules yielding predictable legal outcomes, firms may refrain from welfare-enhancing activity and opt for less efficient forms of doing business. Alternatively, competitors may engage in socially harmful activity but rely on lawyers and lobbyists to try to clear them of legal difficulties. The rule of law can reduce the negative welfare effects associated with such rent-seeking activities. As Friedrich August von Hayek frames it, “[t]he important thing is that the rule enables us to predict other people’s behavior correctly, and this requires that it should apply to all cases — even if in a particular instance we feel it to be unjust.”<sup>2</sup>

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<sup>1</sup> WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 4 (2002).

<sup>2</sup> F.A. HAYEK, THE ROAD TO SERFDOM 114 (U. Chicago Press 2007).

Although competition rules can help fix the rules of the game, and proscribe specific actions deemed socially undesirable, the government is not exogenous to the free market. The laissez-faire approach is to exclude the government from the market. But the law, as a positive force, provides the needed scaffolding for a market economy; it facilitates commerce and economic growth. Thus, the rule of law enables political institutions to “provide the necessary underpinnings of public goods essential for a well-functioning economy and at the same time limit the discretion and authority of government and of the individual actors within government.”<sup>3</sup>

Clear antitrust rules also mitigate the knowledge and information problems that can lead to decision errors. With a general totality-of-economic-circumstances standard, the current administration may be more sympathetic to one industry or firm than another. As Hayek warned, a vague standard fosters central-planning and concentrates more power in the hands of the privileged. As central planning “becomes more and more extensive, it becomes regularly necessary to qualify legal provisions increasingly by reference to what is ‘fair’ or ‘reasonable’ . . . [T]his means that it becomes necessary to leave the decision of the concrete case more and more to the discretion of the judge or authority in question.”<sup>4</sup>

Not surprisingly, the OECD’s ideal characteristics of a competition standard dovetail with rule-of-law principles. An antitrust legal standard should promote:

- *Accuracy* (the standard should minimize false positives and negatives),
- *Administrability* (standard should be easy to apply),
- *Consistency* (standard should yield predictable results),
- *Objectivity* (standard should leave no subjective input from the decision-makers),
- *Applicability* (the wider the scope of conduct the standard can reach the better), and
- *Transparency* (the standard and its objectives should be understandable).<sup>5</sup>

### *B. Rule of Reason’s Infirmities Under Rule-of-Law Principles*

So how does the rule of reason, the “prevailing,”<sup>6</sup> “usual”<sup>7</sup> and “accepted standard”<sup>8</sup> for evaluating conduct under the Sherman Act, fare under these rule-of-law principles? Poorly. In the past few years, the U.S. Supreme Court has complained about the state of federal antitrust law. The Court decries antitrust’s “inevitably costly and protracted discovery phase,” as hopelessly beyond effective judicial supervision.<sup>9</sup> The Court complains that antitrust’s per se

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<sup>3</sup> DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 85 (2005).

<sup>4</sup> HAYEK, *supra* note 2, at 116.

<sup>5</sup> OECD, Policy Roundtables, Competition on the Merits 23, <http://www.oecd.org/dataoecd/7/13/35911017.pdf>.

<sup>6</sup> *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

<sup>7</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007).

<sup>8</sup> *Id.* at 2712.

<sup>9</sup> *Bell Atl. v. Twombly*, 127 S. Ct. 1955, 1966 & 1967 n.6 (2007) (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)); *see also* CIVIL RULES ADVISORY COMMITTEE, MINUTES 32 (Nov. 8-9, 2007), <http://www.uscourts.gov/rules/Minutes/CV11-2007-min.pdf> (demonstrating that court “spent some time

illegal standard might increase litigation costs by promoting “frivolous” suits.<sup>10</sup> It fears the “unusually” high risk of inconsistent results by antitrust courts.<sup>11</sup>

But who created this predicament? The Supreme Court. Over the past 90 years, the Court has supplied the Sherman Act’s legal standards. In determining the legality of restraints of trade, the Supreme Court generally employs either a per se or rule-of-reason standard.<sup>12</sup> The rule of reason, which involves a “flexible” factual inquiry into a restraint’s overall competitive effect, and “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>13</sup> The rule of reason also “varies in focus and detail depending on the nature of the agreement and market circumstances.”<sup>14</sup> “Under this rule the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>15</sup> Despite its label, the rule of reason is not a directive defined ex ante (such as a speeding limit). Instead, the term embraces antitrust’s most vague and open-ended principles.

