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Does the Rule of Reason Violate the Rule of Law?

Maurice E. Stucke

Assoc. Prof. University of Tennessee College of Law

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DISCUSSION

DOES THE RULE OF REASON VIOLATE THE RULE OF LAW?

By Maurice Stucke

DR. MARSDEN: When you saw the program for today, you may have asked why we chose the rule of law as a topic for an antitrust marathon discussion. Obviously there were intimations from history relating to Boston and the UK and US; but mainly we were thinking about the appropriate use or abuse of power held by authorities. In antitrust, some of this comes up relating to the ambit of discretion and the reliance on increased use of expert economic analysis. There is a growing call in Europe at least for more rule of reason, structured or not, with respect to certain practices. And we felt why not learn from a lot of the American scholarship in particular that has gone on in comparing rule of law and rule of reason, the use of discretion, checks and balances, and the like.

Certainty, predictability and administrability are things that we're struggling with in Europe because even though competition law itself is extremely advanced in the EU, some of the issues that Maurice Stucke has raised are quite new to European eyes because we do have quite a different system there. The European system is far more administrative and judicial checks are far less. I thought it would be nice to start the session today by looking at the ramifications of the current movement to increase the scope of the rule of reason in the EU, considering that the Commission has so much power and discretion. In response to the calls for more rule of reason analysis, we're hearing criticism from what is usually referred to as the Ordoliberal camp: they primarily argue that increasing the use of rule of reason analysis will make it more difficult to administer clear and effective standards that would be predictable for businesses and enforcers. And Maurice has examined many of these issues and helped us learn a lot from the

U.S. experience.

PROFESSOR STUCKE: Thank you Philip and Spencer for organizing this Marathon and inviting me today. My issue paper discusses whether the U.S. Supreme Court's rule of reason legal standard violates rule of law principles. And to jog your memory on my issue paper and as a matter of background, the Supreme Court created the legal standards for evaluating anticompetitive restraints under the Sherman Act.

When first interpreting the Sherman Act, the Court construed it literally that all direct restraints of trade were illegal. Then in 1911, the Court construed the Sherman Act to prohibit only unreasonable restraints of trade and its rule of reason standard was promptly criticized. Over the years, the Court shifted toward *per se* rules, as well as presumptions, as in the *Philadelphia National Bank* case.¹ But since 1977, the Court has shifted back to its rule of reason standard. And today the Court states that its rule of reason standard is the prevailing, usual and accepted standard for evaluating conduct under the Sherman Act.

Now the rule of reason involves a flexible factual inquiry into the restraint's overall competitive effect, and considers the facts peculiar to the business, the history of the restraint, and the reasons as to why it was imposed. There is an odd twist. The Court, on the one hand, says that its rule of reason is its usual and prevailing standard, but then notes in other contexts the shortcomings of antitrust litigation today. The Court complains about antitrust's interminable litigation. It complains about antitrust's inevitably costly and protracted discovery phase as hopelessly beyond effective judicial supervision. It complains that its *per se* illegal standard might increase litigation costs by promoting frivolous suits. It fears the unusually high risk of inconsistent results by antitrust courts. But the Court never steps back to evaluate to what extent it bears any responsibility for this sad state of affairs and to what extent its legal standards for evaluating antitrust offenses are responsible for this predicament.

Ideally the Court should evaluate how its rule of reason standard, the "prevailing" antitrust legal standard, fares under rule of law principles. Now, Tim touched on how the rule of law is considered a pre-condition for effective antitrust enforcement.

¹ United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

In fact, one could argue, as did the World Bank,² that the rule of law is a pre-condition for an efficient market economy. If the law generally must comply with rule of law principles, it logically follows that the nation's competition laws must comply with these principles as well.

Ideally, an antitrust legal standard, under the rule of law, should promote several things:

The antitrust legal standard should promote accuracy. It should minimize false positives and false negatives.

It should be administrable and thus easy to apply.

It should be consistent and thus yield predictable results.

It should be objective and thus leave little if any subjective input from the decision makers.

It should have broad applicability such that the standard can reach as wide a scope of conduct as possible.

Finally, it should be transparent. The standard and its objective should be understandable.

The rule of reason has been criticized for being inaccurate, its poor administrability, its subjectivity, its lack of transparency, and its yielding inconsistent results. The rule of reason's infirmities under these rule of law principles have several implications not only on antitrust enforcement in particular but on competition policy in general.

In my longer article³ as well as in my issue paper, I identify several implications. First, the rule of reason's infirmities increase the disincentives to challenge anticompetitive behavior under the federal antitrust laws. Second, there is a loss of protection for consumers and smaller competitors. Third, the Court's rules will affect future market behavior and future market performance. One way to look at legal institutions is not as an exogenous force but as providing the necessary scaffolding for any market economy. The law then plays an important part in providing structure to a market economy.

Fourth, a suboptimal rule of reason will hinder global convergence. Why should other countries be eager to adopt the rule of reason given its infirmities under the rule of law

² WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 4 (2002).

³ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

principles? And fifth, the rule of reason can weaken the *per se* rules.

