MOVING BEYOND CARICATURE AND CHARACTERIZATION: THE MODERN RULE OF REASON IN PRACTICE

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I. INTRODUCTION

After one hundred years one might expect a rule of law to be settled. In the case of the "rule of reason," first endorsed by the Supreme Court in its 1911 decision dissolving the Standard Oil trust,[1] the conventional wisdom often portrays the opposite. Citing its principal early enunciation in *Board of Trade of Chicago v. United States* ("*Chicago Board of Trade*"),[2] critics often denigrate the rule of reason variously as "unstructured," "full-blown," "uncertain," "error-prone," and costly to administer in all its forms.[3] In a metaphor first applied by Judge Taft in his earlier *United*

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1. Standard Oil Co. v. United States, 221 U.S. 1, 61, 62 (1911). For more on *Standard Oil* and its impact, see, for example, Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012); Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783 (2012); Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of* Standard Oil*: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843 (2012).

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

3. For one of the now-classic critiques of the rule of reason, see Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11–14 (1984). *See also* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 322–28 (1986) (criticizing what he labeled as the "standardless, constitutional Sherman Act"). As one commentator has asserted, with specific reference to *Chicago Board of Trade*'s statement of the rule of reason: "This standard formulation is often and properly criticized for being too unfocused—for making almost everything about an industry relevant and for inviting litigants and courts on endless fishing expeditions into the defendant's records." 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1502, at 389 (3d ed. 2010). Areeda and Hovenkamp go on to explain, however, that a set of specific, more focused

States v. Addyston Pipe & Steel Co. decision,[4] application of the rule of reason has been likened to "set[ting] sail on a sea of doubt."[5]

That criticism of the rule of reason is dated and exaggerated. The rule of reason has evolved considerably since *Standard Oil* and *Chicago Board of Trade*, largely due to the Court's own march away from per se rules and undemanding burdens of proof. As that march began in the late 1970s, the Court moved to add contemporary economic content to the broad principles articulated in *Chicago Board of Trade*. In formative cases like *Continental T.V., Inc. v. GTE Sylvania Inc.*;[6] *National Society of Professional Engineers v. United States* ("*NSPE*");[7] *Broadcast Music, Inc. v. CBS* ("*BMI*");[8] and *NCAA v. Board of Regents of the University of Oklahoma*,[9] the modern era's rule of reason was honed to focus on specific, core economic concepts, especially anticompetitive effect and efficiency.

The shift at the Supreme Court has since further evolved into defined and structured legal frameworks that have been developed by government enforcement agencies and across many of the circuit courts of appeals. Although *Standard Oil* and, far more often, *Chicago Board of Trade* are still cited and quoted, few courts still stop at vague, throw-in-the-kitchen-sink formulations of the rule of reason.[10] Today, guided by decision

inquiries about effects and justifications can fairly be inferred from *Chicago Board of Trade*'s "classic" formulation. *Id. See also id*. ¶ 1507, at 425–26.

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

5. *Id*. at 283–84 ("It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not."). Some contemporary critics have invoked Taft's "sea of doubt" metaphor to support their own criticisms of the rule of reason. *See, e.g.*, Arthur, *supra* note 3; Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916223.

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

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

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

9. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

10. For example, in abandoning the per se rule for resale price maintenance, the Supreme Court did not stop at simply announcing that the practice would thereafter by judged under the rule of reason. Instead, it sought to guide the rule of reason inquiry by describing four specific scenarios that could lead to anticompetitive effects, as well as three criteria that could be used to identify suspect cases. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 892–94; 897–98 (2007). *But see* Am. Needle, Inc. v. Nat'l Football League, 555 U.S. 1168, 130 S. Ct. 2201, 2216 n.10 (2010) (quoting Justice Brandeis's "classic" general formulation of the rule of reason from *Chicago Board of Trade* with approval, but providing no guidance as to how it should be applied in practice).

theory,[11] the core economic concepts of antitrust provide a common foundation for all antitrust analysis, not just Section 1 of the Sherman Act, with which the rule of reason is most often associated.[12] They have in effect spawned a collection of "rules of reason" that cut across Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act and serve as a set of unifying first principles of antitrust law. The various frameworks of the new rules of reason are all animated by a common purpose: to differentiate anticompetitive from efficient conduct.

In application, these "new rules of reason" have more economic content and more of a defined legal framework than did the seemingly more abstract *Standard Oil* and *Chicago Board of Trade* approach. To decide cases, particularly at the motion to dismiss and summary judgment stages, courts today focus more intently on evidence of competitive effects and efficiencies as they relate to burdens of pleading, production, and proof. Oftentimes, the filtering process commences with challenges to standing that evaluate the plaintiff's ability to allege "*antitrust* injury,"[13] and many cases fail to overcome even this first hurdle. Few cases make it to trial. Plaintiffs must make out a case of anticompetitive effects;[14] defendants must proffer evidence of cognizable efficiencies.[15] "Common

11. As applied to the formulation of legal rules, "decision theory" considers the likely incidence and costs associated with false convictions (false positives) and false acquittals (false negatives)—collectively, error costs—as well as the costs of administering any particular rule. For a more complete explanation, see Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* I ABA ANTITRUST SECTION, ISSUES IN COMPETITION LAW AND POLICY 125, 129–31 (2008). For an argument that the more recent antitrust decisions of the Supreme Court are consistent with a decision-theoretic framework, see Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871 (2011).

12. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 687–92 (describing the history and origins of the rule of reason under Section 1); Robert H. Bork, *The Rule of Reason and the Per Se Concept*, 74 YALE L.J. 775 (1964) (providing an extensive analysis of the origins and evolution of the rule of reason).

13. *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (holding that a private plaintiff must allege "*antitrust* injury," which it defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). In addition, distinct rules have developed excluding indirect purchasers from federal courts, *see* Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29, 740 (1977), and precluding recovery for injuries that are deemed too remote or speculative from the point of view of causation, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

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

15. For two examples of this kind of structured rule of reason analysis based on shifting burdens of production, see United States v. Visa, USA, Inc., 344 F.3d 229, 238 (2d Cir. 2003); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998). *See also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (advocating use of four sequential questions to structure rule of reason inquiry). Areeda and Hovenkamp similarly propose a set of sequential questions

concepts and variable, but essentially like, frameworks"—that's the current state of the art, and it generally works well to sort the strong cases from the weak cases.[16] Although application of the rule of reason in the closest of cases will necessarily be fact intensive and demand sometimes difficult judgment calls, it can no longer fairly be said that the standard itself is vague.[17]

Because they are animated by a greater focus on competitive effects, these modern rules of reason also tend to rely far less on the traditional approach of "categorization" followed by condemnation or exoneration. For at least fifty years, from *United States v. Trenton Potteries Co.*[18] to *Sylvania*, the Supreme Court developed a sorting framework that separated antitrust cases into categories based on the nature of the conduct and two distinct rules: per se and rule of reason.[19] As the Court would eventually acknowledge, in truth these were but two ways of applying the same legal standard: the rule of reason.[20] Per se treatment was reserved for what was viewed as the most obviously and extremely anticompetitive conduct.[21] Conduct falling into this category was presumptively unreasonably anticompetitive and the presumption was irrebuttable.[22] For a plaintiff, application of the per se rule meant victory. In contrast, rule-of-reason treatment meant detailed inquiry into effects and justifications and an

as a way to operationalize the rule of reason. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 1507, at 425–27.

16. *See, e.g.*, ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES CONCEPTS AND PROBLEMS IN COMPETITION POLICY 202–11 (2d ed. 2008).

17. As Areeda and Hovenkamp have observed with respect to the rule of reason,

> We cannot realistically hope to know and to weigh confidently all that bears on competitive impact. Nevertheless, we cannot escape this uncertainty either by condemning everything that might possibly impair competition or by validating everything that might possibly serve it. The former violates *Standard Oil*'s mandate and the latter eviscerates the statute.
>
> We thus have no choice except to make the best judgments we can, guided by the statutory purpose, our knowledge of the economy, generally accepted economic principles, and the facts of the case.

AREEDA & HOVENKAMP, *supra* note 3, ¶ 1500, at 382.

18. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

19. During this period, many types of conduct were categorized as per se unlawful. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 610–12 (1972) (division of markets by competitors); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212–14 (1959) (concerted refusals to deal); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958) (tying); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (price fixing by competitors). Some conduct, however, was instead funneled to the rule of reason. *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) (exclusive dealing).

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

21. N. Pac. Ry., 356 U.S. at 5.

22. *Id*.

elevated burden of proof for plaintiffs.[23] As was true of the per se rule, although to a lesser extent, categorization of a case as falling under the rule of reason was often outcome determinative—plaintiffs won per se cases; defendants almost always won rule of reason cases. As parties came to realize the consequences of this sorting approach, litigation intensified and focused on "categorization." Judicial decisionmaking often turned on characterization of conduct and subsequent categorization into one of the two approaches. Did it fall into a per-se category of conduct or a rule-of-reason category? Plaintiffs clung to the per se rule; defendants sought to shred it.

Today, although this kind of pigeonholing persists for some of the most obviously egregious types of conduct, such as cartel formation,[24] the courts' reduced reliance on per se rules has diminished the role of sorting. The movement toward greater reliance on economic analysis has instead elevated the importance of sorting cases by type of competitive effects instead of type of conduct, although conduct can, in some cases, be a surrogate for type of effect. As a result, conduct involving "collusive" or direct effects on the one hand and "exclusionary" or indirect effects on the other are treated alike for purposes of analysis based on their economic characteristics.[25] The traditional characterization approach is limited today to narrowly defined instances of single firm conduct—predatory pricing and refusals to deal—that share two characteristics: they involve inherently high risks of overdeterrence and present unique remedial problems.[26] Hence, the courts have developed specialized tests for evaluating their legality.[27]

23. As Areeda and Hovenkamp explain, "The defendant invokes the rule of reason in order to maximize the plaintiff's burden and its own chances of prevailing on the merits or of outlasting plaintiffs lacking the energy, time, or money for a lengthy inquiry into reasonableness." AREEDA & HOVENKAMP, *supra* note 3, ¶ 1511a, at 464.

24. As the Supreme Court has consistently maintained, "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful." Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). *See also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (division of markets by rivals is per se unlawful).

25. For a more complete explanation of collusive and exclusionary anticompetitive effects, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 45–53.

26. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408–10 (2004) (adopting a limited and specialized rule of liability for unilateral refusals to deal); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (adopting a specialized two-part test for predatory pricing).

27. *See supra* note 26. Residual specialized rules also formally remain for exclusionary group boycotts, *see* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294–95 (1985) (finding that the per se rule to be applicable only under specified conditions), and tying, *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–14 (1984) (same).

Despite the critics' considerable success in persuading courts and agencies alike to impose multiple limitations on standing and to move away from the certainty of per se rules and undemanding burdens of proof, criticism of the rule of reason persists in some quarters. Ironically, having won the battle to restore the rule of reason, today's critics detest what they view as its inherent uncertainty and expense to implement.[28] They now yearn for the certainty of the per se era but at the other end of the spectrum; they advocate easy-to-apply filters that would more readily terminate weak or allegedly "frivolous" cases even though defendants already prevail an overwhelming percentage of the time and private antitrust litigation is at a historically low level.[29] When these arguments are unpacked, however, they turn out to be more directed at the U.S. antitrust system than at the

28. *See, e.g.*, Easterbrook, *supra* note 3, at 12–13 ("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."). For more recent examples of critical views of the rule of reason, see Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WISC. L. REV. 835, 898; Nathaniel Grow, American Needle *and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 450 (2011); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1422–66 (2009). The proposition that rule of reason litigation can be uncertain and costly is oft repeated and does not appear to be controversial. *See, e.g.*, Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After* American Needle, 7 J. COMPETITION L. & ECON. 543, 546 (2011) ("Full-blown rule-of-reason analysis subjects defendants to considerable expense and uncertainty."). More generally, the high cost of antitrust litigation, as well as the uncertainty of the Sherman Act's prohibitions and the related risk of false positives, has animated the Supreme Court to constrain antitrust litigation through a variety of mechanisms. For example, in imposing a more demanding burden of pleading antitrust claims in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court expressed its concern that discovery costs alone might coerce defendants to settle weak claims. *Id.* at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."). The Court has expressed similar concerns in connection with the anti-monopolization provision of Section 2 of the Sherman Act, pointing more specifically to the link between uncertain legal standards and the likely incidence of error, or "false positive[s]." *See Verizon Commc'ns*, 540 U.S. at 414.

