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JUSTICE STEVENS AND THE RULE OF REASON

*Spencer Weber Waller**

OVER the past thirty-plus years, Justice Stevens has played a special role in the jurisprudence of antitrust. He came to the Supreme Court after a successful career as an antitrust litigator, scholar, law teacher, and federal appellate judge. Justice Stevens applied the special insights this background provided to articulate a unique voice in shaping antitrust. While much of the antitrust debate since World War II has concerned the proper legal standard for assessing the competitive impact of agreements under the antitrust laws, Justice Stevens focused much of his analytical work for the Court on a more sophisticated, but no less important, question: How should a court actually determine whether an agreement unreasonably restricts competition in violation of the antitrust laws? In antitrust terms, the question for Justice Stevens was not so much whether the *per se* rule or the rule of reason applied in a particular case, but what the rule of reason actually means and how should it be applied.

In this article, I examine the distinctive voice Justice Stevens brought to antitrust, some of the personal and professional influences that created this voice, and the impact he had on the antitrust jurisprudence of the Supreme Court in defining the rule of reason and its application. I argue that 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.

Part I lays out Justice Stevens's student and early professional career and the influence that Professor James Rahl of Northwestern University School of Law had on Justice Stevens and his antitrust philosophy.¹ Part II analyzes the litigation practice, scholarly writing, and limited antitrust appellate opinions of then-Judge Stevens for clues as to his evolving anti-

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1. Professor James Rahl was both Justice Stevens's and my antitrust professor at Northwestern, albeit nearly forty years apart. *See infra* notes 4-10 and accompanying text.

trust philosophy. Part III examines the numerous Supreme Court opinions authored by Justice Stevens which analyze the critical issue of what the rule of reason actually means when it applies in a case. Finally, I conclude that Justice Stevens's most important contribution in antitrust was to redefine the rule of reason from an empty analytical box in which defendants automatically prevailed into the core tool of modern antitrust law in which courts conduct a more meaningful analysis of the competitive impact of agreements.

I. THE MAKINGS OF AN ANTITRUST SPECIALIST

For his legal education, Stevens attended Northwestern University Law School where he was editor-in-chief of the law review² and graduated in 1947 after only two years with what was believed to be the highest grade point average in the history of the law school.³ There he met one of his formative antitrust influences—Professor James Rahl.

Rahl had been a bit of a wunderkind himself, having also served as editor-in-chief of the law review at Northwestern prior to his graduation in 1942. Following four years with the Office of Price Administration and the U.S. Army, he returned to teach at Northwestern in 1946. Rahl spent the remainder of his career (not counting leaves of absence and sabbaticals) at Northwestern specializing in antitrust and tort law.⁴

He taught Stevens antitrust in the 1946-47 academic year. This was his first year of teaching and he was only three years Stevens's senior. This began a life-long personal and professional relationship that ended only with Rahl's death in 1994. According to Justice Stevens, Rahl "was a warm friend" who stimulated "a strong motivation to excel and to be-

2. Northwestern's law review was called the Illinois Law Review from 1906 until 1952 when the name was changed to the present Northwestern University Law Review. John Paul Stevens, *A Personal History of the Law Review*, 100 Nw. U. L. REV. 25 (2006).

3. *Confirmation Hearing on the Nomination of John Paul Stevens to be Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary*, 94th Cong. 4 (1975) (statement of Sen. Charles Percy) [hereinafter *Confirmation Hearing*]; David M. O'Brien, *Filling Justice O. Douglas's Seat: President Gerald Ford's Appointment of Justice John Paul Stevens*, 1989 Y.B. SUP. CT. HIST. SOC. 20; Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007 at 50, 55; Supreme Court Historical Society, John Paul Stevens, <http://www.supremecourthistory.org/myweb/justice/stevens.htm> (last visited Feb. 3, 2009).

4. See Wolfgang Saxon, *James A. Rahl, 77, Ex-Dean and Expert on Antitrust Laws*, N.Y. TIMES, Jan. 3, 1995, at C41. Rahl also served as Dean of the Law School from 1972 through 1977. *Id.* Besides antitrust courses, Rahl taught both basic and advanced torts and co-authored the later editions of the legal realist torts casebooks originally created by Leon Green. See generally LEON GREEN, *ADVANCED TORTS: INJURIES TO BUSINESS, POLITICAL AND FAMILY INTERESTS* (1977); LEON GREEN, *CASES ON THE LAW OF TORTS* (2d ed. 1977); LEON GREEN, *CASES ON INJURIES TO RELATIONS* (1968).