This is not to say that antitrust standards should devolve into the equivalent of U.S. tax code, and prohibit in detail specific behavior in specific markets. Instead, the rule of law must account for the law's development and growth. It would be overly simplistic to say that a complex regulatory scheme has to be either a rules-based system or a principles-based system. The Court could articulate legal presumptions that are consistent with the Sherman Act's legislative aims while reserving at the margin its rule of reason for novel cases.

Finally, my paper offers several suggestions to reorient antitrust's legal standards towards these rule of law principles. First, the Court should curb its adventures under the rule of reason based on its perception of the new economic wisdom. Any legal standard should be consistent with the Sherman Act's legislative aims.

Second, the rule of reason and the *per se* standards should not be abolished but reserved for the exceptional cases. The Court should strive for simpler, easier-to-apply legal standards that are consistent with the law's legislative aims. The Court should create legal presumptions of a restraint's anticompetitive effects based upon the available empirical evidence.

And third, the federal competition agencies should help the Court in this regard. They should undertake more empirical analysis of the restraint's competitive effects. One thing that I found conspicuously absent from the United States' amicus brief in *Leegin*⁴ was any empirical analysis conducted by the federal antitrust agencies within the past twenty years as to the costs and benefits of resale price maintenance. With more empirical analysis as to the benefits and harms of RPM, the U.S. courts could perhaps employ a better legal standard than the full-blown rule of reason—something perhaps along the lines of what Justice Breyer recommended in *Leegin*.⁵ For example, we might have a presumption of illegality for RPM but allow the antitrust defendant to overcome that presumption in cases of new entry or in actual instances of free-riding that prevented retailers from

⁴ Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480).

⁵ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2737 (2007) (noting that common-law courts would issue decisions that phased out the scope and effect of the rule in question over time).

offering the value-added services and where consumers were harmed as a result. Thank you.

DOCTOR MARSDEN: Thank you very much. Our first discussant will be Mark Patterson. What do you think?

PROFESSOR PATTERSON: When Spencer contacted me about this, I thought I was going to be speaking for about 5 minutes. He got very nervous this morning that I was going to be speaking for that long, and he told me to shorten it. It turns out that his wisdom is shown by how easy it is to cut my comments.

Anyway, I think Maurice does a great job of demonstrating the weaknesses of the rule of reason in this shorter version and in his longer piece, but the one thing I think of when I think about the rule of reason, he doesn't emphasize: we really ask it to do a lot. I think it's probably the hardest task that we ever ask courts to do, even when you think of other vague, fact-specific tests like the reasonableness test in tort law. The scope of that inquiry is so much narrower and the evidence that one has to look at is so much less that it seems like the rule of reason has a more difficult task. So I would say that in some way its weakness is not entirely inexcusable.

I think we'll probably never be happy no matter what sort of scheme we adopt. I think that some evidence of this is that as Maurice points out, there are problems with accuracy in the rule of reason and problems with efficiency. I think those go the opposite direction. To the extent you want more accuracy, you have to get more costly and vice versa. So he is right. Most of us probably think we're not striking the right balance. So the costs are probably too high, even if you think the accuracy is one hundred percent. Under the current rule of reason, plaintiffs almost always lose, but some people, who don't favor strong enforcement, might believe that plaintiffs almost always losing actually is exactly right.

Even if you believe that, I think you would think the cost is still way too high. You might be better off with the plaintiffs winning occasionally as long as the cost drops dramatically. So we would need to figure out how to do that, and Maurice offered some suggestions. But what we really need is some sort of measures of the elasticity of accuracy with respect to particular changes. And just as we don't usually have elasticity numbers for the economic world, we don't really have them for the litigation world either. So I think in some ways

Maurice's paper is a call for more work in that area on this procedural issue.

I actually have some other transient comments on this with respect to market power, the use of market power and with respect to presumptive approaches that Maurice suggests and the approach I always favored, which is the burdenship. But I will stop there.

DOCTOR MARSDEN: Let's open it up for discussion. There are two issues I would like to put on the table for anyone to pick up if they wish. A couple of points that Maurice makes about the fact that with the rise of behavioral economics, evolutionary economics, new institutional economics, that these will exacerbate the infirmities of the rule of reason. And I know that there are competition authorities that are doing a lot of work on behavioral economics, so that they can ensure this doesn't happen. I was wondering whether his conclusion would still follow if the authorities do actually publish their thinking with respect to behavioral economics and those issues related to bounded choice.

The other point I was going to make was with respect to the argument that the full scale of rule of reason or structured four-step rule of reason should be limited to novel cases where courts have little experience with a challenged restraint. It's an argument that I've heard made in Germany. They say well, we have a great deal of experience with certain restraints, for example fifty to sixty years of experience of retroactive fidelity rebates by dominant firms, and therefore we feel comfortable not taking too much economic evidence of the effect on the marketplace of these restraints and just ban them instead. So they say they don't need a full rule of reason analysis for such practices, or any analysis perhaps; but they would save their resources for a more full rule of reason analysis of novel issues.

That view of relying on experience over analysis allows formalistic prohibitions, and is being challenged quite severely by current thinking within economic and legal circles in the European Union, even if you trust the experience that courts and agencies have with a particular restraint.

MR. CALVANI: I very much enjoyed the paper. It was most interesting. Professor Stucke did a marvelous job pointing out the difficulties of the rule of reason, but to what end? Yes, the rule of reason can be quite difficult to apply, but that is hardly unique. Judges make difficult decisions every day.