29. *See, e.g.*, Easterbrook, *supra* note 3, at 14–39 (advocating use of a set of "filters," including absence of market power, to weed out unmeritorious antitrust complaints). Judge Easterbrook has relied on that approach to dismiss rule of reason cases when the absence of market power is relatively obvious. *See, e.g.*, Wallace v. IBM Corp., 467 F.3d 1104, 1108 (7th Cir. 2006); Sanderson v. Culligan Int'l Co., 415 F.3d 620, 622 (7th Cir. 2005). Due to the cumulative effect of enhanced burdens of pleading, production, and proof, as well as limits on standing, the number of civil antitrust cases annually filed in the federal courts has dropped from an average of over 1500 in the 1970s, to fewer than 600 today. *See* Douglas H. Ginsburg & Leah Brannon, *Determinants of Private Antitrust Enforcement in the United States*, Competition Pol'y Int'l, Autumn 2005, at 29, 32 (showing in figure 1 that the level of private and public antitrust cases filed in federal courts from 1945–2000). According to the Administrative Office of the U.S. Courts, which tracks civil filings on a September-to-September annual basis, there were 1038 civil antitrust cases filed in 2007, 1318 in 2008, 812 in 2009, 544 in 2010, and 475 in 2011. *See* Administrative Office of the U.S. Courts, Judicial Business 2011, Table C-2A, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

substance of the modern rule of reason. The combination of antitrust specific incentives to suit—treble damages and attorneys' fees—and the predominant features of our litigation system—discovery, class actions, and jury trials—are derided as a "toxic cocktail" that brings defendants to their knees and promotes coerced settlements, which in turn further encourage commencement of weak cases.[30] While these arguments are exaggerated and often minimize the considerable evolution in the substance of the rule of reason, the critique of the antitrust litigation system surely has some merit.[31]

This Article will argue that efforts to caricature the "full-blown" rule of reason based on the "everything is relevant, but nothing decisive" *Chicago Board of Trade* formulation are simply outdated. Today, numerous filters are available to weed out truly weak cases. Because of those filters, the few cases that defy early weeding are likely to have at least some merit. Even when a comprehensive rule of reason is required in closer cases, courts are likely to apply a very structured and demanding framework that largely favors defendants. False positives are far less likely today than ever before, and the standards of antitrust overall are the most business friendly ever to exist in American antitrust law. If anything, room for improvement lies on the underdeterrence side of things. Sometimes the burdens of proof imposed on plaintiffs at the behest of defendants are irrationally demanding, even in cases of conduct that is obviously suspect.

We are primed, therefore, for the next phase in the evolution of the rule of reason. Our highest priority should be to simplify its administration in the most obvious cases—both anticompetitive and not. Despite the considerably higher burdens imposed on plaintiffs today, a review of the cases reveals that relatively weak cases still can be prolonged at great cost to parties and courts. Likewise, defending parties are far too able to wear down plaintiffs with possibly meritorious claims through years of scorched-earth trench warfare, and by demanding layers of proof even in cases in

30. *See, e.g.*, Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 640 & n.79 (2010). Cavanagh persuasively argues, however, that this characterization is "harsh and misleading." *Id.*

31. Again, however, there is irony. Some of the costs associated with litigating complex antitrust cases today are significantly attributable to an increased demand for sophisticated economic evidence that in turn requires more extensive discovery and is delivered by highly compensated economist-experts. The litigating practices of the large law firms that typically represent defendants in antitrust cases may also be a contributing factor. *See* EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010) (identifying representation by larger law firms as a factor contributing to the higher costs of litigation).

which anticompetitive effects are relatively obvious and cognizable defenses lacking. Second, even in the closer cases, we must better articulate relative burdens of production and proof, as well as our approach to processing claims and defenses, so that reasonably accurate decisions can be reached without incurring years of party and institutional costs. Although the movement toward structured analysis is pronounced, there remain significant instances of surprisingly confused, confusing, and inconsistent applications of the rule of reason. These cases deserve our attention regardless of outcome; they are poorly reasoned and undermine the continued efficacy of the otherwise modern rules of reason.

II. THE RULE OF REASON: EARLY PHASES OF DEVELOPMENT

A. FOUNDATIONS: 1890–1918

The Supreme Court famously declared in *Standard Oil* that the "standard of reason which had been applied at the common law" should guide interpretation of the phrase "restraint of trade" in Section 1 of the Sherman Act.[32] The Court's adoption of this rule of reason was something of a personal triumph for Chief Justice Edward Douglass White, who, as an Associate Justice, had dissented from the Court's decision fourteen years earlier in *United States v. Trans-Missouri Freight Ass'n*;[33] he faulted the Court for its literal reading of the Sherman Act when it gave full weight to the "[e]very" that opens Section 1, thereby rejecting his call for a reasonableness limitation on its provisions.[34] To support his view, then–Associate Justice White cited to common law usage of the term:

> Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade?" I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words.[35]

Elevated to the position of Chief Justice by President Taft in

32. 15 U.S.C. § 1 (2006); Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).
33. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).
34. *Id*. at 346 (White, J., dissenting).
35. *Id*. (White, J., dissenting).

December 1910, Chief Justice White wrote the opinion of the Court in *Standard Oil*. Drawing on the arguments he had first developed in his *Trans-Missouri* dissenting opinion, he now wrote for the majority, abandoning *Trans-Missouri*'s expansive reading of Section 1 and ushering in the era of the rule of reason.[36]

Chief Justice White's reinterpretation of the Sherman Act to incorporate a reasonableness qualification has never been seriously questioned. Moreover, it is now widely understood that Congress adopted the common law term of art "restraint of trade" not only to give the prohibition of Section 1 a known meaning, but also to provide it with the flexibility to evolve over time.[37] As the Court observed years later in *NSPE*:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[38]

That common law tradition also provided the Sherman Act with its "flexibility" and durability.[39] The Court later emphasized this flexibility in explaining why "*stare decisis* is not an inexorable command" under the Sherman Act:

> In the area of antitrust law, there is a competing interest [to stare decisis], well-represented in this Court's decisions, in recognizing and adapting to

36. President Taft, a former circuit judge on the U.S. Court of Appeals for the Sixth Circuit and later a Chief Justice himself, shared Justice White's view that interpretation of Section 1 of the Sherman Act should be guided by the common law origins of "restraint of trade." That view had been reflected in his opinion in *United States v. Addyston Pipe & Steel Co*., 85 F. 271, 283–84 (6th Cir.1898), *aff'd*, 175 U.S. 211 (1899), which is itself a still-relevant authority on application of the rule of reason. Like Justice White, he turned to the history of the common law usage of the term as a guide to its use. In contrast to Justice White's approach, however, then-Judge Taft saw a more structured use of reasonableness at common law based on ancillary restraint analysis, which he incorporated into his approach to the Sherman Act. *Id*. He viewed the approach as an alternative to any unguided reliance on "reason" as a general concept. Indeed, in a since often-quoted turn of phrase, he derided the unguided alternative, expressing his concern that courts applying the rule of reason absent the discipline of a structured approach "have set sail on a sea of doubt." *Id*. at 283–84. Some courts still appear to view ancillary restraint analysis as a superior method of implementing the rule of reason when the conduct challenged is an integral part of a broader cooperative integration. *See, e.g.*, Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 334–41 (2d Cir. 2008) (Sotomayor, J., concurring).

37. Similarly, it added "or otherwise" following "in the form of trust" to insure that the specification that Section 1 could reach concerted action would remain effective regardless of the corporate form it might take. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) (quoting Section 1 of the Sherman Act).

38. *Id*. at 688.

39. *Id*.

> changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." As we have explained, the term "restraint of trade," as used in § 1, also "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."[40]

It was not until the Court's 1918 decision in *Chicago Board of Trade*, however, that the content of the rule of reason began to take shape. There, Justice Brandeis penned what to date remains one of the most frequently cited expressions of that content:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[41]

Justice Brandeis's timeless explanation of the rule of reason incorporates many of its most enduring characteristics. He recognized that restraints on competition may often be a valuable and integral part of business arrangements, and that not all restraints should be condemned.[42] He thus can be credited with laying the foundation for important and much later decisions of the Court that, as was true in *Chicago Board of Trade* itself, rejected Sherman Act challenges to conduct that had procompetitive or competitively neutral effects. Moreover, his articulation of the content of the rule of reason intuitively focused on the issues that lie at the core of the rule of reason inquiry and always have: the nature of the conduct, its

40. State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997) (citing *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688; Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726, 732 (1988)).

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

42. *Id*.

purpose, and, perhaps most importantly, "its effect[s], actual or probable."[43] While much was left to evolve and even change over time, this basic approach has endured, with good reason: for the most part, it focused on the right questions. Although perhaps lacking in the economic precision demanded of antitrust analysis today,[44] the *Chicago Board of Trade* framework has not been given its due.

But the *Chicago Board of Trade* framework also left important questions unanswered and invited some mischief. Justice Brandeis presented the rule of reason as a very open, fact-intensive, and seemingly unstructured inquiry.[45] To reach a conclusion about any specific restraint's reasonableness, all of the relevant evidence would have to be collected and evaluated.[46] While this proscription might have worked from the broad perspective of competition policy, it was not responsive to the needs of litigation, through which the closest cases would be decided. He did not address, for example, the procedural specifics with respect to relative burdens of pleading, production, or proof, or the various techniques that might be used to establish and measure effects.[47] And even though he focused on competitive effects when he posed the rule of reason's central inquiry as whether a restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," in his application of the framework, he seemed to define relevant "effects" broadly, suggesting a willingness to go beyond competitive effects.[48]

The *Chicago Board of Trade* formulation of the rule of reason,

43. To evaluate the restraint's effects, Justice Brandeis looked to output and price, often the focal point of modern economic analysis, observing that the restraint at issue "had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago." *Id*. at 240

44. The successful modern antitrust case must commence with a sound economic theory of competitive harm and, with the exception of the few remaining per se offenses, it must also take into account possible justifications for the conduct under examination. *See, e.g.*, GAVIL, KOVACIC & BAKER, *supra* note 16, at 892–93. For a thoughtful account of the intellectual history of economic analysis in antitrust, see William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000). *See also* 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.

45. *See Bd. of Trade of Chi.*, 246 U.S. at 238–40.

46. *See id*. at 238–39.

47. *Id*. at 238–39 (discussing the error of the district judge in striking allegations and excluding evidence in relation to the antitrust case).

48. *Id*. at 238, 241 ("Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity.").

therefore, did not establish a fully operable rule of reason for purposes of litigation. What would a plaintiff need in terms of evidence of effect to shift a burden of production to a defendant? How would a defendant shift a burden back? What kinds of presumptions, if any, might be used? What kinds of effects matter and what kinds of defenses would be recognized? These issues simply were not addressed.[49]

Beyond this lack of specification lies a more fundamental flaw in the rule of reason as stated in *Chicago Board of Trade*: the search for truth is not costless. Even in Justice Brandeis's day, *Chicago Board of Trade*'s open-ended approach might prove to be burdensome. Over time, business practices became more complex and industries more regional, then national, and today international; such an approach could call for large volumes of data and difficult-to-make assessments of effect. Moreover, modern rules of pleading, discovery, and motion practice were still twenty years in the future for Justice Brandeis, and he surely could not have fully anticipated the challenges of implementing the rule of reason in today's world of global enterprises that rely on electronically stored information.

B. TRANSITION TO THE MODERN ERA: 1977–1979

1. The Bipolar Rule of Reason

For nearly sixty years after *Chicago Board of Trade*, the rule of reason lay fallow. With few exceptions,[50] the Court turned away from application of the rule of reason in favor of expansive reliance on its abbreviated variant, the per se rule, which presumed anticompetitive effects from the nature of conduct—and the presumption was irrebuttable. As the Court explained in *Northern Pacific Railway Co. v. United States*, "there are certain agreements or practices which because of their pernicious effect on

49. The omission is not uncommon. Indeed, in one of its most recent decisions embracing the rule of reason for vertical price restraints, the Supreme Court openly invited lower courts to fill in the unanswered questions presented by its decision over time:

> As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

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

50. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 262–64 (1963) (applying the rule of reason to nonprice vertical intrabrand restraints); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333–335 (1961) (applying a rule-of-reason-type approach to exclusive supply contracts under Section 3 of the Clayton Act).

competition and lack of any redeeming virtue are *conclusively presumed to be unreasonable and therefore illegal* without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[51] Until the Court altered course in its 1977 decision in *Sylvania*, it invoked this characterization for a wide range of conduct, banning not only hardcore price fixing[52] and division of markets by rivals,[53] but also group boycotts,[54] tying,[55] and vertical price[56]and nonprice restraints.[57] When it did not rely on per se rules, it often embraced relatively low burdens of proof for plaintiffs and invoked rhetoric suggesting its reliance on noneconomic factors.[58]

This was the state of affairs when the makeup of the Court began to change during the administration of President Nixon. With four new appointees to the Court, Chief Justice Warren Burger, along with Associate Justices Harry Blackmun, William Rehnquist, and especially Lewis Powell, a new majority coalesced, one that was far more receptive to complaints from industry and academic criticism directed at antitrust's unduly restrictive, albeit predictable, prohibitions.[59] Justice John Paul Stevens, who brought antitrust-specific expertise to the Court, was appointed by President Ford in 1975 and would thereafter make significant contributions

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

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

53. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (extending *Timken*'s per se ban to a less obviously horizontal division of markets).