Professor Rahl later became one of the leading early generation of scholars to study the application of United States antitrust laws to international business transactions and the development of the competition law of the European Communities. See generally JAMES A. RAHL, *COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT* (1970); James A. Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974). See also Biography, James A. Rahl (1917-1994) Papers, 1938-1995, Northwestern University Archives (on file with author).

come knowledgeable about the intricacies of antitrust law. He was a wonderful teacher, so thoughtful and decent. We all loved him.”⁵

After Stevens completed his Supreme Court clerkship with Justice Wiley Rutledge, he spurned overtures to teach at Yale and returned to Chicago to practice as an associate with one of the larger downtown law firms in 1949.⁶ He returned to Washington, D.C. to serve in 1951 as Associate Counsel to the House Subcommittee on the Study of Monopoly Power.⁷ He then founded a new firm back in Chicago with other associates from his prior firm and practiced as a named partner at the new firm until he became a Seventh Circuit judge in 1970.⁸ He also taught antitrust as a lecturer, first at Northwestern, as a colleague of Rahl, and later at the University of Chicago Law School.⁹

Even after Stevens focused full time on private practice, he and Rahl remained close and frequently participated in conferences and bar association programs. One important professional aspect of their relationship was their service together on the 1955 Attorney General’s Committee to Review the Antitrust Laws, the premier blue ribbon commission in the history of antitrust.¹⁰

Both Rahl and Stevens came of age as antitrust professionals at a critical stage in the history of U.S. antitrust law. Beginning with the *Socony-Vacuum* decision in 1940,¹¹ the Supreme Court established an ever-growing number of per se rules categorically barring different types of both horizontal and vertical agreements between businesses. *Socony-Vacuum* established a per se prohibition on price fixing between competitors.¹² By the end of the 1950s, most tying cases, nearly all exclusive dealing arrangements, and most boycotts were added to the list of per se or quasi-per se offenses.¹³ The price discrimination provisions of the Robinson-

5. James Andrew Rahl, *October 8, 1917—December 29, 1994*, NW. L. ALUMNI MAG. 1995, at 9 (on file with author).

6. KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* 38-39 (2001). The firm was Poppenhausen, Johnston, Thompson & Raymond, which is today known as Jenner & Block. History of Jenner & Block, <http://www.jenner.com/firm/ourfirm.asp?type=History> (last visited Feb. 3, 2009).

7. MANASTER, *supra* note 6, at 38-39. That subcommittee, chaired by Representative Emmanuel Celler, focused primarily on studies of the extent of monopoly power in such industries as aluminum, newsprint, and professional baseball, but also included issues of monopoly more generally and resale price maintenance. Neither Section 1 nor the rule of reason was part of the Subcommittee’s mission or work product.

8. *Id.* at 39. Originally named Rothschild, Hart, Stevens & Myers, the firm continues to exist today under the name Rothschild, Barry & Myers. Rothschild, Barry & Myers LLP: About the Firm, <http://www.rbmchicago.com/about> (last visited Feb. 3, 2009).

9. MANASTER, *supra* note 6, at 39.

10. See *infra* Part II.

11. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

12. *Id.* at 224 n.59.

13. See, e.g., *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *N. Pac. Ry. v. United States*, 356 U.S. 1 (1958); *United States v. Standard Oil Co.*, 337 U.S. 293 (1949).

Patman Act¹⁴ were being strictly interpreted, and Congress passed the Celler-Kefauver Act in 1950 dramatically expanding the coverage and impact of the anti-merger provisions of the Clayton Act.¹⁵

The cumulative effect of these statutory and case law developments was a certain analytical aridness to antitrust law. Categories ruled.¹⁶ Once a business practice was identified as per se unlawful, it was summarily condemned without further analysis or consideration of justification. Conversely, once some type of commercial agreement was identified as subject to the rule of reason, the analysis became almost completely open-ended and the defendant was certain to prevail.

Professor Rahl rebelled against both of these ways of looking at agreements under Section 1 of the Sherman Act and sought to give greater meaning and clarity to their analysis beyond the labels “per se” and “rule of reason.”¹⁷ In analyzing the common law antecedents of the antitrust laws and the early cases under the Sherman Act, he argued that the rule of reason was a rule of interpretation that governed all cases under Section 1.¹⁸ The rule of reason, as adopted in *Standard Oil*,¹⁹ was necessary to prevent the Sherman Act from sweeping within its ambit and prohibiting all commercial agreements and contracts, regardless of the effect on competition. Thus, under the rule of reason Section 1 of the Sherman Act prohibited only those agreements which were unreasonable in the special sense of being unreasonably restrictive of competition. This also meant that arguments that the agreement injured competition, but nonetheless benefitted society in some other way, were irrelevant under the rule of reason.²⁰

Rahl argued that the per se rule was really a presumption of unreasonableness which cut off further defense or justification of the agreement in question.²¹ At the same time, he contended that the per se rule had to be connected to a likelihood of harm to competition, otherwise any pre-

14. See e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 39 (1948) (holding that discriminating in price between different purchasers violated Section 2 of the Clayton Act, as amended by the Robinson-Patman Act).