A judge in the Court of First Instance in Luxembourg

recently observed that his most difficult task while sitting on a high court of a Member State was having to consider the best interest of the child in a custody case. He observed that child custody cases employed an often-difficult rule of reason—every bit as difficult as a rule of reason analysis in a competition case. This observer is not persuaded that the rule of reason is too difficult.

Additionally, the discussion of the legislative objectives of the Sherman Act was curious. *Law & Economic Policy in America: The Evolution of the Sherman Antitrust Act* by William Letwin and the *Federal Antitrust Policy: Origination of An American Tradition* by Hans Thorelli are widely regarded as serious studies of the legislative history of the Sherman Act. This observer, perhaps erroneously, reads both to suggest that it is quite difficult to discern the legislative intent.

Lastly, one might ask whether merger analysis under Section 7 of the Clayton Act is not application of the rule of reason. Is it argued here that contemporary merger analysis ought to be rethought? Should we return to the days of *Philadelphia National Bank*? Thank you very much. Professor Stucke has authored a very fine paper.

PROFESSOR CAVANAGH: When you read Brandeis, *Chicago Board of Trade*,⁶ and his statement of the rule, it's beautiful literature but the reality is if you try to apply it in the courtroom, it's impossible. And the thing that troubled me about the rule of reason was there has to be weighing, and judges don't weigh. I mean they look for trump cards. And somebody screams out free rider. There it is. Without any proof.

And Terry, I know the courts purport to waste stuff all the time. This is an area it just seems to me where they're not good at it. And what has happened is we are a distributor of textile when this rule of reason almost equals judgment for the defendant.

MR. AHLBORN: First of all, rule of reason may mean different things in different jurisdictions. I think if you look at what the European Commission has done in the area of abuse of dominance, they've basically shifted, or attempting to shift from, the rule of reason without affecting the outcome.

And the way you do that is by allocating the standard of burden of proof in the right way. So you could have rule of reason

⁶ *Bd. of Trade of the City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905).

which has different shades of gray, and I think you understand with the rule of reason when Mark just says almost a sort of *per se* legality because it's heavily stacked against the complainant. You could have a rule of reason that shifts that sort of burden somewhat differently and you can probably fine-tune the rule of reasoning that way.

The other thing certainly is asymmetry and that is that you do have certain screens which filter out unproblematic behavior so you have almost a *per se* legality screen. Then where you end up is only the last step of the small number of cases, so it's not that sort of clear-cut *per se* versus rule of reason. It's a mixture of both in the same case.

PROFESSOR FIRST: Maurice's paper is nicely provocative and the presentation continues that. My first reaction is: who could be against the rule of law? So that's a great turn to say that the rule of reason is against the rule of law. Ah ha. We like the rule of law so we don't like the rule of reason. I like that approach.

Now that led me to wonder exactly what we meant by the rule of law. And I think this is an issue that will probably go through the papers all today.

And then I realized that this whole session is talking about the rule of law and whether there is some concept behind it or whether it's just that you have to comply with certain kinds of things. We look at the indicia of the rule of law, but what is behind it, exactly? And, in part, my question about that is whether we would be perfectly happy with antitrust if we had a rule of law that said everything is lawful except for price fixing. We'll throw in the Darth Vader awful part of antitrust, the supreme evil: Price fixing will be illegal but everything else will be lawful. Now that would be, in the terms that rule of law is being defined, a rule of law. I suspect that for many, but not for everyone around this table, that would *not* be what we would want antitrust to be.

So I think in part—and perhaps this is how discussion is starting to go—that we're really talking about the institutional framework of antitrust and how discretion is dealt with, who gets to apply this rule of law and what cabins their discretion? It's a very complicated picture, involving judges and various antitrust enforcers. And I think that's the picture we want to start thinking about.

Of course, as lawyers we will resort to our favorite lawyer's trick, which we all know is presumptions that shift the

burden of proof. So that's where a lot of discussion goes as well. There is substantive content behind all of this and procedural content as well. All of antitrust problems are not encompassed in the substantive rule of law. Actually, the rule of reason isn't even a rule. It's a standard. That's a little weird when you think about it. *Twombly*,⁷ which Maurice talks about as a stumbling point, was not about an antitrust rule of law. It was about whether there was a conspiracy. So that's the factual issue the Court stumbled on, that it didn't want to allow the parties to get to. If it were clear there was conspiracy, then it was *per se*.

So we have a lot of work to do but there really is something in the rule of law and I hope the discussion will continue to try to tease out exactly what the problem is.

DOCTOR MARSDEN: I wonder if a lot of the differences of understanding about what is the rule of law and what is rule of reason is not so much about whether or not judges can be trusted to weigh things in the context of the rule of reason but with respect to their openness and transparency – i.e. how they, and competition agencies, tell us they reached their conclusion; what they relied on, etc. So in antitrust we don't need something like the tax code but we need to be comfortable with the way agencies use their discretion, and how courts review that process, and what would help a lot more is if their reasoning at both levels is clear and we can rely on it. Would that remove quite a few of your concerns about the rule of reason violating the rule of law, or not?