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

55. *See N. Pac. Ry. Co.*, 356 U.S. at 5.

56. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968) (finding that maximum resale price maintenance was per se unlawful), *overruled by* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (finding that minimum resale price maintenance was per se unlawful), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882, 907 (2007). The Court later overruled both *Albrecht* and *Dr. Miles*, concluding that a more complete rule of reason approach should be used for all forms of resale price maintenance.

57. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (holding nonprice vertical restraints unlawful), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

58. *See, e.g.*, *Klor's*, 359 U.S. at 213 (emphasizing the adverse impact of the challenged refusal to deal on dealer "freedom" and expressing an interest in protecting "small businessmen"); *Schwinn*, 388 U.S. at 378 (citing *Klor's* and observing adverse impact of challenged restraint on dealer "freedom"). This was especially true in the case of merger law. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (declaring a merger of competing firms with combined, single-digit market shares unlawful).

59. For a more complete discussion of the impact these changes had at the Court, see Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553 (2005); Andrew I. Gavil, *Sylvania and the Process of Change in the Supreme Court: A First Look at the Powell Papers*, ANTITRUST, Fall 2002, at 8–9.

as well to this change of direction.[60]

For this new majority, Section 1 of the Sherman Act appeared at first to be a bipolar world. As Justice Stevens explained writing the opinion of the Court in *NSPE* in 1978,

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . . .*[61]

This all or nothing, bipolar view of Section 1 was, by the time of *NSPE*, deeply rooted in the law of antitrust. Courts and parties had two choices in applying its prohibitions of unreasonable restraints of trade: presumptive and conclusive condemnation or comprehensive analysis. Those two choices were repeatedly described by courts and commentators alike as distinct and alternative "rules"—per se and rule of reason.[62]

Even as Justice Stevens appeared to embrace this bipolar approach to applying Section 1, however, his explanation of it emphasized the deeper, unitary character of the rule of reason.[63] In stating that "[i]n either event [per se or rule of reason], the purpose of the analysis is to form a judgment about the competitive significance of the restraint," he was in effect reintegrating the "two" rules.[64] The rule of reason is the standard under Section 1, the per se rule but one means to apply it. There were, therefore, not two standards, but two alternate ways of applying the one.

60. *See generally* Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009) (discussing the origins of Justice Stevens's antitrust philosophy and his method of defining the rule of reason).

61. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (emphasis added).

62. This was evident just a year before *NSPE* in the Court's *Sylvania* decision. Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–50 (1977). Indeed, the Supreme Court continues on occasion to refer to "the per se rule" and "the rule of reason" as if they were two distinct and alternative "rules." *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

63. Waller, *supra* note 60, at 693 ("Justice Stevens, more than any justice, helped define the rule of reason as a single *unitary continuum* in analyzing agreements under section 1 of the Sherman Act and further defined what counted as potential legitimate justifications under the rule." (emphasis added)). *Cf.* Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859, 859 (1988) ("It is sometimes said there are two antitrust rules, per se and that of reason. This view is incorrect; there is only one form of analysis, the rule of reason.").

64. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691–92.

In addition, Justice Stevens's application of the bipolar rule of reason in *NSPE* implicitly acknowledged that it was incomplete.[65] The case involved a ban on competitive bidding that was incorporated into the National Society of Professional Engineers's ("the Society") Code of Ethics, which the Court struck down as a violation of the Sherman Act. According to the Court,

> The parties compiled a voluminous discovery and trial record. The District Court made detailed findings about the engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary because the court was convinced that the ethical prohibition against competitive bidding was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act."[66]

The inherently ambiguous characterization of the case in this passage reveals that it was a poor fit for the simple bipolar model. The record appeared to go well beyond the traditional facial invalidity associated with a true per se rule, yet the United States did not introduce any evidence of actual competitive effects.[67] The seeming justification for lengthy inquiry was the Society's defense, which was the issue that appeared to challenge all of the courts: whether the Society's assertion that competitive bidding would undermine public safety was a cognizable defense to an allegedly anticompetitive restriction—the ban on bidding. The Court famously concluded that such a defense was "a frontal assault on the basic policy of the Sherman Act," because it attributed ill effects to the process of competition itself.[68] Like "reasonable prices," which was urged as a defense by price fixers in some of the early Sherman Act cases, a defense based on the assertion that competition was harmful was not cognizable.[69]

Although the Court firmly condemned the ban, however, it never

65. *See id*.

66. *Id*. at 685–86 (quoting United States v. Nat'l Soc'y of Prof'l Eng'rs., 389 F. Supp. 1193, 1200 (D.D.C. 1975)).

67. *Id*. at 692–95.

68. *Id*. at 695.

69. For an argument that there are no true "per se offenses" under antitrust law, but rather defenses that have been deemed inadmissible, such as the Society's proffered defense, see Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165 (1988).

specifically labeled it per se unlawful. And in this crucial paragraph, it at first appears to reject, then embrace "facial" condemnation:

> While this is *not price fixing as such*, *no elaborate industry analysis* is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." . . . *On its face*, this agreement restrains trade within the meaning of § 1 of the Sherman Act.[70]

The Court would later look back at *NSPE* with uncertainty, characterizing it as a per se case in one instance and as a case rejecting reliance on the per se rule in another.[71] As will be discussed in the next section, the decision is best understood as the precursor to a more nuanced approach to analysis under the rule of reason, one that would later be called the "quick look," and one that does not fit comfortably within the simple, bipolar model.

2. First Principles: Focus on Competitive Effects

Justice Stevens's 1978 opinion in *NSPE* was also significant in a far more fundamental way. As was true of the Court's decision in *Sylvania* the previous term, *NSPE* sharply refocused the Sherman Act inquiry on competitive effects. It was one of a trilogy of decisions from the Court between 1977 and 1979 that also included *Sylvania* (1977) and *BMI* (1979), which collectively laid the foundation for the modern rule of reason. These decisions had one unifying and forcefully expressed theme that was rooted in *Standard Oil* and especially *Chicago Board of Trade*. The central concern of the rule of reason is competitive effects, what Steven C. Salop would later label antitrust's "first principles."[72]

70. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692–93 (emphasis added) (quoting United States v. Nat'l Soc'y of Prof'l Eng'rs, 404 F. Supp. 457, 460 (D.D.C. 1979)).

71. *Compare* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 362 (1982) ("[I]n *National Society of Professional Engineers v. United States* . . . we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members."), *with* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) ("[W]e have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers v. United States* . . . .").

72. Steven C. Salop, *The First Principles Approach to Antitrust*, Kodak, *and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187 (2000). As Salop explained

Sylvania and *BMI* were twin cornerstones of the resuscitated rule of reason, which was based on three propositions that they advanced. First, the Court restored comprehensive rule of reason analysis as the default setting for antitrust analysis and repositioned the per se rule as an exception.[73] Second, they, like *NSPE*, which was decided during the term between them, sharpened the focus of the relevant inquiry under the rule of reason on competitive effects.[74] Finally, *Sylvania* and, in particular, *BMI*, invited a decidedly more economic approach to evaluating effects, one that would also value and integrate considerations of efficiency.[75] The interrelation of these three marked changes was evident in *BMI*:

> [I]n characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."[76]

After a sixty year absence, *Chicago Board of Trade* was back in play, but with greater definition.

> The first principles approach centers on an examination of the competitive effects of the conduct at issue. This is appropriate because competitive effect is the true core of antitrust. Although market power and market definition have a role in antitrust analysis, their proper roles are as parts of and in reference to the primary evaluation of the alleged anticompetitive conduct and its likely market effects. They are not valued for their own sake, but rather for the roles they play in an evaluation of market effects.

Id. at 188.

73. This repositioning was evident in the Court's declaration in *Sylvania* that "departure from the rule-of-reason standard must be based upon demonstrable economic effect," Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977), and in its penultimate conclusion that "[w]hen anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, *the standard traditionally applied for the majority of anticompetitive practices challenged under § 1* of the Act," *id.* at 59 (emphasis added). *See also* Broad. Music, Inc. v. CBS, 441 U.S. 1, 9 (1979) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . ." (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972))).

74. *Sylvania* thus asserted that "[i]nterbrand competition . . . *is the primary concern of antitrust law*," *GTE Sylvania*, 433 U.S. at 52 n.19 (emphasis added), and in a passage that echoed Judge Taft's warnings about an open-ended and unfocused rule of reason, the Court similarly cautioned that "an antitrust policy divorced from market considerations would lack any objective benchmarks," *id.* at 53 n.21.

75. *See Broad. Music*, 441 U.S. at 20; *GTE Sylvania*, 443 U.S. at 36. Both decisions also stood for the proposition that application of the per se rule was inappropriate in the presence of plausible efficiencies associated with the conduct under scrutiny. *See Broad. Music*, 441 U.S. at 20; *GTE Sylvania*, 443 U.S. at 36.

76. *Broad. Music*, 441 U.S. at 19–20 (footnote omitted) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

Building on Justice Powell's watershed decision in *Sylvania*, Justice Stevens's decision in *NSPE* was especially significant in mooring the modern rule of reason to its first principles. Reaching back to its common law roots, he argued that

> The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act . . . has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, *it focuses directly on the challenged restraint's impact on competitive conditions*.[77]

Justice Stevens then completed his historical analysis, reestablishing the connection between the Sherman Act's common law roots and the Court's decisions in *Chicago Board of Trade* and *Sylvania*:

> In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade*, to the Court opinion written by MR. JUSTICE POWELL in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.[78]

Driving home his point, he also reached back to *Standard Oil*:

> The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.[79]

After *Sylvania*, *NSPE*, and *BMI*, therefore, the presumptive approach under Section 1 was comprehensive rule of reason analysis. The per se rule was de-emphasized and viewed as an exception whose use would need to be specifically justified. And all Section 1 decisions would have to be more firmly anchored to an assessment of competitive effects, based on economic inquiry that looked at both adverse and beneficial effects. With these building blocks in place, it was once again time to consider how the

77. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (emphasis added).

78. *Id*. at 691.

79. *Id*. at 690 (footnotes omitted). Justice Stevens added that "[t]hroughout the Court's opinion [in *Standard Oil*] the emphasis is on economic conceptions." *Id*. at 690 n16.

rule of reason could be sensibly implemented across a range of conduct, and the bipolar model quickly proved to be inadequate to the task.[80]

III. THE BREAK DOWN OF THE BIPOLAR MODEL AND THE RISE OF THE "QUICK LOOK": 1984–1999

Both *NSPE* and *BMI* hinted at recognition that the bipolar model was inadequate. First, if the per se rule could be applied only after some considerable experience with conduct, or if some degree of inquiry beyond facial analysis might be required even before the per se presumption could be invoked and justified, then it was not truly a bright line rule. Moreover, both decisions hinted at the idea that a non–per se approach might not always warrant "elaborate inquiry."[81] If neither immediate condemnation nor elaborate inquiry was always needed, was there some middle ground that could lead to either condemnation or exoneration?

A closer examination of the evidence and reasoning of the two cases reveals an often overlooked nuance to their application of the rule of reason. Both involved conduct that the plaintiffs sought to characterize under the per se rule as a variation of price fixing. And in both cases the Court eschewed the easy label, concluding in *NSPE* that the ban on competitive bidding was not "price fixing as such"[82] and in *BMI* that the blanket licensing practices of ASCAP and BMI were only price fixing in a "literal sense," but not the equivalent of per se unlawful price fixing.[83] *NSPE* went on to condemn the Society's ban on competitive bidding.[84] *BMI* concluded that owing to plausible efficiencies, application of the per

80. In the hands of adversarial litigants, the bipolar model also tended to distort the rule of reason over time. Plaintiffs pressed for application of the per se rule regardless of the presence of plausible efficiencies for the defendants' conduct and defendants sought to impose unnecessarily demanding burdens of proof on plaintiffs in rule of reason cases. As the Federal Trade Commission ("FTC") observed in 1988,

> [L]itigants and courts have taken positions that distort *both* ends of this dichotomy—saying that conduct must be condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category; while conduct falling into the residual rule of reason category cannot be condemned at all until all aspects of definition, market power, intent, and net competitive effect have been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture.

In re Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 603–04 (1988).

81. The phrase was first used by the Supreme Court to characterize per se offenses in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

82. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.").