Moreover, since 1977 the Supreme Court has narrowed the scope of its per se rule. The Court overturned its per se rule for vertical, non-price restraints in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>16</sup> for vertical maximum resale price maintenance (“RPM”) in *State Oil Co. v. Khan*,<sup>17</sup> and for vertical minimum RPM in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*<sup>18</sup> But in shedding its earlier per se rule, the Court has not offered clear objective rules. Instead, the Court retreated to its rule-of-reason standard.<sup>19</sup> The Court’s totality-of-economic-circumstances standard has drawn heavy criticism over the past 97 years, including the Court itself.<sup>20</sup>

The rule of reason has long been criticized for its inaccuracy, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results. The rule of reason provides little predictability to market participants. It subjects litigants and trial courts to the purgatory of “sprawling, costly, and hugely time-consuming” discovery.<sup>21</sup> For example, a per se

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decrying the enormous burdens that could be imposed by [antitrust] discovery, and in doubting the possibility that effective management of staged and focused discovery can be used to enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information exclusively available to the defendants can be used to supply a better preliminary fact showing that will justify full-scale discovery and litigation”).

<sup>10</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007).

<sup>11</sup> *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2395 (2007).

<sup>12</sup> Federal Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.2 (Apr. 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> [hereinafter Collaboration Guidelines].

<sup>13</sup> *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

<sup>14</sup> Collaboration Guidelines, *supra* note 12, at § 1.2. The rule of reason also governs most monopolization claims under Section 2 of the Sherman Act. See *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001).

<sup>15</sup> *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

<sup>16</sup> 433 U.S. 36, 57-59 (1977).

<sup>17</sup> 522 U.S. 3 (1997).

<sup>18</sup> 127 S. Ct. at 2712.

<sup>19</sup> *Leegin*, 127 S. Ct. at 2712-13; *Khan*, 522 U.S. at 10; *Sylvania*, 433 U.S. at 49 n.15.

<sup>20</sup> See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

<sup>21</sup> *Bell Atl. v. Twombly*, 127 S. Ct. 1955, 1967 n.6 (2007). This also assumes that uncertainty provides no

price-fixing claim under Section 1 of the Sherman Act requires proof of an agreement.<sup>22</sup> But for all other non-hard-core restraints, the rule of reason applies. Under the lower courts' more "structured" rule of reason, antitrust plaintiffs (including the federal antitrust agencies) must not only prove an agreement, but also:

- establish that the challenged restraint has had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. Absent direct evidence of anticompetitive effects, plaintiffs can demonstrate the restraint's likely anticompetitive effects by showing defendants' "market power" as inferred from their high market share within a properly defined product and geographic market,<sup>23</sup> Such market definition, in turn, entails issues of cross-elasticity of demand,<sup>24</sup> as well as supply substitutability into those markets, and ease of entry;<sup>25</sup>
- After plaintiffs meet their initial burden, the burden of production shifts to defendants to provide a pro-competitive justification for the challenged restraint (including the extent to which the restraint increased productive efficiencies, lowered marginal costs, and yielded pro-competitive benefits to consumers);<sup>26</sup>
- If the defendants offer pro-competitive business justifications, plaintiffs can respond by showing the defendants' pro-competitive justifications as pretextual, that lesser restrictive alternatives exist for the challenged restraint or that the restraint is not reasonably necessary to achieve the pro-competitive objectives;<sup>27</sup> and
- If plaintiffs' rule of reason claims survives to this point, plaintiffs must show that the restraint's anticompetitive effects outweigh its pro-competitive benefits.<sup>28</sup> The fact-finder then engages in a "careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition."<sup>29</sup>

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advantage to either private plaintiffs or defendants. In reality, uncertainty may favor the players with greater resources or alternative means to resolve their disputes.

<sup>22</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

<sup>23</sup> The burden is on the antitrust plaintiff to first define the relevant market within which the alleged significant anticompetitive effects of the defendant's actions occur. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2<sup>nd</sup> Cir. 2003).

<sup>24</sup> *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (relevant product market is defined as "those commodities reasonably interchangeable by consumers for the same purposes"); Federal Trade Comm'n & Dep't of Justice's Horizontal Merger Guidelines § 1.1 (1992, revised 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11>.

<sup>25</sup> *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001), judgment modified by 183 F. Supp. 2d 613 (S.D.N.Y. 2001).

<sup>26</sup> Only after the antitrust plaintiff has met its initial burden does the burden of production shift to the defendant, who only then must provide a pro-competitive justification for the challenged restraint. *Visa*, 344 F.3d at 238.

<sup>27</sup> *Visa*, 344 F.3d at 238.

<sup>28</sup> *Geneva Pharm. Tech. Corp. v. Barr Lab., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *Law v. NCAA*, 134 F.3d 1010 (10<sup>th</sup> Cir. 1998).