PROFESSOR STUCKE: That would help. I mean there are several problems with the rule of reason. One of them is just, I remember when I was at the DOJ that there was this fear that the court was not going to view this as *per se* legal. In that case, we would need to prepare the case under the rule of reason which entails a lot more in terms of manpower, time, and resources. There is a whole host of problems with the rules of reason not only in terms of weighing, because under the four-tier structured rule of reason done by most of the lower courts, the courts rarely get to the fourth one.

But the weighing can happen in the first and second and also as a point that Ed makes, that sometimes the court just because of the journey that the court sees ahead of it might then decide to avoid that journey on others such as antitrust injury or standing.

⁷ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

So even before you get to the rule of reason, there may be these sort of procedural traps in order for the court to even avoid or, for example, failure to accurately define a relevant product. And I think in that sense, it is foreclosing litigants from quickly addressing the harms. It doesn't give any sort of guidance to businesses and they can't readily internalize with the rule of reason one sort of norms in conducting their affairs.

A couple of points with tort law: the interesting thing is when I teach business torts, we look at the prima facie tort and the prima facie tort is the tort at its infancy, and that is where weighing is seen. Then the court has to look at the defendant's interests and the plaintiff's interests and weigh the two and then eventually come to some outcome. Only a handful of jurisdictions in the United States recognize prima facie tort, but under the Second Restatement of Torts, courts, as they become more familiar with the tort, should do less weighing. Then you might have the elements of the offense and well-recognized defenses.

And the one thing I find the Supreme Court seems to be going against is the evolutionary grain. Rather than the rule of reason now developing into affirmative elements and recognized defenses, it always repeats the *Chicago Board of Trade*⁸ factors. And the *Chicago Board of Trade* doesn't really then give something to the next litigant saying now you can benefit from the prior rule of reason. Instead the court then starts at ground zero with that. It doesn't seem to transmit little over time.

The second, with the legislative aims of the Sherman Act, I agree with you, Terry, but I think when you look at some of the statements coming out of the Supreme Court today and you look at the sparse legislative history with respect to Section 2, you wonder to the extent that monopoly prices are important for pre-market economy. Statements like that seem to be far afield of the legislative aim underlying the Sherman Act. And maybe that's telling me at the margins you're right, it's hard to define. When you have statements such as that that seem to be so far afield and it's based upon the court's new economic wisdom which isn't even actually mainstream as far as I can understand, it's problematic.

With respect to merger analysis, I did another paper on behavioral economics and antitrust which advocates more exposed mergers, to find out in which industries and under what

⁸ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918).

conditions the agencies are accurately predicting the matter. One of the most frustrating things when I was at the Department of Justice, when we would call up haphazardly, we had another merger in that industry. You know you got the last case wrong, and you thought this would happen but it didn't. And we're not, we weren't really. At least the weather person knows when they're wrong because the next day they can see it.

PROFESSOR FIRST: That doesn't stop them.

PROFESSOR STUCKE: We don't regularly go back to evaluate mergers, particularly in close-call second requests, to see whether or not we got it right or wrong. And there is this disconnect to what you see going on with criminal prosecution; the type of industries that we're seeing and the industries that are under merger review we think collusion may be more likely.

With respect to *per se* legality for the defendant and recent empirical studies, the FTC did a nice Section 2 workshop where they looked at private causes of action involving Section 2. They found that the defendants prevailed over ninety percent of the time either on motions to dismiss or in summary judgment.

But nonetheless, there is still a danger for the defendant because if plaintiffs predictably lose, then how is the rule of reason unpredictable? If the defendants lose in a motion to dismiss, they're confronted with the discovery costs. And if they then lose on summary judgment, those that continue could then face a verdict of treble damages. There was an earlier study done that found that antitrust had a higher rate of dismissal for plaintiffs but also a higher rate of settlement, and that might not be reflected in the statistics as to the amount of dismissals.

And with respect to Harry's point about the rule of law, one of the reasons that there is such consensus on the rule of law is that it is so broad a concept that many different things fall into it, just like consumer welfare. Who is opposed to consumer welfare? But when you start asking different jurisdictions as the ICN did, you find out that they have different interpretations of consumer welfare. I tried to outline in my paper, the longer paper, what I mean by rule of law and rule of law principles.

PROFESSOR PATTERSON: The way I have been thinking about this is what sort of information would we need to decide how to fix this. And thinking back to Christian's comment about the EEC, I always liked the EEC's approach: Article 82 asks for an objective business justification, and under

Article 81 you get an exemption structure. The idea is the defendant has to justify its conduct. So basically you're shifting the burden to the defendant.

But when I start thinking about the rule of law, it's not clear to me that you get more accurate. Do we improve the rule of law? Is it more efficient to do that? I don't know. It shifts the cost to the defendant but does it actually lower cost or just shift it? When you think about accuracy, it probably means the plaintiff wins more, which I think is more accurate, but some people don't think that's more accurate.

And so what we really need is more information, it seems to me, on how you want to allocate the burdens. Antitrust doesn't pay much attention to putting the burdens where they will produce the most cost-effective production of information. It doesn't explicitly talk about that. Some areas of law do that much more. And so I would be inclined to shift the burden to the defendant firms on the view that they have an idea of what they're doing and why they're doing it but not everyone agrees with that. In the old *Limits of Antitrust* article, Judge Easterbrook says, "Well, firms just don't know why they're doing what they are doing."⁹ I don't believe that, but maybe it's true. And so it would be nice to have better data on how cost effectively we can produce accurate information from various sources.