83. Broad. Music, Inc. v. CBS, 441 U.S. 1, 8–9 (1979).

84. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692–96.

se rule to the blanket license was inappropriate.[85] It remanded the case for consideration of whether the plaintiffs could prove anticompetitive effects in any way other than through the presumption accorded by the per se rule.[86]

Importantly, in neither case did the Court reach its conclusion based on any metes-and-bounds expert economic evidence of measured or measurable anticompetitive effects or efficiencies. Having relied on the per se rule, the government did not offer evidence of actual adverse effects in *NSPE*.[87] Similarly, the defendants in *BMI* did not offer specific evidence of measurable efficiencies; it was enough that they were able to articulate and support the idea that there were efficiencies served by their conduct.[88] Yet in both cases the Court was able to reach firm conclusions based on its assessment of the conduct's effects. It did so not by demanding "elaborate" economic proof, but by reaching a judgment about the effects of the challenged conduct based on an economically informed evaluation of the background evidence concerning the history, purposes, and operation of the two practices.[89] In short, the all-important issue of competitive effects was a product of economic reasoning, built on that background evidence.[90]

85. *Broad. Music*, 441 U.S. at 8–10.

86. The court of appeals concluded that the plaintiffs could not do so and dismissed the complaint. *See* CBS v. Am. Soc'y of Composers, Authors & Publishers, 620 F.2d 930 (2d Cir. 1980).

87. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 684–86.

88. *Broad. Music*, 441 U.S. at 20.

89. *See Broad. Music*, 441 U.S. 1; *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679.

90. For preliminary assessments, the Court's observations regarding adverse competitive effects in *NSPE* and efficiencies in *BMI* were quite specific and read like findings of fact, leaving little room for debate. In *NSPE*, the Court stated

> In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692–93 (citation omitted). And in *BMI*, the Court observed that

> The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use . . . . ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

Somewhere between facial invalidity and comprehensive analysis there appeared to be additional choices.

A. DIRECT VERSUS CIRCUMSTANTIAL EVIDENCE OF ANTICOMPETITIVE EFFECTS AND THE "QUICK LOOK TO CONDEMN"

The Court was presented with an opportunity to examine that middle ground five years later when two powerhouse college football teams challenged the television broadcast licensing contracts of the NCAA.[91] The plan had two critical features. First, it limited the number of college football games that could be televised in a season.[92] Second, it set an aggregate licensing fee for all of the televised games, even as it appeared to authorize individual, game-specific price negotiations.[93] As the Court explained

> A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.[94]

In another of Justice Stevens's influential antitrust opinions, the Court nevertheless declined the plaintiffs' invitation to apply the per se rule, resting its decision on the fact that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[95] In a crucial paragraph of the Court's decision, however, it also rejected the NCAA's demand that the plaintiff be required to establish the NCAA's market power in a properly defined relevant market, holding that

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Broad. Music, 441 U.S. at 20–21 (footnotes omitted). As will be argued *infra*, *NSPE* fits better into what became known as the "inherently suspect" category than it does the per se category, whereas *BMI* seemed to be a pioneering example of the converse—an inherently *not* suspect approach.

91. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

92. *Id*. at 90–95.

93. *Id*.

94. *Id*. at 99–100 (footnotes omitted).

95. *Id*. at 101.

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[96]

The Court's wording is paradoxical on a number of levels. First, the Court oddly seems to be differentiating market power from proof of anticompetitive effect,[97] yet economic teaching suggests that such effects are likely to occur only in the presence of market power. Traditionally, however, market power was inferred from high market shares in defined relevant markets, and from market power, courts inferred anticompetitive effect.[98] Given that the Court was responding to the NCAA's demand that the plaintiffs prove a relevant market and sufficient market shares to infer market power, what the Court likely meant in this passage was that proof of market power through circumstantial means was not required given alternative evidence that would justify the same conclusion as to effect. This would later become clearer in *FTC v. Indiana Federation of Dentists* ("*IFD*"), in which the Court explained

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."[99]

Second, *NCAA* describes the conduct at issue as "a naked restriction on price or output,"[100] wording long associated with the per se rule, yet it declines to apply the per se rule;[101] it also asserts that "no elaborate industry analysis is required,"[102] which sounds like it is declining to apply a comprehensive rule of reason analysis. As already discussed, prior to *NCAA*, the Court had suggested that there were but two choices in applying

96. *Id*. at 109 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)). The citation to *NSPE* here, given the *NCAA* Court's refusal to apply the per se rule, may suggest that it did not view *NSPE* as a pure example of application of the per se rule.

97. *Id*. at 185.

98. For a more complete discussion, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 185–87.

99. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (quoting 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)). The Court went on to uphold the FTC's complaint, based on its finding of "actual, sustained adverse effects on competition," and once again rejected the demand by the defendants for more "elaborate market analysis." *Id*.

100. *NCAA*, 468 U.S. at 109.

101. *Id*. at 117.

102. *Id*. at 109.

Section 1: per se or full rule of reason.[103] Here, it appeared to be holding that neither was a good fit for the case.

None of the parties had suggested any third way to apply the rule of reason in their briefs to the Court. That option was instead advocated in the Brief of the United States as Amicus Curiae[104] and is embedded in two crucial footnotes in the Court's opinion that reflected key tenets of the government's position.[105] The government argued that

> It is our submission that antitrust analysis is not restricted to these two extremes, a per se category that precludes an examination of actual effects, and an elaborate, "full-blown" category that requires precise measurement of markets and market power. Rather, as this Court's decisions in *Broadcast Music* and *Arizona v. Maricopa County Medical Society* . . . suggest, there is some middle ground in the continuum of antitrust analysis. Often a restraint can escape per se condemnation and yet be judged unreasonable without a full evaluation of its precise effects in the marketplace. For example, the market power of a combination may be so obvious that no elaborate evaluation is needed and rule of reason analysis may therefore be "truncated."[106]

To support that view, the government cited a 1981 monograph on the rule of reason that had been prepared by Phillip Areeda for the Federal Judicial Center and was quoted at length by the Court. The Court stated that

> The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important

103. *See supra* text accompanying notes 51–63.

104. Brief for the United States as Amicus Curiae in Support of Affirmance at 15–16, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (No. 83-271) [hereinafter Brief for the United States]. The Brief was cosigned by Douglas H. Ginsburg, then a Deputy Assistant Attorney General in the Antitrust Division of the Justice Department. As the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, Ginsburg would later author one of the more significant appellate court decisions applying abbreviated rule of reason analysis. *See infra* notes 161–67 and accompanying text.

105. *NCAA*, 468 U.S. at 109 n.39 & 110 n.42.

106. Brief for the United States, *supra* note 104, at 16–17 (citation omitted). For an account of the developmental process that led to the government's position in *NCAA*, see Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 ANTITRUST L.J. 773, 774 n.4 (1998).

> price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement "reasonable" under Sherman Act § 1. *The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye*.[107]

The Court's receptivity to the government's argument is reflected not only in this footnote quoting Areeda, but also in a later footnote quoting the government's brief, to the effect that "where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary."[108]

The influence of the government's brief is evident and provides useful insight into what the Court likely had in mind when it embraced what would later be labeled the quick look or truncated rule of reason. Given the arguments presented to the Court and its own observations, *NCAA* could be understood as endorsing two alternate approaches to implementing a quick look rule of reason:

> (1) The Actual Effect Quick Look. Viewed through the characterization of it in *Indiana Federation*, *NCAA* could stand for the proposition that a horizontal restraint can be objectionable not only when it is facially objectionable (per se), but also when there is evidence of its actual anticompetitive effect. In such cases no detailed market analysis is required.[109]

> (2) Asymmetrical Economic Plausibility Quick Look. Read together with *BMI*, *NCAA* might also support the proposition that per se treatment is inappropriate when a defendant proffers a plausible justification for its conduct, but when the anticompetitive potential of the conduct is nevertheless relatively obvious, *and* the defendant cannot support that justification with evidence or that upon closer examination the proffered justification is not cognizable, no detailed market analysis is needed before the conduct warrants condemnation.[110]

Unfortunately the clarity and utility of the truncated rule of reason, as conceived by Areeda, advocated by the government, and endorsed by *NCAA*, would later be undercut by the Court's decision in *California*

107. *NCAA*, 468 U.S. at 109 n.39 (emphasis added) (quoting PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (1981)).

108. *Id*. at 110 n.42 (quoting Brief of the United States, *supra* note 104, at 19–20).

109. For a variation of these propositions, see GAVIL, KOVAVIC & BAKER, *supra* note 16, at 206.

110. *Id*. at 206 (emphasis added).

Dental Ass'n v. FTC[111] and viewed by some courts and commentators as limited to the first proposition.

B. CONSTRAINING THE QUICK LOOK

In *California Dental*, the Court for the first time sought to more clearly define the limits of the "quick look," which had become associated with *NCAA* and *IFD*.[112] *California Dental* involved a challenge by the Federal Trade Commission ("FTC") to a variety of restrictions on price and nonprice advertising adopted by the California Dental Association ("CDA").[113] The FTC concluded that the restrictions on price-related advertising were per se unlawful or, in the alternative, unlawful based on an "abbreviated" rule of reason analysis, as were the nonprice restrictions.[114] One of the principal issues before the Court was the propriety of the FTC's reliance on such abbreviated or "quick look" analysis.[115] Citing *NSPE*, *NCAA*, and *IFD*, the Court observed that

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, *an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets*.[116]

The FTC, the Court concluded, did not satisfy that standard: "The case before us . . . fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious."[117] In the Court's view, the CDA's "plausible" assertions of competitive benefits associated with the restrictions "rules out the indulgently abbreviated review to which the Commission's order was treated. *The obvious anticompetitive effect that triggers abbreviated analysis has not been shown*."[118] The final sentence appeared to impose a bright line limitation on the quick look. Thereafter, lower courts and many commentators assumed that the quick look was limited in application to cases presenting evidence of actual anticompetitive

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

112. GAVIL, KOVACIC & BAKER, *supra* note 16, at 187 (stating that *California Dental* clarified how *NCAA* and *IFD* established a more structured and focused approach to applying the rule of reason).

113. *In re* Cal. Dental Ass'n, 121 F.T.C. 190, 284 (1996).

114. *Id*. at 300–22.

115. *Cal. Dental*, 526 U.S. at 759.

116. *Id*. at 770 (emphasis added).

117. *Id*. at 771.

118. *Id*. at 778 (emphasis added).

effects.[119]

But to limit *California Dental* to a simple, actual-effects version of the quick look is to wrench one sentence from the opinion out of its full context. While true that the Court faulted the Federal Trade Commission's evidence by observing that "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown," the Court did not necessarily equate "obvious" with "actual."[120] To the contrary, in responding to Justice Breyer's dissenting opinion, the Court majority explicitly endorsed the option of quick look burden shifting based on *theoretically* obvious effects, but it placed a condition in it, that, in the Court's view, the FTC had not satisfied:

> The point is that before a *theoretical claim of anticompetitive effects* can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, *there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive*. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.[121]

In this segment of its opinion, the Court clearly accepted the possibility that, in addition to actual effects, a "theoretical claim of anticompetitive effects" also could shift the burden of production to a defendant, which is an approach to truncated rule of reason analysis that is more consistent with Areeda's "twinkling of an eye" conception of the quick look as endorsed by the Court in *NCAA*.[122] The significance of this endorsement of an approach focused on economic reasoning was obscured, however, by the Court's subsequent implicit emphasis on actual effects.

Thus, while reaffirming that the quick look was a legitimate means of applying the rule of reason, some of the language used by the Supreme Court in *California Dental* appeared to limit its use to cases involving evidence of actual anticompetitive effects. Echoing the government's position in *NCAA*, the Court then completed its march away from the traditional, bipolar view of the rule of reason, concluding that

119. My own previous work made this analytical error. *See, e.g.*, Andrew I. Gavil, Copperweld *2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 97–98 (2000).

120. *Cal. Dental*, 526 U.S. at 778

121. *Id*. at 775 n.12 (emphasis added).

122. *See supra* text accompanying note 107.

> 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 . . . . As the circumstances here demonstrate, 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. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.[123]

This is where the rule of reason stood in 2000. The Court had progressively moved away from expansive reliance on the per se rule in favor of a more effects-focused analysis of anticompetitive effects and efficiencies. The rule of reason was the rule; per se an exceptional method of applying the rule. It had also expressly abandoned the bipolar model, endorsing the concept of quick look use of the rule of reason, but seemingly limiting its application to cases of actual anticompetitive effects.[124] And it had discouraged any suggestion that it was replacing the bipolar model with a tri-polar rule of reason. The point was not to move from per se versus the rule of reason to a new per se versus quick look versus the rule of reason, but instead to embrace a continuum model, which the Court likened to a "sliding scale" approach.[125]

IV. THE MODERN RULE OF REASON IN PRACTICE

A. CORE ECONOMIC CONCEPTS, STRUCTURED FRAMEWORKS, AND THE MYTH OF BALANCING

Concurrent with developments at the Supreme Court over the two decades between *NSPE* and *California Dental*, other courts and commentators, as well as the FTC and the Justice Department, devoted considerable thought to improving the operability of the resurgent rule of

123. *Cal. Dental*, 526 U.S. at 779–81 (emphasis added).