<sup>29</sup> *Geneva Pharm. Tech.*, 386 F.3d at 507; see also *Visa*, 344 F.3d at 238; *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 959 (6th Cir. 2004); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

To prevail under the rule of reason, antitrust litigants generally offer competing economic expert testimony. To confound matters further, the experts' neo-classical economic theories are often premised on "rational" profit-maximizing behavior. These theories, as the burgeoning behavioral economics literature reflects, may be divorced from marketplace realities. Over the next decade, the rule of reason's infirmities likely will worsen. The courts will weigh not only conflicting testimony by Industrial Organization economists but conflicting economic theories, with the rise of behavioral, evolutionary, and New Institutional Economics.

Under the Court's flawed economic theories, antitrust standards will continue to stray further from rule-of-law principles. Evolving (and disputed) economic theory cannot provide the requisite rules for civil and criminal illegality. As one study of the antitrust laws puts it, "[l]egal requirements are prescribed by legislatures and courts, not by economic science."<sup>30</sup> Each new economic "wisdom" can affect criminal liability under the Sherman Act. Neo-classical economics cannot predict myriad behavior across markets today. Given many markets' dynamic nature, courts cannot expect to optimize allocative efficiency through its rule of reason. Despite claims of being descriptive in nature, any economics-based competition policy ultimately is normative. Subjective value judgments underlie "objective" economic standards, and the objectives vary.<sup>31</sup> Legal standards that are premised on the Court's assessment of the latest prevailing economic thinking simply afford too much discretion to the judiciary.

*C. Rule of Reason's Infirmities Under Rule-of-Law Principles Have Significant Implications on Antitrust Enforcement and Competition Policy*

The rule of reason's deficiencies have significant implications for antitrust enforcement and competition policy generally. One implication is, because a rule-of-reason case is so costly to try, fewer cases will be brought. This is significant because private plaintiffs have brought the overwhelming majority of antitrust cases over the past thirty years. Concerned about expenses, plaintiffs with meritorious claims may forego antitrust litigation.<sup>32</sup> Since the Court's *Sylvania* decision, there are fewer private federal antitrust cases. Fewer antitrust cases are now brought annually relative to total litigation. Some enterprising plaintiff lawyers seek redress under state

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<sup>30</sup> STANLEY N. BARNES ET. AL, THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955); *see also* *Leegin*, 127 S. Ct. at 2729 ("antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views") (Breyer, J., dissenting).

<sup>31</sup> ADVOCACY WORKING GROUP, INT'L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT 25 (2002), *available* at [http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy\\_report.pdf](http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf) (survey of 33 members identified 10 policy objectives regarding monopolistic behavior).

<sup>32</sup> Expert economic testimony is often necessary for antitrust plaintiffs to prevail under the rule of reason. Indeed, some have attributed antitrust litigation's significant costs for economic experts as one factor for the decline of antitrust claims and growth of business torts claims. One recent survey of trial attorneys found generally that "[e]xpert witness fees are a significant cost factor driving litigants to settle, ranking just slightly behind trial costs and attorneys fees in that respect." INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER & THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 3-4 (2008), *available* at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650>.

business tort claims. Others abandon their client's antitrust claims and forego litigation altogether.

A second effect on antitrust enforcement and competition is the potential loss of protection for consumers and smaller competitors. An independent judiciary and the rule of law may be their only protections. Powerful firms may have little utility for judicial redress of antitrust violations. Entrants with potentially innovative technologies may lack comparable means of self-preservation, and be foreclosed from the market, which is troubling under an evolutionary economic perspective. Indeed, a profit-maximizing competitor should opt for litigation when it represents the least costly (or remaining) alternative. Neither competitors nor consumers will be compensated for their antitrust injuries.

Third, the Court's choice of rules will affect future market behavior (and its future rules) and the incentives for market participants to engage in productive activity. As Douglass North notes, how the game is actually played is a consequence of the formal structure (e.g., formal rules, including those by the government), the informal institutional constraints (e.g., societal norms and conventions), and the enforcement characteristics.<sup>33</sup> A market's performance characteristics are a function of these institutional constraints. The rules will define the opportunity set in the economy. Changing the game's rules can lead to different outcomes. If the institutional constraints reward (or are indifferent to) monopolization, monopolies will be the likely outcome in markets conducive to monopolization.