PROFESSOR ROBERTSON: Since *Standard Oil* in 1911, I believe that ultimately the rule of reason is all we have. There are even reasons and rationales behind the *per se* rule.

I'm a great proponent of the *per se* rule first of all because bright-line legal rules are more effective at promoting fundamental rule of law interests in legal predictability. I think Sherman Act litigation should always seek to accomplish this goal. But in any case, and in any of these cases, the ultimate justification for the *per se* rule always rests on the reasonableness of its effects.

For all of the shortcomings of the rule of reason – and I think that Maurice's paper is very rich for pointing those out – the basic problem as I see it isn't only that the contemporary rule of reason is an intractable morass that almost always guarantees plaintiffs are going to lose. It is also problematic that modern applications of the rule of reason rely so heavily on

⁹ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

Chicago School-oriented notions of maximizing economic efficiency as a primary decisional value. Those applications are often so narrow that they leave out many of the other foundational values that were important reasons for why the Sherman Act was passed in the first place. Those reasons and values include societal concerns about fair competition, which were at the root of *per se* prohibitions against price-fixing found in Section 1 of the Sherman Act. They also include egalitarian issues regarding the distribution of wealth, and ultimately the distribution of economic power by outlawing both monopolization and attempts to monopolize in Section 2. Narrow efficiency-oriented balancing forecloses the consideration of many of the most important societal values that reflect the richness of the populist heritage of American antitrust law.

That being said, if the rule of reason could be richer somehow in its application, despite the shortcomings, I wouldn't have so much of a quarrel with it. If it could co-exist as it has for a very long time with bright line *per se* applications, that is, functionally co-exist, so that the broader purposes of antitrust law could be better served, then it certainly would be worth keeping. Now what I'll be taking up to some greater degree later today is a challenge presented by rule of law concerns about consistent, coherent judicial determination of fairness and efficiency considerations in the context of Sherman Act litigation.

The issue presented is whether, because of the way the rule of reason operates, most Sherman Act cases should be taken out of the jurisdiction of the federal courts and placed in the lap of the federal administrative agencies like the FTC which arguably have superior technical economic expertise and therefore greater competence to deal with them. I'll argue that this conclusion about the heightened institutional competence of rule of reason balancing for microeconomic decision-making by administrative agencies is equally problematic for the same reasons Maurice Stucke pointed out in his rule of law critique of the limitations of the rule of reason.

MR. ALESE: Well, I haven't read Maurice's paper entirely, but I was surprised he said that U.S. judges were quite liberal in their application of antitrust law when it was adopted. I don't think that's right. For example, Peckham was extremely conservative. In the very first antitrust decision, *Transmissouri*, he didn't know what to do with the parties' arguments over the fairness of price fixing. Rather than borrowing decisions from common-law which allowed the practice in certain situations and

taking the liberal approach, he just kept telling them you haven't provided me with a standard to deal with the case which more or less links to the notion of fairness in terms of rule of law.

You also talked about Section 2, monopoly perhaps being the phrase. You talked about monopoly saying judges seem to think they're okay. I think that's fair to an extent because you need innovation. You need rivals to come up and challenge monopolies rather than whining about them or running to the courts for salvation. And I thoroughly agree with Christian that we have some cases that are blatantly against the law and some that are borderline – which is where the problem usually arises.

I think in terms of accuracy of decisions, this is extremely difficult to achieve because antitrust is a very dynamic field. It is a field in which judges, like the players, have to constantly refine things. Accuracy is particularly very difficult to move toward in common law jurisdictions where decisions can be case-dependent. I guess rather than thinking about accuracy, judges focus on looking at what is in front of them and moving in the direction that the case takes them. I think they always want to seek out fairness and efficiency in competition cases wherever possible.

PROFESSOR WALLER: I was taken by Harry's comment that of course the rule of reason isn't the rule. It's a standard. Three of the four papers and possibly Elbert's as well cited Lord Bingham and his article and the different factors. And when you look at that, the rule of law isn't a rule, it's a standard also. With multi-factored tests, sometimes one has to be sacrificed in order to achieve another. You do the best you can to satisfy the most, not just to minimize error cost but to maximize accuracy benefits. So it's very difficult, and the only place where I disagree with Maurice is that there are two paths in U.S. antitrust jurisprudence that have not been consistently followed. If they had, they would do a better job at having a structured form of the rule of reason that comports with as many of these rule of law principles as you can in the real world. One is the Taft Ancillary Restraint Doctrine, which pops in and out of mainstream antitrust jurisprudence in very interesting and peculiar and episodic ways.

And the other is the work of Justice Stevens on the rule of reason, which is something I'm in the midst of writing.¹⁰ And I

¹⁰ Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU L. REV. 693 (2009).

don't think it's a coincidence that Justice Stevens is the only trial lawyer on the Supreme Court, the only one of the current group who made a living trying cases. And most, but not all, were antitrust cases. He was also a scholar and a teacher, but basically a partner in a commercial litigation firm in Chicago that did very sophisticated antitrust work. He realized early on the danger that the rule of reason was a lengthy, expensive way of saying that defendants win, or if that is what you want, there are simpler, cheaper ways of saying that defendants win. And he had the luxury of laying out his views where he wrote for the court a series of opinions about Section 1 of the Sherman Act over a roughly ten year period beginning with, I think, *Society of Professional Engineers*¹¹ and going through several of the other cases after that. He laid out what many people call the quick look, by essentially saying gee, the defendant's conduct looks suspicious. We have reason to believe that there are substantial anticompetitive effects. So defendant you better go first and you better articulate and have some substantial reasonable business justification for doing this.