124. Some courts and commentators also have sought to integrate some form of *Addyston Pipe*'s ancillary restraint analysis into the structured rule of reason, suggesting that it can be invoked as a defense—the restraint was ancillary and necessary to some underlying legitimate transaction—but also permitting the plaintiff to respond to the defense by demonstrating that the restraint was either not "reasonably necessary" to achieve the stated legitimate purpose, or that it was greater than necessary to do so. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); AREEDA & HOVENKAMP, *supra* note 3, ¶ 1505, at 415–19.

125. *Id.* at 780.

reason. Various frameworks were advocated both to better structure the rule of reason and to provide it with greater flexibility than the bipolar model permitted. All of these efforts share a greater focus on the core economic concepts embraced by the Court in its formative modern rule of reason cases, especially anticompetitive effects and efficiencies.[126]

One of the most significant structuring efforts undertaken in the context of a specific enforcement action was the FTC's decision in *In re Massachusetts Board of Registration in Optometry*, which advocated the use of a series of questions to guide the analysis of horizontal restraints.[127] A decade later, the then–Assistant Attorney General in charge of the Antitrust Division of the Justice Department proposed a "StepWise" approach that consisted of a sequential set of inquires focused on effects and justifications.[128] The government's various efforts to define a modern, structured rule of reason culminated in 2000, when these two federal agencies jointly issued a comprehensive set of guidelines for evaluating collaborations among rivals under the antitrust laws.[129]

At the same time, various courts also began to articulate structured approaches to applying the rule of reason in light of the economic principles that had been embraced by the Supreme Court. Not surprisingly, their efforts were geared more towards the context of litigation and hence focused on burden-shifting.[130] In virtually all of these frameworks the plaintiff bears the initial burden of coming forward with evidence to establish that the defendant's conduct resulted in a substantial adverse effect on competition.[131] If that burden is met, the burden of production shifts to the defendant to articulate and support some cognizable, procompetitive justification for its conduct.[132] If it does so, the burden

126. *See supra* Part II.C.

127. *See, e.g.*, *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988) (establishing a set of questions to guide rule of reason analysis). For an in-depth discussion of *Massachusetts Board*, see, e.g., Muris, *supra* note 106, at 773–75 (discussing the history, background, and decision in *Massachusetts Board*). Justice Breyer also envisioned the rule of reason as a series of questions in his dissent in *California Dental*. *See Cal. Dental*, 526 U.S. at 782 (Breyer, J., dissenting). As is discussed in Part IV.A, *Massachusetts Board* is also the source of the "inherently suspect" model of burden shifting.

128. *See* Joel I. Klein, *A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41–43.

129. *See* FTC & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1–2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. For a discussion of the Guidelines' approach, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 208–10.

130. *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) ("Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof.").

131. *Id*.

132. *Id*.

again shifts back to the plaintiff to either challenge the justification or introduce additional evidence of adverse effect.[133] Many courts assert that when evidence of both adverse and procompetitive justifications are presented, the court must as a final step engage in "balancing" to determine whether the restraint is reasonable.[134] As I have argued elsewhere, however, "rule of reason balancing is perhaps the greatest myth in all of U.S. antitrust law."[135] Most cases are resolved based on the weight of the evidence and the presence or absence of evidence of competitive effects or evident and substantial efficencies. In practice, rule of reason balancing rarely, if ever, occurs.[136]

Importantly, efforts to structure the antitrust inquiry with a greater emphasis on competitive effects have not been limited to the analysis of horizontal restraints under Section 1 of the Sherman Act. Courts have embraced similarly structured frameworks for analyzing monopolization under Section 2 of the Sherman Act,[137] exclusionary distribution agreements,[138] and, most recently, commentators have advocated a structured approach for evaluating resale price maintenance in the wake of the Supreme Court's 2007 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* decision,[139] which abandoned per se treatment of the practice.[140]

The efforts of federal enforcement agencies and courts alike all share some common features and goals. All sought to synthesize the prior case law and commentary in light of the Supreme Court's modern rule of reason decisions.[141] The common core of these varying models was an emphasis first on principles of competitive effects. Although the treatment of

133. *Id*.

134. *Id*. For additional examples of courts suggesting that the final step of rule of reason analysis is to "balance" anticompetitive and procompetitive effects, see, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 417 (5th Cir. 2010); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 (3d Cir. 2010); Benson v. St. Joseph Reg'l Health Ctr., 575 F.3d 542, 549 (5th Cir. 2009).

135. GAVIL, KOVACIC & BAKER, *supra* note 16, at 207 (internal quotation marks omitted).

136. For two empirical studies documenting the absence of balancing in rule of reason cases, see Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) [hereinafter Carrier, *Empirical Update*] (suggesting that balancing takes place in less than 2% of cases and reporting that 97% of reported cases are disposed of based on the absence of any anticompetitive effect); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1267–68 ("In an astonishing 96% of Rule of Reason cases, courts do not balance anything."). Carrier also documents that a "burden-shifting" approach is now the predominant mode of application of the rule of reason. Carrier, *Empirical Update*, *supra* at 828.

137. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001).

138. *See, e.g.*, United States v. Visa USA, Inc., 344 F.3d 229, 238 (2d Cir. 2003).

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

140. *See* Christine A. Varney, *A Post*-Leegin *Approach to Resale Price Maintenance Using a Structured Rule of Reason*, ANTITRUST, Fall 2009, at 22.

141. *See supra* Part III.

efficiencies has varied somewhat, all of the approaches have also sought to integrate a more robust consideration of procompetitive justifications. Finally, almost all of these approaches have assumed the inadequacy of the bipolar model and have sought to define a range of options for resolving easier cases, either through condemnation or exoneration, more quickly.

In the context of litigation, the initial issue under a structured, effects-driven rule of reason inquiry is whether the plaintiff has adduced sufficient evidence of adverse competitive effects to shift a burden of production to the defendant. Three recognized methods for doing so by presumption are now well-established: (1) through conclusive presumption—that is, per se condemnation;[142] (2) through rebuttable presumption triggered by what *California Dental* described as "obvious anticompetitive effect;"[143] and (3) through rebuttable presumption triggered by a showing of market power, typically via definition of a relevant market, calculation of a market share, the inference of market power from a sufficiently high share, and finally, the inference of anticompetitive effects from market power.[144] A fourth route, supported by *IFD* and *California Dental*, is evidence of actual effects. Note that here I am differentiating the actual effects approach from method 2, above, which rests on a presumption. As *IFD* correctly explains, proof of actual effects "obviates the need" for the inferential and circumstantial analysis of market power through the market definition exercise.[145] Actual effects evidence, however, is not properly understood as based on any presumption. Presumptions would be used in the absence of actual effects evidence. Similar to the use of presumptions, however, a burden shift triggered by actual effects evidence would be rebuttable in theory. But in practice, it would be difficult to do so, except by undermining the effects evidence itself. Evidence of efficiencies would seem to be irrelevant, given the apparent insufficiency of any such efficiency to dissipate or eliminate the demonstrated adverse effects. The

142. In *Northern Pacific Railway* the Supreme Court described "this principle of per se unreasonableness" in explicit terms of presumptions: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively presumed to be unreasonable* and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (emphasis added).

143. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999).

144. This method of applying the rule of reason is intimately connected with the market share presumption still used in merger analysis, albeit less so as a comprehensive framework. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 354–55 (1963) (often referred to as "the *Philadelphia National Bank* presumption"). For a discussion of both single and double inference methods of establishing anticompetitive effects, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 926–37.

145. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986).

true option two is discussed below and is more appropriately referred to as the quick look.

1. The FTC's "Inherently Suspect" Approach to Burden Shifting

As noted above, one of the most significant early efforts to map out a structured approach to rule of reason analysis was the FTC's decision in *Massachusetts Board*. There the FTC proposed the following approach:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.[146]

In setting forth this framework, *Massachusetts Board* was expressly building on the Court's then recent decision in *NCAA*.[147] In fact, as noted above, Tim Muris had a hand in both developments.[148] Where *NCAA* had failed to fully define the quick look beyond its reliance on Areeda's "twinkling of an eye" allusion, the FTC, through the "inherently suspect" idea, sought to do so.[149] Critically, neither *NCAA* nor *Massachusetts Board*, however, equated the inherently suspect version of the quick look with "actual anticompetitive effects."

Not surprisingly, *Massachusetts Board* played an important role in the FTC's case against the CDA, where the agency sought to again apply the

146. *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988).
147. *Id*. at 602–03.
148. *Id*. at 603 n.11.
149. *Id*. at 604–05.

inherently suspect framework.[150] When the Court in *California Dental* appeared to tether the quick look to "actual effects" evidence, however, it in effect created a rift between its own thinking and that of the FTC and the DOJ as reflected in *NCAA*. The FTC's loss in *California Dental* thus was a setback for the inherently suspect approach. As discussed in Part III.B, by appearing to consture *NCAA* and hence the quick look as dependent on actual anticompetitive effects, however, *California Dental* seemingly misread both *NCAA* and the authorities on which it had relied, and unnecessarily limited its utility. In doing so, the Court failed to fully exploit the value of its own characterization of the earlier quick look cases:

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.[151]

Economic *reasoning*, not just economic *facts*, was an integral element of the quick look.

2. *California Dental*'s Arguable Distortion of the Quick Look

In appearing to equate the quick look with actual anticompetitive effects—and resting that conclusion on its previous decisions in *NSPE*, *NCAA*, and *IFD*—the Court in *California Dental* was arguably misreading those cases and overlooking the intellectual roots of the quick look concept as it had been advocated to the Court in *NCAA*.

First, nothing in *NCAA* suggests that the plaintiffs introduced evidence of any actual effects in the sense of measured higher prices based on some competitive benchmark, as is sometimes demanded today of plaintiffs. Instead, the Court reasoned that "[b]ecause it restrains price and output, the NCAA's television plan has a significant *potential* for anticompetitive effects."[152] It went on to assert that "[t]he findings of the District Court indicate that this potential has been realized."[153] A careful reading of the cited district court's findings reveals, however, that the reduced output was presumed based on the nature of the television plan and higher prices were presumed from the price structure, which the Court observed was "unresponsive to viewer demand and unrelated to the prices that would

150. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 762–63 (1999).
151. *Cal. Dental*, 526 U.S. at 770.
152. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984) (emphasis added).
153. *Id*. at 104–05.

prevail in a competitive market."[154] No systematic or econometric analysis was offered to support the idea of actual effects; no competitive benchmark was demonstrated with respect to output and price.[155] In short, the Court's concerns about the television plan were deduced from basic facts and economic reasoning, not induced from evidence of actual effects. The Court stated that

> The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. . . . At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.[156]

Perhaps more importantly, neither the government's brief in *NCAA*, nor Areeda's example in his Federal Judicial Center monograph,[157] relied on evidence of actual price or output effects. Indeed, the entire point of their shared view was that some conduct not subject to the per se rule will nevertheless be so suspect as to warrant condemnation because of: (1) the nature of the conduct; (2) the observable position of the parties to the agreement; and (3) the absence of any plausible justification. Metes-and bounds measurements of markets and effects are unnecessary in such cases and so requiring them adds cost without improving the likely accuracy of the court's decision—an offense to the core principles of decision theory. The approach advocated by Areeda and the government in *NCAA* was far more akin, therefore, to the "inherently suspect" framework developed at the FTC then the "actual effects" concept that emerged in *California Dental*.

Finally, the Court in *California Dental* erred to the degree it intended to equate actual effects with a quick look. Although in some cases the actual effects of conduct will be relatively obvious, in many others gathering actual effects evidence may be as demanding, if not more so, than the traditional market definition route to rule of reason analysis, and may significantly overlap with it. Indeed, detecting and measuring actual effects in the form of restricted output and higher prices, can be a time-

154. *Id*. at 106.

155. *See id*. at 105–15 (failing to cite economic figures in determining actual effects).

156. *Id*. at 106–08 (footnotes omitted).

157. *See* PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (1981); AREEDA & HOVENKAMP, *supra* note 3, ¶ 1508, at 435–36 (providing an updated version of Areeda's original hypothetical example).

consuming and evidence-demanding undertaking.[158] The inherently suspect approach, like Areeda's allusion to the "twinkling of an eye," instead recognizes a more simple truth that the Court appeared to grasp in *California Dental*, but then discounted, that some cases lend themselves to an "intuitively obvious *inference* of anticompetitive effect."[159] On this crucial point, the majority opinion in *California Dental* is internally inconsistent and severed from the roots of the abbreviated rule of reason analysis.