Fourth, a suboptimal U.S. legal standard hinders global convergence. "A key objective of international cooperation between antitrust agencies is to achieve convergence as far as possible (taking into account differences that might exist in each jurisdiction), in rules and standards of review and remedies in order to facilitate the conduct of business in a global marketplace," reported the ABA Antitrust Section.<sup>34</sup> "Without such cooperation, inconsistent rules, standards, procedures and remedies can serve as an obstacle to business investment, growth, and economic expansion by imposing regulatory burdens that are costly or even impossible to reconcile."<sup>35</sup> Given the rule of reason's shortcomings under rule-of-law principles, it is difficult for U.S. competition authorities to persuade other nations to converge to the rule of reason. Nor can they plausibly argue that convergence is feasible when the Supreme Court remains wedded to its rule of reason; nor can the United States be of much assistance in having other nations model their legal standards for competition on the United States' legal standards.<sup>36</sup>

#### *D. Recommendations to Align Antitrust's Legal Standards with Rule-of-Law Principles*

Over the past few years, the Supreme Court's approach to the federal antitrust laws has

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<sup>33</sup> NORTH, *supra* note 3, at 52.

<sup>34</sup> AM. BAR ASS'N SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 42 (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/obamabiden.shtml>.

<sup>35</sup> *Id.*

<sup>36</sup> An amorphous legal standard for some developing competition authorities can also hinder enforcement and foster corruption. *Id.* at 18.

taken a perverse twist. The Court of late states that its rule of reason is the prevailing, usual and accepted standard for evaluating conduct under the Sherman Act. Then the Court uses the infirmities of its rule of reason (such as high discovery costs and inconsistent outcomes) to restrict antitrust plaintiffs' access to (or increased the cost in accessing) the courts, and ultimately governmental interference in the marketplace. It is "hard to see how the judiciary can wash its hands of a problem it created."<sup>37</sup> The rule of reason's acceptance did not arise independently from the Court. The Court created the rule of reason and determined the scope of its application. It could now create a new standard. When rule-of-reason analysis is equated with per se legality (for the antitrust plaintiff's bar) or uncertainty (for the defense bar), it signals the standard's deficiencies.

While the Roberts Court has been active in deciding antitrust issues, and addressing the risk of false positives under its per se rule, the Roberts Court never assessed the deficiencies of its rule of reason under rule-of-law principles.<sup>38</sup> This assessment, however, is critical. Although a perfectly realized rule of law may be unattainable, antitrust standards must be reoriented toward rule-of-law ideals. I offer several suggestions toward that end.

First, the Supreme Court's antitrust standards should be in accordance with the originally intended and understood meaning of the directives of legitimate, democratically accountable lawmaking authorities. Congress never drafted the Sherman Act as a vehicle for the Court to advance its own ideologies, nor those of certain economists. The Court should refrain from announcing new policies based on its perception of "modern" economic theory that run counter to the Sherman Act's originally intended and understood meaning. Reckless statements, like one suggesting that monopoly pricing is an important element of the free-market system,<sup>39</sup> can lead to uninformed competition policies that are inconsistent with the citizens' preferences. To give content to the Sherman Act, the Court should update its interpretation of the Sherman Act's words

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<sup>37</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2630 (2008) (discussing punitive damages).

<sup>38</sup> In *Leegin*, for example, the Court noted the risk of false positives under its per se rule against vertical price-fixing. 127 S.Ct. at 2718. The Court found that RPM may not always or almost always tend to restrict competition. But the Court lacked any empirical basis as to the percentage of instances when RPM is pro- or anti-competitive or competitively neutral, and the magnitude of benefits and harms. For example, if RPM were likely to be anticompetitive 65% of the time, and likely to cause over \$100 billion in harm, while being procompetitive 20% of the time (with \$10 billion in benefits), the Court could decide whether the incremental administrative costs of a more nuanced legal standard is worth its benefits. In addition, the Court never addresses the risks of false negatives (and positives) arising from its rule of reason, and the increase in administrative costs under the rule of reason. For example, the Court opines that its per se rule "may increase litigation costs by promoting frivolous suits against legitimate practices." 127 S.Ct. at 2718. This is illogical. In determining that a certain restraint is per se illegal, the Court has concluded that the practice is generally illegitimate. Thus, one cannot fault antitrust plaintiffs for challenging such restraints. Indeed the Sherman Act (or any state statute prohibiting unfair and deceptive practices) could be faulted for promoting frivolous suits against legitimate practices. Thus the proper response is providing a better legal standard that effectively spares specific legitimate practices (such as providing a legal exception to the per se rule in cases of new entry). 127 S.Ct. at 2731 (Breyer, J., dissenting). Moreover, the Court's rule of reason would only exacerbate the litigation costs, and thereby increase the risk of promoting frivolous suits against legitimate practices. The rule of reason, given its far broader scope of factual issues and defenses, increases litigation costs. Thus while defendants face the same amount of antitrust damages under either a rule of reason or per se standard, defendants under the rule of reason face higher litigation costs and a less predictable result.