He had similar views in other areas of antitrust, but that was his basic understanding. He used all the tricks that courts use in the real world, which are presumptions and burdens of proof because he knew the way in his heart and you rarely get to it. And the D.C. Circuit in *Microsoft* used those same tricks of burdens of proof and shifts and presumptions.

But under both the jurisprudence on Section 2 in *Microsoft* and for Stevens, where the defendant really had something real and plausible both legally and factually, they win. When they don't, they lose. And that, I think, is a methodology that would give meaning to the rule of reason. I think the problem is the Supreme Court screwed it up in *California Dental*¹² when they said of course you can do it that way, just we're not sure when you should do it that way. So I think that's the other path not taken that would have gotten us closer to a decent real-world solution.

PROFESSOR HYLTON: There is a fundamental premise in the argument that I have to go against. There has been an old issue about the common law's use of fact-sensitive discretionary balancing tests in contrast to bright line rules, and that debate predates the Sherman Act. Bentham's attack on the common law

¹¹ Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679 (1978).

¹² Cal. Dental Ass'n. v. FTC, 526 U.S. 756 (1999).

included the claim that it was “dog law,” because that is how you teach your dog what to do. You let him do something wrong and then you beat the dog. That was Bentham’s description of what the common law was like.

People have attacked common law reasoning and the common law process on that basis for a long time; that it’s not predictable in comparison to rules of law, things like that. In reality and in practice, I think those arguments have been wrong. I think the world is lucky Bentham was totally unsuccessful in getting countries to adopt his approach and codify their law.

So to some extent I see the strain of this argument underneath what you’re saying, which is an ancient argument that I have to reject, and I think I’m glad the argument has been unsuccessful for the most part.

The rule of law is a vague concept. It can mean a lot of different things. So one notion, in the sense in which I find some meaning in it, and agree with you, is the notion that you don’t want to have legal decision makers unconstrained by the law. And you don’t want to go into court or to agencies and to have someone up there who decides on the basis of his whim or on whether he has connections with you, whether you’re a member of the same political party or whether you contributed money to him, whatever.

The absence of rule of law means a regime in which the rules matter less than whether you have some connection with the person who is making the decision. And that to me is a concept of rule of law that I can buy, and makes sense. And I don’t think that’s what you’re talking about because I don’t think anyone can say that about the rule of reason as an approach to antitrust law. I don’t think anyone has attacked it on that basis, and I don’t think that’s what you’re saying.

Another notion of rule of law has to do with predictability and error costs. But I really think those are different concepts. I think there is a core notion of rule of law, and maybe that’s a notion you don’t want to have in your argument, involving capricious, arbitrary decision-making. Predictability and error costs, those are more functional arguments of what you would like to see out of the law. I personally view those as unhinged to the rule of law concept. I would not link them to the rule of law concept because I think it’s a different concept.

I think when the rule of law gets applied outside of this more conservative sense that I brought up, then it becomes something that people can attach to their own interests and start

to argue, use it as a principle to argue against the things that they don't like. Whatever those things are. And so I'm reluctant to see the rule of law concept moved beyond that narrower sense that I just described.

A few examples on the issue of clarity. I don't think that the *per se* test has been a great advance in clarity or predictability or in the rule of law concept in some applications. Take the whole area of resale pricing where you have *Colgate*¹³ issues. I think the issues made predictability a mess and put a high premium on having good lawyers available to avoid liability rather than making sensible business decisions. Liability depended on whether you had lawyers there to talk to the dealers. So that's not a great advance of success of moving to the bright line rule when the *per se* standard puts a premium on the legal advice rather than making sensible decisions, decisions that all sides of the transaction would think are efficient.

And I guess the other point is the rule of reason has moved over time. We have moved from just a vague balancing framework, and crystallized rules have formed under the rule of reason. Maybe they're not happening as fast as you would like to see them, but they are happening. If you look under Section 2, there is a general balancing test, as described in *Microsoft III*¹⁴. Well, under certain subcategories, we get bright line rules. Under *Brooke Group*,¹⁵ dealing with predatory pricing, you get bright line rules developed in that area. So I don't think the rule of reason is a total failure in trying to move toward bright line rules.

MR. AHLBORN: Similar direction but from a slightly different angle. If you look at the criteria you used for two dimensions, you have accuracy on one dimension, and then everything else is almost sort of no-conflict between the rest in terms of simplicity, predictability and transparency. So the two angles you can go are almost got a tradeoff between the two.

And if you look at the antitrust regimes, which have a very high degree of predictability, I think you can go down what Harry proposed to say "look, price fixing and everything else is fine." Or you can go down like the European Commission which is the opposite, saying that everything is bad. So that's very

¹³ United States v. Colgate & Co., 250 U.S. 300 (1919).

¹⁴ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*).