B. THE FTC'S EFFORTS TO CORRECT FOR *CALIFORNIA DENTAL*'S ERROR

The FTC responded to the Court's decision in *California Dental* not only with criticism,[160] but with additional cases that sought to resurrect the inherently suspect approach. Economic reasoning and basic facts could, just like actual effects evidence, be sufficient to shift a burden of production to the defendant, warranting evidence of a procompetitive justification. In three successful efforts, the FTC persuaded various courts of appeals to endorse this alternative formulation of the quick look.

The groundbreaking case was *Polygram Holding, Inc. v. FTC*,[161] in which the FTC challenged an agreement by two record promoting companies to suspend advertising on previously released albums during the promotional period of a third and similar one. The two previous albums had been produced independently by each of the two defendants. The third was the product of a joint venture. When the parties to the venture realized that much of the repertoire of the Three Tenors for the third album was similar to that of the first two, they became concerned that sales of the new album might easily be undercut by efforts by either of them to promote the earlier albums during the release period for the new one, so they agreed to suspend such efforts.[162]

158. When the government initiates a post-consummation challenge to a merger, for example, it often relies on actual effects evidence—the observed consequences of the merger. But the process of building such a case is hardly "quick" and may require extensive discovery and study by teams of lawyers and economists. *See, e.g.*, *In re* Evanston Nw. Healthcare Corp., 2007 WL 4358355 (F.T.C. 2007).

159. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) (emphasis added).

160. *See* Timothy J. Muris, *The Rule of Reason After* California Dental, 68 ANTITRUST L.J. 527, 531 (2000) ("If *CDA* is praiseworthy because of its rejection of a rigid bipolar approach to analyzing restraints among competitors, it is less commendable in telling us when and how to apply truncated analysis.").

161. Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005). The case concerned the distribution of recordings of several concerts jointly performed by operatic stars José Carrerras, Placido Domingo, and Luciano Pavarotti, and is often referred to as "*The Three Tenors*" case. *Id*. at 31.

162. *Id*. at 31–34.

The FTC expressly relied on the analytical framework of *Massachusetts Board* and urged it on the court as an appropriate way to apply the rule of reason.[163] In its view, although the agreement was not per se unlawful, it was inherently suspect and neither evidence of actual effects nor an elaborate market study was needed to shift a burden to the respondents to offer a cognizable justification for their agreement. As the court explained, Polygram Holding responded that

> [T]he Commission's framework conflicts with Supreme Court precedent by condemning a restraint that is not *per se* illegal without the Commission having to prove the restraint actually harms competition. According to PolyGram, "proof of actual anticompetitive effect (or market power as its surrogate) is required in *any* Rule of Reason case."[164]

The case thus squarely presented the court with the seeming rift between *California Dental* and the FTC's *Massachusetts Board* opinion, between a quick look limited to cases of actual effects and one that could also operate based on theoretically sound and obvious economic reasoning.

In a unanimous opinion for the court by Chief Judge Douglas Ginsburg, who had been a signatory to the Brief of the United States in *NCAA*, the D.C. Circuit accepted the FTC's framework. The D.C. Circuit stated that

> [W]e reject PolyGram's attempt to locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line separating *per se* analysis from the rule of reason. . . . At bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition; the Commission's framework, at least as the Commission applied it in this case, does just that.
>
> We therefore accept the Commission's analytical framework. If, based upon *economic learning* and the *experience of the market*, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm. That much follows from the caselaw . . . .[165]

The FTC argued that *Massachusetts Board* was in fact consistent with *California Dental*, and the court saw no conflict between the two.[166] In its

163. *Id*.
164. *Id*. at 36.
165. *Id*.
166. *Id*. at 35.

view, as the Court had held in *California Dental*, the range of conduct fairly viewed as suspect would evolve over time, as had conduct subjected to the per se rule:

> [U]nder the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything "inherent" in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare. The Commission appears to acknowledge, as it must, that as economic learning and market experience evolve, so too will the class of restraints subject to summary adjudication.[167]

In effect, the court did not read *California Dental* as requiring proof of actual effects.[168] The FTC would later urge the inherently suspect approach in two other cases. It prevailed in one,[169] and in the other the court of appeals concluded that the evidence of effect was substantial enough to satisfy even a broader rule of reason analysis, so there was no need to rule on the propriety of the FTC's reliance on the inherently suspect approach.[170]

Although the FTC and the court, especially in *Polygram*, labored to harmonize the inherently suspect approach with the quick look endorsed by *California Dental*, it clearly goes beyond what a limited reading of *California Dental* would permit. As noted above, although it might be possible to read *California Dental* more broadly, the decision appeared to endorse only a limited use of abbreviated rule of reason analysis, tied to evidence of actual effects. Endorsing the idea that "*economic learning* and the *experience of the market*" might also justify a burden shift, the courts were going further, but doing so in a way that was wholly consistent with the origins of the quick look idea in *NCAA*.

167. *Id*. at 37 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999)). The Court cited *California Dental* in support of this proposition, thus appearing to assume that had the case for suspecting professional advertising there been stronger and the suggestion of potential justifications weaker, the FTC might have prevailed. In effect, it did not read *California Dental* as requiring proof of actual effects.

168. As Areeda and Hovenkamp correctly observe in finding fault with the result in *California Dental*, "requiring a showing of actual output effects would foreclose antitrust inquiry into even the most naked restraints." AREEDA & HOVENKAMP, *supra* note 3, ¶ 1504b, at 403.

169. *See* N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 363 (5th Cir. 2008) (finding for the FTC).

170. *See* Realcomp II, Ltd. v. FTC, 635 F.3d 815, 826 (6th Cir. 2011) (upholding the FTC's decision without relying on quick look analysis).

C. THE LEGACY OF *CALIFORNIA DENTAL*: CONTINUED CONFRONTATIONS ABOUT CHOICE OF STANDARD AND CONFUSION ABOUT ABBREVIATED RULE OF REASON ANALYSIS

The D.C. Circuit's decision in *Polygram* provides a uniquely lucid account of the current state of Section 1 analysis.[171] Then Chief Judge Ginsburg, who, as already noted, was a signatory to the Brief of the United States in *NCAA*, carefully and clearly recounts the development of the rule of reason from *NSPE* to *California Dental* as it evolved from an exercise in bipolar categorization to more of a case-by-case, sliding scale approach that focused on competitive effects.[172] As noted in Part IV.B, the court in *Polygram* also recognized the value of approaching rule of reason analysis with a structured framework and it concluded that the FTC's version of that framework, drawn from its decision in *Massachusetts Board*, was an acceptable way to implement Section 1's prohibition of unreasonable restraints of trade.[173]

Although decisions like *Polygram* demonstrate that the state of the rule of reason is far better than critics generally concede, there remains considerable inconsistency and division among the lower courts in those courts' application of Section 1. Because the choice of approach to the rule of reason can be outcome determinative, as was true in the bipolar days, parties and lower courts continue to invest sizeable resources into litigating whether a given restraint should be evaluated under the per se, quick look, or rule of reason analysis, as if they represented three discrete and alternate choices—even as the courts take note of *California Dental*'s direction that they apply a sliding scale enquiry meet for the case.[174] In different ways, these decisions illustrate how courts can still make critical analytical errors

171. The Antitrust Guidelines for Collaborations Among Competitors, issued jointly by the FTC and the Department of Justice in April 2000, also provide a valuable synthesis of a near-century of case law into a comprehensive framework for analyzing horizontal restraints. *See* FTC & U.S. DEP'T OF JUSTICE, *supra* note 129.

172. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 33–35 (D.C. Cir. 2005). In the course of its discussion, *Polygram* also cites the D.C. Circuit's previous decision in the *Microsoft* monopolization litigation, which similarly sought to provide a comprehensive synthesis of the evolution of standards under Section 2 of the Sherman Act. *Id*. at 35 (citing United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)).

173. *Id*. at 36 ("We therefore accept the Commission's analytical framework.").

174. *See, e.g.*, California *ex rel*. Harris v. Safeway, Inc., 651 F.3d 1118, 1134, 1137–39 (9th Cir. 2011); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317–19 (3d Cir. 2010); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830–31 (3d Cir. 2010); Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 316–18 (2d Cir. 2008); Expert Masonry, Inc. v. Boone Cnty., 440 F.3d 336, 343–44 (6th Cir. 2006); Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 773 (8th Cir. 2004).

that needlessly complicate rule of reason analysis and risk both false positives and false negatives. In this final section, I profile one such recent case, which pitted the State of California against four of the state's largest supermarket chains.

As discussed in Part II, in explaining the Court's prior decision in *NCAA*, *IFD* appeared to equate the quick look with evidence of actual anticompetitive effects.[175] That association was seemingly reinforced in the Court's later decision in *California Dental*, where the Court turned back the FTC's proposed invocation of the approach because the Commission "ha[d] not shown" the "obvious anticompetitive effect that triggers abbreviated analysis."[176] As is also argued in Part IV.A, however, equating the quick look with actual effects misreads its origins and ignores other language in *California Dental* that clearly endorsed the idea that the burden shift associated with the quick look could be triggered by a "theoretical claim of anticompetitive effects."[177] That acknowledgement supports the approach to abbreviated rule of reason analysis endorsed by cases such as *Polygram Holding, Inc. v. FTC,*[178]and *North Texas Specialty Physicians.*[179]

In *California v. Safeway, Inc.*,[180] the State of California sued four supermarket chains in Southern California challenging the "Mutual Strike Assistance Agreement" ("MSAA") they had negotiated in advance of the expiration of their collective bargaining agreement with their employee unions. The MSAA included what the defendants characterized as a "revenue sharing provision" ("RSP"), which "provid[ed] that in the event of a strike/lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares."[181] According to the record in the case, "the 15% figure was designed to estimate the incremental profit the grocers earned on each additional dollar of revenue."[182] When a strike ultimately ensued and the parties invoked the provision, the State of California brought suit

175. "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (quoting PHILLIP AREEDA, ANTITRUST LAW ¶ 1511, at 429 (1986)).

176. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999).

177. *Id*. at 775 n.12.

178. *Polygram Holding*, 416 F.3d at 36.

179. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 360–61 (5th Cir. 2008).

180. California *ex rel*. Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011).

181. *Id*. at 1123.

182. *Id*.

challenging the RSP as a violation of Section 1 of the Sherman Act.[183] It argued that the provision was per se unlawful either as a "profit pooling" agreement or a "market allocation" scheme.[184] In the alternative, it urged the courts to use a quick look because of the RFP's obvious potential for anticompetitive effects.[185]

In the district court, the defendants twice moved unsuccessfully for summary judgment seeking antitrust immunity pursuant to the "non-statutory labor exemption" that had previously been recognized by the courts.[186] California also sought summary judgment, arguing that because the RSP was obviously anticompetitive, judgment against the grocers was in order under either the per se rule or an abbreviated version of the rule of reason.[187] When the district court also denied the State's motion, the State and the defendants entered into a stipulation providing for judgment in favor of the grocers, while preserving all issues for appeal. Whereas the grocers wanted to press their case for immunity, California effectively declined to pursue the case under a comprehensive rule of reason, instead committing the case to rise or fall based on its assertion that the RSP should be condemned under either the per se or quick look versions of the rule of reason.[188]

A three judge panel of the Ninth Circuit affirmed the district court's conclusion that the nonstatutory labor exemption did not apply, but reversed the lower court's holding that the case warranted comprehensive rule of reason treatment.[189] Rejecting California's arguments for the per se rule,[190] a 2-1 majority nevertheless concluded that the RSP should have been condemned under a quick look. Invoking *California Dental*'s "enquiry meet for the case" standard, the panel proposed reliance on what it described as a "mixed or blended approach"—a quick look plus—that it located somewhere mid-way along the continuum between per se and comprehensive rule of reason.[191]

183. *Id*. at 1123–24.

184. *Id*. at 1148.

185. *Id*. at 1124, 1134–39.

186. For a discussion of the scope of the exemption, and the Ninth Circuit's explanation of why it was inapplicable, see *id*. at 1124–32.

187. *Id*. at 1124.

188. *Id*.

189. California *ex rel*. Brown v. Safeway, Inc., 615 F.3d 1171 (9th Cir. 2010).

190. *Id*. at 1179–82.