<sup>39</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

in the light of its legislative history and of the particular evils at which the legislation was aimed. Any trade-off or policy pronouncement should come from Congress, rather than the democratically unaccountable judiciary.

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

Given its infirmities under the rule of law, the full-scale rule of reason should be limited to novel cases where the courts have little experience with the challenged restraint. Even there, the Court should build upon the lower courts' structured four-step rule of reason and minimize the need for judicial balancing. If properly applied, the rule of reason would minimize contentious issues of market definition. Circumstantial evidence of market power via market definition is a weak proxy for direct evidence. If a challenged restraint has been in force for several years, an antitrust plaintiff should identify the restraint's anticompetitive effects. Thus, market definition would play a very limited role; rather than establishing defendants' market power, it simply would provide some context as to the area of trade or commerce that the anticompetitive restraint affects. By focusing on actual anticompetitive effects, the court need not engage in tradeoffs. If the challenged restraint's net result, for example, is higher prices and reduced output, it is difficult to fathom offsetting pro-competitive justifications that defendants can offer. Even if defendants could establish that the practice fosters competition in another market, it is doubtful that the courts and antitrust agencies can quantify these pro- and anti-competitive effects. The courts should not engage in further trade-offs, which are beyond their competence or authority under the Sherman Act. Ultimately, Congress should decide such trade-offs.

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

On the other hand, except in extreme cases of hard-core cartels or behavior with significant anti-competitive effects, the courts should hesitate in categorically condemning any particular practice without regard to its justification. Commonplace restraints do not merit a rule of reason. Instead, the Court should aim for differentiated rules that further the Sherman Act's legislative aims. As several scholars have argued, in many cases, simpler is better: especially when resources are scarce and the increased complexity leads to slight marginal social benefits.

The Court could begin with presumptions based on the prevailing empirical evidence. One key issue (which the majority in *Leegin* avoids) is the percentage of cases where RPM leads to positive and negative effects. The *Leegin* Court fell into the "never" fallacy: "Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive

effects, depending upon the circumstances in which they are formed.”<sup>40</sup> But this is also true of horizontal agreements among competitors to fix price, or of many possible criminal acts, like homicide, which can be legal or illegal depending on the surrounding circumstances. The fact that at times killing can be justifiable does not justify the assessment of guilt under the rule of reason. A second issue is whether the new rule (in lieu of per se liability) reduces or increases error and regulation costs. The majority in *Sylvania* and *Leegin* rejected any standard less than the full-blown rule of reason. Justice White in *Sylvania*,<sup>41</sup> like Justice Breyer in *Leegin*,<sup>42</sup> offered an incremental shift away from per se liability. Even if the majority of Justices had concerns with the intermediary standard, they cannot assume that its shortcomings are greater than the rule of reason’s.

Third, the Court cannot assume that better legal standards will arise independently. The Supreme Court and lower courts have not undertaken the empirical analysis to promote the judiciary’s understanding of the impact of the antitrust standards (and decisions) on the marketplace. Nor can they, because their view is limited to the evidence the parties supply; the courts do not unilaterally revisit a particular industry to assess the impact of their decision. Nor can academia and the private bar fulfill this complex mission. Through division of labor and increased specialization, knowledge has dispersed in today’s society. This dispersal “requires a complex structure of institutions and organizations to integrate and apply that knowledge.”<sup>43</sup> Collecting information on how various markets work, and the impact of restraints on those markets, entails high transaction costs. Moreover, the relevant information is often nonpublic.

The U.S. competition authorities in the Obama administration should now undertake this empirical testing and learning. Unlike private litigants who are concerned with prevailing and promoting their parochial interests, the competition authorities are acting on the citizens’ behalf. This should make those authorities less ideological and more objective. Consequently, to assist the courts in determining the proper legal standard for evaluating certain restraints, the federal antitrust agencies first must better comprehend how markets operate and evolve. This requires more empirical analysis on the agencies’ part.

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<sup>40</sup> *Leegin*, 127 S. Ct. at 2717.

<sup>41</sup> *Sylvania*, 433 U.S. at 71 (proposed using market power as screen and exception for infant industries: “Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the Schwinn restraints to justify a rule-of-reason standard, even if the same weight is given here as in Schwinn to dealer autonomy”).

<sup>42</sup> *Leegin*, 127 S. Ct. at 2737 (modified per se to allow exception for more easily identifiable and temporary condition of new entry).

<sup>43</sup> NORTH, *supra* note 3, at 99.