¹⁵ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

predictable as well.

But then you have to make a trade off if you have a small, very selective sort of enforcement mechanism. You bring the economy to its knees if you apply that standard across the board where there is massive or private enforcement. The only way that works well is where you have an agency that sees three or four cases. The lack of predictability gives you what I call the lightning system, where lightning strikes and you get caught and you have four or five cases and the rest is unpredictable. But you do not get around the fundamental issue that you have to have a proper tradeoff between accuracy and all the rest. And I don't think *per se* rule is the answer.

MR. BRUNELL: My reaction picks up from some comments Harry and Keith made, but it's hard to ignore the role of rhetoric in the substantive debate. Whether you favor the rule of reason may depend on whether the prevailing law is a rule of *per se* illegality and you're trying to argue the rule of reason, as in *Leegin*,¹⁶ or whether the prevailing law is the rule of reason as under Section 2 and you're trying to argue it should be *per se* legality, as in *Linkline*.¹⁷

So the rule of reason is to some extent a kind of argumentative device one uses in arguing about what the substantive rule should be. But I think it is worthwhile to think about the rule of reason on the merits as Maurice suggests in how it relates to rule of law issues. On that score, I think I agree with Keith that the debate about rules versus standards is one that usually doesn't get you very far.

That's an ancient debate and my take on that ancient debate is that it's not that Bentham was wrong. It's just that it's totally indeterminate as to whether a particular rule is more predictable than a standard or not.

And my main rule of law concern about the discretion of courts is more of a separation of powers issue. Who gets to decide what the rules are and what the standards should be? We have accepted this notion that the Sherman Act is this standardless delegation of authority to the Supreme Court to make whatever rule or standard it wants to develop. That is probably a more fundamental problem with a rule of reason that unhinges the Court from any democratic constraint.

¹⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹⁷ *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 U.S. 1109 (2009).

MR. COWEN: Two points related to that last point: it raises the fundamental rule of law question about the whole of the antitrust system in the U.S. I think there is a question that can be raised in that area when you clearly have a political appointment system both in the court process and in the Department of Justice. There is no separation of powers between policy and enforcement. And so there is a really big rule of law question about that which I think we should try to pull out.

Secondly, and more constructively, how to fix the system going forward. What could be done? I think you can build on the criticisms of the system and ask "Why did this agency not look back?" I think that's right and should be a feature of the system. But an agency can also look forward. Authorities can look around. They can actually gather evidence instead of playing a litigation game. They may play the game, which I think people enjoy doing because games are fun, but it may not be very constructive.

The litigation game misses the point that actually the ministerial authorities (and maybe there is more opportunity to do this in Europe than in the system here) could gather information in advance if they were gathering information on a more regular and systematic basis. If such authorities were more systematic about information-gathering we wouldn't have the snapshot problem, which arises from gathering information on a snapshot basis in response to a case.

In a perfect world you would have unlimited amounts of knowledge about unlimited amounts of information and an unlimited amount of time, and that is impossible in any judicial system. The judicial system says that we will only look for a limited period of time, given the limited amount of space that can be assembled and assimilated. To improve things you can look at them over time.

What can be done about that? Authorities and companies can be gathering data on a regular basis. The system can also emphasize looking forward rather than simply looking back from the date of a complaint. Authorities could actually database market information; analyze, assimilate and become more knowledgeable in the industries they deal with; and make better decisions about particular situations.

One of the problems that is exacerbated by the legal system is this idea that things are dealt with on a one-shot basis. It does not have to be the case, and that's certainly something that we've argued and had full study about for 10 years. This is

the issue that the authorities should look at things over time and should dedicate capability to focusing on different sectors to develop industry knowledge. If they did so, we would probably end up with a better, higher quality, more knowledgeable and a closer-to-justice result. That would be moving things forward.

PROFESSOR WALLER: Bill Kovacic at the Federal Trade Commission has been a huge proponent of having the Commission do far more research both in general and case retrospectives than had been the practice in general in the United States.

MR. ALESE: I'm sorry to interrupt. My argument again is that you can do as much market research as you like. This is a dynamic field, products are dynamic, events are dynamic, and to move in the direction where we rely entirely on past knowledge I think would restrict the advancement of the process.

My second point is that Tim raised the issue of political appointments in terms of rule of law and rule of reason application in the U.S. I don't think that has a say in terms of how these things go. The UK does not have a separation of the executive and the judiciary but that doesn't seem to compromise the integrity of the judiciary. In the U.S., judges appointed by presidents sometimes go in different political directions from those of their appointers.

MR. McGRATH: I guess what I find in this debate, being from Europe, is that so far we haven't really focused on what the conduct is that we're trying to stop. And when I'm advising clients, I tell them there are some things which are clearly wrong like hard-core price-fixing. If you put unilateral conduct to one side for the moment, that's where it gets really tricky. You have a very wide middle "it depends" category which covers the infinite variety of commercial conduct, much of which I'm prepared to accept, even as an ex-agency person, is broadly benign. And if two reasonably-informed companies want to write an agreement to do something, then I still think ultimately that once you've been given the benefit of doubt, even if that means it's rather hard for one of those parties or a third party to overturn that agreement in court, then so be it.