15. 15 U.S.C. §§ 18, 21 (2006).

16. For a contemporary take on how antitrust has evolved from an emphasis on categories towards a reliance on core concepts, see generally ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* (2d ed. 2008).

17. Rahl also insisted that the proper phonetic Latin pronunciation of “per se” was “per see” and the not commonly used “per say.” I still do not know which would have been correct in ancient Rome.

18. James A. Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U. L. REV. 137, 139-40 (1962).

19. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

20. Rahl, *supra* note 18, at 146-47. (“[E]ven if the arrangement were greatly beneficial to the national interest in lower prices, better quality, military defense, full employment, foreign trade, health and safety, good morals, and exploration of outer space, it would still be illegal under the rule of reason as that rule has evolved.”).

21. James A. Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1169 (1959).

sumption of unreasonableness would not make sense.²² Certain practices like tying and boycotts required proof of certain facts of likely market impact before the presumption of unreasonableness should attach and cut off further analysis or justification by the defendants.²³ Furthermore, great care had to be exercised before employing overly broad labels and categories in creating per se rules.²⁴

Professor Rahl was equally concerned that applying the rule of reason should not be a meaningless open-ended exercise in which defendants always prevailed. In his writings and lectures, he argued for giving greater meaning and structure to the rule of reason than the Supreme Court's invitation in the *Chicago Board of Trade* case to consider:

[T]he 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.

While Professor Rahl struggled with these and other antitrust issues as an academic and legal consultant, Justice Stevens soon had the opportunity to do so as a full-time practitioner, appellate judge, and finally associate justice of the Supreme Court where he could more directly fill in the missing analytical pieces of the rule of reason. I do not suggest a linear relationship where Professor Rahl's teachings and writings were the cause, or even the most important cause, of Justice Stevens' views about antitrust. Some of Rahl's views were developed after Stevens graduated and was himself a leader in the antitrust bar. Stevens had many other influential friends and mentors in the antitrust community, including Edward Levi and Aaron Director at the University of Chicago, who held very different views of how the law should develop.²⁵ However, I do suggest that these views were the starting point for a dialogue between Rahl and Stevens that continued for decades and can be seen in places where lawyer Stevens, Judge Stevens, and later Justice Stevens made important contributions to antitrust jurisprudence.

II. PRIOR TO THE COURT

Justice Stevens did not merely study, teach, and write about antitrust law, he practiced it nearly full-time. He is the only member of the current

22. *Id.* at 1172-73.

23. *See id.* at 1173-74.

24. *Id.* at 1173-74.

25. For the development and spread of the Chicago School view of antitrust, see Spencer Weber Waller, Abstract, *The Law and Economics Virus*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017882.

Supreme Court who made his living trying cases prior to joining the bench. He is also the only member of the Court who was an antitrust specialist as a practitioner rather than an academic.²⁶

Justice Stevens practiced most of his career at the firm he founded, which was known as Rothschild, Hart, Stevens & Meyers. It was a medium-sized litigation firm with a heavy antitrust practice, in large part due to Stevens's skill and reputation. He practiced with the firm from its founding in 1952 until he joined the Seventh Circuit in 1970.²⁷ While in private practice, he served as counsel of record in eighteen reported trial and appellate decisions involving various antitrust issues and appeared in numerous matters for which there is no reported decision. As counsel for plaintiffs, he lost where he could not establish a per se violation and prevailed as a defendant where the plaintiff failed to do so,²⁸ but had to take the cases and clients as they came. Thus, he could not systematically focus on any other single issue in antitrust.