191. As the court explained

> Although the parties briefed the case on the traditional view that the two summary forms of review [per se and quick look] are separate and unrelated, and we discuss the questions they posed separately to some extent, we ultimately consider the lawfulness of the agreement in light of the Supreme Court's recent explanation that "our categories of analysis are less fixed

The initial panel's decision was withdrawn, however, when the Ninth Circuit ordered rehearing en banc,[192] and in another divided opinion, the en banc court reversed the initial panel's conclusion regarding the propriety of applying the quick look to the supermarkets' profit-sharing agreement.[193] The court agreed with the initial panel that per se treatment of the RSP was inappropriate, citing three factors: (1) the short duration of the pact; (2) what it viewed as the grocers' continued incentives to compete for customers during the revenue sharing period; and (3) the presence of other competitive supermarkets who were not subject to the agreement and hence would serve as a competitive constraint on any incentive to raise price.[194] In its view, these factors tended to undermine the assumption that the agreement would be obviously anticompetitive as is required for per se condemnation. Citing these same three reasons, the majority also concluded that application of the quick look would be inappropriate, reasoning instead that "further development of the record" was needed before the court could predict the agreement's likely anticompetitive effects.[195] Specifically, the court suggested that the plaintiff might need to come forward with both expert testimony on the likely impact of the RSP on the incentives of the grocers to compete on price and additional evidence on the likely reactions of other market participants to any increase in price.[196] Absent such evidence, no burden shift was warranted to test the grocers' proffered "procompetitive" justification.[197]

Although the en banc majority quoted some of the very same language from *California Dental* that had been relied on by the initial panel, it

> than terms like 'per se,' 'quick look' and 'rule of reason' tend to make them appear." [quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999)] . . . . We follow the Court's suggestion, and apply a mixed or blended approach, engaging in an analysis "meet for the case"—here, a thoroughgoing analysis that compels our confident conclusion that the principal tendency of defendants' agreement is anticompetitive and that the agreement thus violates § 1 of the Sherman Act.

Id. at 1179.

192. California *ex rel.* Brown v. Safeway, Inc., 633 F.3d 1210 (9th Cir. 2011) (ordering rehearing).

193. California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118 (9th Cir. 2011) (en banc). The en banc court agreed with the district court and the initial appellate panel that the provisions of the MSAA were not immune from antitrust scrutiny under the non-statutory labor exemption. *Id*. at 1129–32. The en banc court differed with the initial Ninth Circuit panel, however, on the propriety of applying the quick look to the MSAA, thus affirming the district court's entry of judgment for the grocers. *Id*. at 1137–39.

194. *Id*. at 1135–36.

195. *Id*. at 1137 ("To reach a confident conclusion on the anticompetitive effects of the RSP, further development of the record is required.").

196. *Id*. at 1137–38.

197. *Id*. at 1138 n.17 ("Because California has not met its burden to show that the RSP is obviously anticompetitive, we need not address the grocers' procompetitive justifications.").

interpreted and applied that language quite differently, in effect viewing the quick look as a far more fixed and limited category, one located very near the per se end of the rule of reason continuum. This was evident in its decision to reject application of the quick look for the very same reasons it cited for refusing to apply the per se rule.[198] The majority thus committed two distinct errors.

First, it equated the per se and quick look, as if they were two very closely aligned forms of summary condemnation. The majority's mistaken association of the quick look with per se condemnation was quite obvious when it asked rhetorically, "[c]an it be successfully argued . . . that because the RSP reduces the monetary risks of lost sales to participating grocers during a whipsaw strike, it is *irretrievably anti-competitive* in effect?"[199] While this may be an appropriate question to pose before applying the per se rule, it evidences a serious lack of appreciation for the role and essential character of abbreviated analysis. As noted in Part IV.A, abbreviated analysis is designed merely to shift a burden of production based on presumption, but that presumption is rebuttable. It acknowledges the administrative desirability of putting a defendant's "defenses" to the test of evidence in the face of evidence suggesting an obvious threat to competition.

Second, while at first appearing to accept the concept that a quick look might be utilized based on economic reasoning and background facts,[200] in closing the court seemed to align itself with the actual effects view of the quick look: "While it is true that the arrangement provides a cushion that may arguably affect incentives to compete, that alone, *absent evidence of actual anticompetitive impact on pricing*, is not sufficient for us to resolve the RSP issue on a 'per se' or 'quick look' or any other abbreviated basis."[201] In two important ways, therefore, the majority did

198. *Id*. at 1138.

199. *Id*. (emphasis added).

200. *Id*. ("To use the 'quick look' approach, we must first determine whether 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999))). It even used the "inherently suspect" label to describe such conduct: "Once it is established that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the burden shifts to the grocers to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry . . . ." *Id*. (citation omitted).

201. *Id*. at 1139 (emphasis added). In contrast, the dissent observed that

> Defendants' fallback position is that the state lacks empirical evidence to demonstrate that the effects of the agreement were anticompetitive in practice. However, neither per se nor quick look review ordinarily requires empirical evidence of anticompetitive effects, nor is it required for the combined or mixed per se/quick look approach that should be applied here . . . . So long as the anticompetitive nature of the likely effects of an agreement is, as a

not appear to fully comprehend, or perhaps accept, the concept and content of abbreviated rule of reason analysis.

Judge Reinhardt, who had authored the initial panel's decision, concurred with respect to the majority's decision that the nonstatutory labor exemption was inapplicable,[202] but dissented on its refusal to apply any version of abbreviated rule of reason analysis.[203] Largely reiterating the arguments he had crafted in the initial panel's decision, he argued that the majority's reliance on the MSAA's short duration and the prospect that there was sufficient remaining competition in the market to check any incentive to raise price was speculative and largely missed the point of the quick look approach.[204] In effect, the majority was dismissing the importance of what even it conceded was evident—"the immediate monetary risk of losing sales to competitors during a labor strike is reduced by revenue sharing."[205] And while expressing the intention not to reach the merits of the justification proffered by the grocers,[206] the majority quite obviously embraced and credited the grocers' fundamental argument, that the RSP was merely a strategy to defeat the anticipated "whipsaw tactics" of the striking union.[207] In doing so, the majority had in effect not only

> theoretical matter, "obvious," it is not necessary for a plaintiff to provide empirical evidence demonstrating anticompetitive consequences.

Id. at 1157. Moreover, the dissent pointed out that under the facts of the case, such "empirical evidence" would be "difficult to obtain," a further reason to utilize abbreviated analysis when the effects are comparatively obvious. *Id*. at 1157–58.

202. *Id*. at 1145 n.2 (Reinhardt, J., dissenting in part and concurring in part).

203. *Id*. at 1144–62.

204. *Id*. at 1146–62. In particular, he again emphasized the impact of the RSP on the grocers' incentive to compete during a strike:

> I am confident in the conclusion that defendants' profit sharing arrangement removes, or at the least significantly reduces, a key source of competitive pressure—competition among defendants for sales to be made during the agreement period—without there being any countervailing pressure sufficient to neutralize or overcome the overwhelming likelihood of anticompetitive effects. Although it is plausible that the two differences on which defendants rely [the limited duration of the agreement and the fact that it only bound the "dominant" market participants] will serve to reduce the competitive pressures to a lesser extent than would a long-term agreement among competitors who control 100% of the market, it is evident that the lessening of the reduction in competitive pressure will be one of degree only, and that there is no likelihood whatsoever that the anticompetitive effects of a profit sharing agreement will be eliminated.

Id. at 1153. The dissent's refusal to assign significant weigh to the short duration of the MSAA is supported by *Polygram*. *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 32, 37 (D.C. Cir. 2005) (condemning restraint under abbreviated analysis even though it was in effect for a period of less than three months).

205. *Safeway*, 651 F.3d at 1139.

206. *Id*. at 1138 n.17.

207. *Id*. at 1138, 1141 ("If a competitor finds itself the target of a strike, which would cause it to lose sales to other competitors, then revenue sharing provides some cushion from the damaging monetary impact of the strike.").

accepted the grocers' mere assertion that they had a plausible efficiency justification for the RSP, but implicitly relied on it to prevent the plaintiff's burden from shifting to the defendant to prove its defense. Yet as the dissent correctly concluded, the defendants' assertion—that the RSP would help it to reduce their labor costs—was not a cognizable "procompetitive" defense.[208]

The divisions within the Ninth Circuit in *Safeway* illustrate the varying approaches to applying abbreviated analysis as well as the strategy typically afoot in such cases. In all of the cases in which the plaintiffs have successfully invoked the quick look, the courts concluded that the "procompetitive justification" offered by the defendants was either not cognizable or unsupported by the record evidence.[209] The key strategy for defendants in most of these cases, therefore, was to arrest the burden shift before it occurred by demanding more evidence of effect and seeking to undermine the assumption that the conduct was anticompetitive.[210] That pattern held true in *Safeway*. As already noted, the only "procompetitive justification" offered by the grocers was that the RSP would help them to secure a more favorable collective bargaining agreement with the unions and hence facilitate lower prices to consumers:

208. "[D]riving down compensation to workers in this way is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit." *Id*. at 1161 (Reinhardt, J., dissenting in part and concurring in part). The dissent continued

> Defendants do not pretend that they agreed to bargain in such a way that there will be a greater overall amount of labor purchased, for example because the transaction costs to purchase each unit of labor are lower when the supermarkets work together. Defendants' argument for why their profit sharing agreement is procompetitive is instead, essentially, that it increases their bargaining power relative to striking workers in order to buy their labor at a lower price. In this way, the profit sharing arrangement resembles a cartel on the buyer side of the market.

Id. The dissent's analysis is further supported by the court's broad agreement that the defendants were not entitled to invoke the nonstatutory labor exemption to immunize their conduct from antitrust scrutiny. *Id*. at 1129–32. *See also supra* note 204 (discussing economic reasons why the defendants' assertion should not have been credited as a "procompetitive" justification for the RSP).

209. *See, e.g*., N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 368–70 (5th Cir. 2008) (concluding that the defendants' proffered justifications were unlikely to have any plausible procompetitive effect); *Polygram*, 416 F.3d at 38 (likening the defendant's defenses to those found to be noncognizable as a "frontal assault" on the policies of the Sherman Act in *NSPE*); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463–64 (1986) (same); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 115 (1984) ("The NCAA's efficiency justification is not supported by the record."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (characterizing the defendants' "defense" as "nothing less than a frontal assault on the basic policy of the Sherman Act").

210. *See, e.g*., *Polygram*, 416 F.3d at 36 (rejecting defendants' argument that plaintiff had to prove actual anticompetitive effects); *NCAA*, 468 U.S. at 109 (stating that the NCAA had unsuccessfully argued that plaintiffs failed to prove that it had market power in a properly defined relevant market). *But see* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775–76 (1999) (agreeing with the defendant that the evidence of adverse competitive effects was insufficient to justify a burden shift).

> The supermarkets assert that . . . the procompetitive benefit of their agreement is that it increased their chances of winning the labor dispute and reducing the wages and benefits they would be required to pay to their employees, which in turn would increase their ability to lower prices and compete more effectively with other companies…. Defendants' proffered justification for their profit sharing arrangement is, in essence, a countervailing power defense that the restraint of trade is necessary in order to give them sufficient bargaining power to counteract the market power exercised by their striking workers and thereby to allow them to purchase their workers' labor at a lower price.[211]

In this the dissent was surely correct. The RSP produced no economic efficiencies as they are typically understood in antitrust law.[212] Indeed, efforts to justify anticompetitive conduct based on the assertion that it will aid in the creation of countervailing market power have consistently been rejected in a variety of industries and antitrust contexts.[213] The grocers prevailed in preventing the burden of production from shifting to them, therefore, not by asserting a plausible, cognizable, and supported procompetitive justification, but by casting enough doubt on the likely anticompetitive consequences of their actions—and by finding a sympathetic judicial ear who shared their aversion to aggressive labor tactics. Given California's unwillingness to try the case under a comprehensive rule of reason—perhaps because it would have been costly and difficult to establish actual effects—this left but one outcome given the approach of the majority: judgment for the grocers.

211. *Safeway*, 651 F.3d at 1160 (Reinhardt, J., dissenting in part and concurring in part).

212. *See* GAVIL, KOVACIC & BAKER, *supra* note 16, at 991–92. In *NCAA*, the Supreme Court associated "procompetitive" with increased output and reduced price. *NCAA*, 468 U.S. at 114 ("If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games."). *See also Safeway*, 651 F.3d at 1160–62 (Reinhardt, J., dissenting in part and concurring in part) (discussing economic definitions of procompetitive justifications).