I think that's a slight problem I have with Maurice's paper and I can see it colored by the U.S. context. It sort of presumes that it's a bad thing to make it hard for claimants to overturn commercial agreements. A lot of cases in the U.S. seem to be about this sort of commercial conduct, which can be arguable either way. It may well be that legitimate commercial

agreements through different lenses could be about customer allocation or some form or adaptation of price competition. I rely on sort of a gut reaction, and I don't think business people understand. Why are you doing this? Are you doing this to restrict competition, or are you doing it for some sort of wide commercial aim? It's easy to put something in those terms, but you have to start from some sort of presumption, and if there are certain types of conduct that viewed the policy reasons as bad, then as long as that is reasonably clear, that can be helpful.

In the European context, I'm not really persuaded that in economic terms absolute territorial protection is clearly bad. But the European Commission and European courts, for decades of case law, have said absolute territory protection banned on all past knowledge of sales across the border is an infringement. Therefore it is going to infringe. And if that doesn't have a very good intellectual or economic opinion, at least we know where we stand when we advise clients. You can say, well, you should have a battle on all across-the-border sales. That's a policy decision. So as long as you have that, I think that's okay as long as constraints are narrow.

And I think it's often quite useful and informative to see how things go in countries where things get done badly. I am not so much talking about the whole side of the rule of law which is covered by Lord Bingham 6 subrule. I'm parking that to one side to talk about later because I find most interesting the sort of writing or framework of judicial review standards of people acting within the law. But it's simply are they actually applying it sensibly?

I was just talking to colleagues from our Moscow office the other day, and they are saying that there are huge issues in Russia at the moment about how the courts are interpreting the law on resale pricing. They are basically saying that if a supplier has a recommended resale price, then by charging the recommended resale price, it is virtually pricing fixing, which is prohibitive and illegal. And that just seems balmy. But that is the position in Russia.

So I think we should try to sort of take a step back and ask if we're arguing about angels on pinheads or whether we are actually saying, you know, there is a lot of variety of emotional behavior, and if there is a heavy burden on somebody who wants to overturn that, whether or not they're part of that agreement, then that is such a fact.

PROFESSOR FIRST: Am I staying in the way of getting

coffee? I'll just speak at length then. (Laughter)

The last comments were very interesting, reminding us that what we see in court is just a very small tip of the iceberg. There is a lot of practice that goes on in lawyers' offices around the world that we never see. And you really have to think about whatever rules get articulated and what the shadow of those rules are in terms of advice. And in part it goes to what I think the rules should be, not whether we should have a rule but what are we talking about and how should we inform those rules.

I do want to pick up on something Rick said and something I think I heard Keith say as well. A lot of the critique is about judicial discretion to make up the law. I think that at the heart of the rule of law debate is the idea that the judges have just gone a little too far. Scalia said something in *Business Electronics*¹⁸ that the Court applies the common law in antitrust cases, but not static common law of 1890. I apply the common law in my head right now.

So there is an evolutionary quality. It does go to the notion that business practice is very dynamic—go try to find cases from 1890 on standard setting or failure to disclose your patents. Don't look for them.

For Terry, yes, back to *PNB*.¹⁹ Thank you very much. I'll just throw that out. If we're looking for a standard, for a clearer rule, we might just as well be talking about the actual substantive rules. We might be better off with a much tighter merger rule, based on the notion that a lot of mergers fail and the ones that have succeeded are now failing. So why not prohibit them in the first place?

I do want to talk about Brandeis for a minute and the invocation of *Chicago Board of Trade*.²⁰ Brandeis was the modern man. He was the Justice who believed not in formal legal rules, which is what he saw his colleagues following, but he believed in facts. He believed that you could really learn about and understand what business practice was going on and that judges could judge that. Maybe he didn't give us a great standard for doing that, but he was really against the formalism of his day and very much in favor of expanding out and looking at the facts.

¹⁸ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988).

¹⁹ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

²⁰ *Bd. of Trade of Chicago v. United States*, 246 U.S. 231 (1918).

Now that can lead you in interesting ways. Take the *Boston Store* case, involving resale price maintenance on patented phonograph records.²¹ The Supreme Court says you can't do that; it's unlawful under the Sherman Act to impose that restriction.²² Brandeis concurs, saying I'm bound by the cases but I think we should look at this as a matter of economics.²³ This isn't something you decide by the formal legal categories.²⁴ We should look and see what the economic consequences are.²⁵

Now we all know what he thought of resale price maintenance. It was a great idea, because it protected smaller distributors. So I think in the end, we're driven inevitably about what the content of antitrust should be, where this should go.

But there is something about this discretion, and I would just like to put in, right before the break, a little plug for politics. Political values with a little p, not the Chicago (sorry, Chicago) and not the Illinois-governor type of politics, but political values. In a way I have nothing against the Bush administration. They came in. They had political values. I don't like their values, but it seems to me that antitrust is not just a technical exercise. And that has to come in, whether we call them rules or standards. It must come into how we are going to decide these cases; politics has to be a part of it. Antitrust is not just something we give over to technocrats.

²¹ *Boston Store of Chicago v. Am. Gramophone Co.*, 246 U.S. 8, 27-28 (1918).

²² *Id.* at 25.

²³ *Id.* at 27.

²⁴ *Id.* at 27-28.

²⁵ *Id.* at 28.