213. The issue has frequently arisen in the health care field in the context of physicians seeking to improve their collective bargaining position relative to insurance companies. *See, e.g.*, FTC & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 14, 27 (2004) (opposing efforts to grant physicians antitrust exemptions that would facilitate their exercise of countervailing market power), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf; Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 619 (2005) ("A right to exercise market power, whether statutory as in the case of labor, or through superior foresight and efficiency in the case of an insurer, should not create a right to use otherwise anticompetitive means to exercise countervailing market power without an explicit political decision to do so in the form of special legislation."). *But see* Tom Campbell, *Bilateral Monopoly in Mergers*, 74 ANTITRUST L.J. 521, 523–24 (2007) (advocating for a merger standard that would permit mergers to monopoly in industries with existing monopoly buyers while acknowledging that in the past it has been up to Congress to grant exemptions from the antitrust laws to permit groups of firms to seek to create "countervailing market power").

The defining characteristic of the quick look, however, is its ability to shift a burden from the plaintiffs to the defendants without "elaborate industry analysis."[214] One way to understand the divergence within the Ninth Circuit, therefore, is as a conflict between two distinct views of what constitutes sufficient evidence to secure that burden shift. In one version, the one originally conceived by Areeda and embraced by the Supreme Court in *NCAA*, obvious effects can be discerned from economic reasoning and background facts;[215] but in the other, the one that emerged from *IFD* and portions of *California Dental*, the burden shift can only be secured with evidence of actual adverse effects.[216] Whereas the majority embraced the latter, the dissent relied on the former. Thus, for the en banc majority, California failed to shift its burden to the defendant grocers; hence there was no need to consider their justifications.[217] In contrast, the dissent was quite comfortable with its conclusion that the RSP presented a genuine threat to competition, and upon examination of the grocers' defenses, it found nothing that would shift the burden back to the State.[218]

More deeply, *Safeway* may also illustrate a lack of appreciation for the methodology of sliding scale analysis that was urged in *California Dental*. A clearer articulation of that methodology might serve to bridge the gap between the two opinions in *Safeway*—and likely would have led to a different outcome.

One way to envision the sliding scale is as a weight of the evidence standard based on relatively formalistic burden shifting. As one court has observed in the context of merger analysis, "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."[219] Under this view, although the burden of proof remains

214. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692. *See also NCAA*, 468 U.S. at 109. The burden that shifts is one of production, not proof. *See*, *e.g.*, United States v. Visa USA, Inc., 344 F.3d 229, 238 (2d Cir. 2003). The dissenting opinion in *Safeway* erred, therefore, when it selectively quoted *California Dental* for the mistaken proposition that when a plaintiff successfully makes out a case of anticompetitive effects "the burden of *proof* shifts to the defendant." *Safeway*, 651 F.3d at 1150 (Reinhardt, J., dissenting in part and concurring in part).

215. *See supra* notes 107–10 and accompanying text.

216. *See supra* notes 112–21 and accompanying text.

217. *Safeway*, 651 F.3d at 1138 n.17 ("Because California has not met its burden to show that the RSP is obviously anticompetitive, we need not address the grocers' procompetitive justifications.").

218. *Id*. at 1160–62 (Reinhardt, J., dissenting in part and concurring in part).

219. United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990). *See also* U.S. DEP'T. OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 10 (2010) ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market."), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

with the plaintiff, the burden of production shifts, but can be adjusted upward in the face of an especially strong case of adverse effects—the stronger the plaintiff's showing of adverse competitive effects, the more compelling a showing the defendant would need to make to rebut. In response, if the defendant makes an especially strong showing of procompetitive justifications, the burden of production would shift back to the plaintiff, who would have to either discredit that proof or offer additional proof in support of its case.[220]

Another way to conceive of the operation of the sliding scale, however, is less formalistic as to burden shifting and more holistic with respect to evidence. It is more typical of internal agency decision-making, but is also implicitly used in antitrust litigation, especially litigation under abbreviated rule of reason analysis. Under this approach, evidence of adverse effects is not evaluated in isolation. Instead, it is assessed together with any evidence of procompetitive justifications. In contrast to formalistic burden shifting, provided there is at least some credible evidence of adverse effects, the decisionmaker undertakes at least a preliminary assessment of the proffered justification, to determine whether it is economically plausible and legally cognizable.[221] As with the formalistic sliding scale approach, an especially strong case of anticompetitive effects would demand compelling proof of efficiencies. However, in contrast to a formalistic sliding scale approach, under a holistic approach a weak or noncognizable justification could actually count in favor of the plaintiff—it could in effect strengthen the case for a burden shift, which in turn would require more elaborate and formal proof by the defendant to support its justification.

Under this approach, it is theoretically possible that the combination of some evidence of adverse effects plus weak evidence of justification could be deemed sufficient to meet a burden of proof. This approach to the sliding scale can be usefully thought of as symmetrical abbreviated analysis, in which the court takes a quick look at the economic plausibility

220. *Baker Hughes*, 908 F.2d at 983 ("If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times."). *See also* FTC v. H.J. Heinz Co., 246 F.3d 708, 715, 725 (D.C. Cir. 2001) (describing burden shifting framework and use of sliding scale).

221. *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35–36 (D.C. Cir. 2005) ("First, the Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed 'inherently suspect' and, unless the defendant comes forward with some *plausible (and legally cognizable) competitive justification* for the restraint, summarily condemned." (emphasis added)).

of both the plaintiff's theory and evidence of anticompetitive effects and the defendant's justifications, if any. Abbreviated rule of reason analysis will be especially well suited to cases in which that examination reveals asymmetries: if the plaintiff's case for harm seems particularly obvious, but the case for efficiencies does not, the approach could result in a "quick look to condemn;" conversely, if the plaintiff's case for harm appears to be attenuated and the defendant's assertion of efficiencies is comparatively obvious and strong, the approach could result in a "quick look to exculpate."[222] Procedurally, the approach will work especially well in connection with a motion to dismiss or a motion for summary judgment.[223]

This latter approach to implementing a sliding scale is not at all novel. Indeed, it is commonplace in many of the cases in which the parties contest the mode of application of the rule of reason standard. For example, in neither *NSPE* nor *NCAA* did the Court rigidly refuse to consider the defendants' justifications. Instead, it examined them and found them wanting.[224] This was also true in other quick look cases, such as *Polygram*. Noting that "[a]t first glance" Polygram's competitive justification "has some force,"[225] the court concluded that upon closer examination the defense, like that advocated in *NSPE*, was "nothing less than a frontal assault on the basic policy of the Sherman Act."[226] Moreover, the Supreme Court has endorsed use of economic plausibility in a bilateral fashion, using it as a screen that can be used not only to evaluate the plaintiff's ability to satisfy its burden of pleading[227] and production,[228] but also to

222. For a similar use of these concepts, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 206, 210.

223. One court has wrongly concluded that "'[t]he application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry." Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 833 (3d Cir. 2010) (quoting MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES § A-8 n.2 (2005)). Although the propriety of relying on a per se or quick look application of the rule of reason is surely a question of law for the court, there is no reason why application of an abbreviated rule of reason analysis could not be carried out by a properly instructed jury. Indeed, if application of the approach requires findings of fact, doing so could deprive a party of its right to jury trial. The Model Jury Instructions misread the cases it cites in support of this bold proposition, which was uncritically embraced in *Deutscher Tennis Bund*. As noted in the text, however, application of abbreviated analysis may nevertheless lend itself well to motion practice.

224. *See supra* notes 77–110 and accompanying text.

225. *Polygram*, 416 F.3d at 37.

226. *Id*. at 38 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978)) (internal quotation marks omitted).

227. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–59 (2007) (discussing the plaintiff's burden of pleading an antitrust claim of conspiracy).

undertake preliminary assessments of proffered efficiencies to conclude that application of the per se rule was inappropriate.[229] In all of these cases, the Court has undertaken a preliminary assessment of the overall economic strengths and weaknesses of the case before it, without the aid either of formal burden shifting or elaborate analysis.

Under either form of the sliding scale, *Safeway* appears to have been wrongly decided. Once the majority conceded that the RSP was likely to dampen the grocers' incentives to compete, its disagreement with the dissent became one about the degree to which the RSP was likely to be anticompetitive, not the fact of it. At that moment, it was error for it to rigidly decline to undertake at least a preliminary assessment of the grocers' defenses. Ironically, it committed the inverse of the error that *California Dental* saw in the treatment of burden shifting by the court of appeals:

> The court indirectly acknowledged the plausibility of procompetitive justifications for the CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," . . . . But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.[230]

This does not mean that California had no burden, but it should have been enough that the RSP quite obviously diminished the incentives of the grocers to compete during any strike. Indeed, that was its purpose: to insulate each of the grocers' from the lost profits occasioned by a strike directed at one, but not all of them. This one-for-all-and-all-for-one strategy assured each of them that none had the incentive to exploit the occasion of a targeted strike to take away its main rivals' customers. In the end, any profits gained would have to be shared and hence the loss of

228. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596–97 (1986) (discussing plaintiff's burden of production in response to a properly supported motion for summary judgment).

229. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–56 (1977) (declining to apply per se rule to vertical non-price restraints in light of possible efficiency justifications); Broad. Music, Inc. v. CBS, 441 U.S. 1, 19–21 (1979) (declining to apply per se rule to blanket licensing arrangement in light of potential for economic efficiencies).

230. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775–76 (1999)

business to its main rivals would be neutralized. As the dissent correctly argued, the costs, if any, of a false negative under such circumstances would be minimal. In contrast to *California Dental*, it could not be said that the grocers' agreement might have "a net procompetitive effect."[231] At best, it might be said to have had no effect, but that seemed highly unlikely given its explicit purposes.

The case for a burden shift under a bilateral economic plausibility sliding scale approach in *Safeway* is even stronger. Again, once the majority conceded that the RSP was likely to dampen the grocers' incentives to compete, it should not have declined to examine their justification. As was true in *Polygram*, even a cursory examination of the RSP would have revealed that by design it was supposed to eliminate the incentive to compete, in this case the incentive of the colluding grocers to take advantage of a targeted strike to steal away its rivals' customers. Hence, as in *NCAA*, the very theory of the defense tended to reinforce the plaintiffs theory of competitive harm.[232] The critical error of the majority in *Safeway* was that it implicitly credited a non-cognizable defense as a way of justifying a refusal to examine it. Had it done so, California's case for a burden shift would have been fortified. In any event, the majority would have been compelled to address rather than dodge California's, and the dissent's view, that the defense was unsupported and unsupportable.

V. CONCLUSION

Although the state of the rule of reason is far better than critics generally concede, all is still not well. Some courts—often at the behest of defendants—continue to rely on unstructured approaches based on language from older Supreme Court and circuit court decisions, even when more structured options are available.[233] Even though most still result in victory for the defendants, litigation can be needlessly prolonged and, when courts accede to defendants' demands to pile on proof burdens for

231. *Id.* at 771 ("[I]t seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.").

232. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984) ("By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act."). This was also true in *Polygram*, where the defendants' purported "justification" strongly suggested a design to eliminate competition, not promote it. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37–38 (D.C. Cir. 2005).

233. *See supra* note 16.

plaintiffs, the possibility of false negatives increases.[234]

Three reforms might further improve the operation of the modern rule of reason. First, the structured approach that has become ubiquitous in many circuits could be even more uniformly applied to ensure that antitrust analysis stays focused on the right questions. A focus on competitive effects, as explained above, will tend to direct courts towards the kinds of evidence that can be used successfully by plaintiffs to shift a burden to defendants. When it is absent, either at the pleading or production stage, appropriate motions can be invoked to terminate the litigation.

Second, we could revisit *California Dental*'s sometimes caricatured idea of an "enquiry meet for the case."[235] As is done in merger analysis, the sliding scale approach intended by the court recognizes that not all burden shifts are created equally. The weaker the case for effects, the more easily it will be for defendants to prevail with evidence of a procompetitive justification. Conversely, courts should be demanding of defendants who proffer economically implausible or noncognizable defenses, or defenses that are not supported by substantial evidence, in cases where the case for anticompetitive effects is comparatively strong.[236] If lawyers and economists can differentiate these cases in the context of mergers to provide clear guidance to their clients, they can also do so in the case of horizontal restraints and other kinds of competitively sensitive conduct.

Finally, openly conceding the ambiguity of *California Dental*, courts should continue to apply the FTC's inherently suspect approach to burden shifting where appropriate. The approach is superior to a narrowly conceived quick look equated with actual effects and will accomplish more than such a limited approach to expedite the adjudication of relatively more obvious cases. It will work especially well if courts eschew rigid and formalistic burden shifting in favor of bilateral plausibility analysis based on informed economic reasoning.

234. *See* Carrier, *Empirical Update*, *supra* note 136, at 830 (reporting, after a survey of 222 rule-of-reason decisions, that "plaintiffs almost never win under the rule of reason").

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

236. Just as the Supreme Court has demanded "plausibility" of plaintiffs at the burden of pleading, *see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007), and burden of production stages of litigation, *see* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596–97 (1986), so too would a symmetrical plausibility screen for defenses prove to be a useful administrative device.