As a Seventh Circuit judge, Stevens heard and wrote opinions on a disproportionate number of antitrust cases. He sat on fifteen of the thirty-two antitrust cases that the court heard during his time on the Seventh Circuit.²⁹ Of those fifteen cases, Stevens was the author of nine antitrust opinions and one dissent, and he was part of one per curiam decision.³⁰ These opinions included diverse subjects including the Robinson-Patman Act, monopolization law, and Section 1 of the Sherman Act, but none directly focused on the core meaning of the rule of reason.³¹

26. See MANASTER, *supra* note 6, at 38-39. In contrast, Justice Breyer is a well-known antitrust specialist whose pre-judicial experience in the area was primarily academic and legislative, rather than practice. Other prominent justices with substantial antitrust practice experience include Justices Abe Fortas, Thomas Clark, and Robert Jackson. In an earlier era, Justices Taft and Brandeis also came to the Court with considerable knowledge and interest in the antitrust laws. See generally Supreme Court Historical Society, www.supremecourthistory.org (containing biographical information on the justices) (last visited Feb. 3, 2009).

27. See MANASTER, *supra* note 6, at 38-39.

28. *Parmalee Transp. Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir. 1961) (affirming summary judgment for defendant in case alleging conspiracy to restrain trade in transfer of passengers between Chicago rail stations).

29. Robert E. Riggs & L. Cordell McCarrey, *Justice Stevens and the Law of Antitrust*, 43 U. PITT. L. REV. 649, 663-64 (1982).

30. *Id.*

31. See generally *Arenson v. Chi. Merc. Exch.*, 520 F.2d 722 (7th Cir. 1975) (affirming lower court order that defendant had not violated earlier consent decree); *Avnet v. FTC*, 511 F.2d 70 (7th Cir. 1975) (affirming FTC order barring acquisition); *Corning Glass Works v. FTC*, 509 F.2d 293 (7th Cir. 1975) (affirming FTC cease and desist order barring resale price maintenance falling outside of fair trade statutes); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974) (reversing injunction for plaintiff and holding that defendant had not violated Robinson-Patman Act); *Protectoseal Co. v. Barancik*, 484 F.2d 585 (7th Cir. 1973) (affirming holding that defendant violated interlocking director provisions of Clayton Act); *Fison Ltd. v. United States*, 458 F.2d 1241 (7th Cir. 1972) (affirming denial of motion to quash service); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 469 F.2d 14 (7th Cir. 1972) (dismissing appeal for lack of jurisdiction due to lack of finality of district court order denying motion to refer issue to SEC); *Bailey v. Logan Square Typographers, Inc.*, 441 F.2d 47 (7th Cir. 1971) (remanding complaint raising intellectual property and antitrust claims for resolution of common law claims); *Kearney & Trecker Corp. v. Giddings &*

In addition to litigation and service on the lower court, Stevens was also an active member of various bar associations, participating in panels on such diverse topics as patent-antitrust issues, distribution law, and the Robinson-Patman Act. He published widely on the full range of antitrust topics, with many of the articles growing out of his presentations at these conferences and symposia.³²

He also served as one of the most junior members of the 1955 Attorney General's Committee to Study the Antitrust Laws, the premier blue ribbon panel convened to consider antitrust reform.³³ The 1955 Committee was a veritable "who's who" of antitrust law and economics and included Stevens's former teacher, Rahl.³⁴ The Committee's work began in 1953 when Stevens was only six years out of law school.

The 1955 Attorney General's Report would have been the perfect opportunity to set forth a systematic philosophy of the antitrust laws for the committee, but it was not to be. Stevens served as an active, but not vocal, member of the Legal and Economic Concepts Work Group which drafted key sections of the report, including the discussion of Sections 1 and 2 of the Sherman Act.³⁵ Professor Eugene Rostow of the Yale Law School was the principal drafter of this section of the Report, and while

Lewis, Inc., 452 F. 2d 579 (7th Cir. 1971) (reversing dismissal of patent claims and awarding attorneys' fees for antitrust violation).

32. See, e.g., John Paul Stevens, *The Robinson-Patman Act Prohibitions*, 38 CHI. BAR REC. 310 (1956); John Paul Stevens, *Defense of Meeting the Lower Price of a Competitor*, in 1953 MICH. U. INST. ON FED. ANTITRUST LAWS (1953) [hereinafter Stevens, *Defense of Meeting the Lower Price*]; John Paul Stevens, *Exemptions from Antitrust Coverage*, 37 ANTITRUST L.J. 706 (1972); John Paul Stevens, *Cost Justification*, 8 ANTITRUST BULL. 413 (1963); John Paul Stevens, *The Regulation of Railroads*, 19 ANTITRUST L.J. 355 (1961); John Paul Stevens, *Tying*, in CONFERENCE ON THE ANTITRUST LAWS AND THE ATTORNEY GENERAL'S COMMITTEE REPORT (1955) [hereinafter Stevens, *Tying Arrangements*]; John Paul Stevens, Book Review, 28 NOTRE DAME L. 430 (1952) (reviewing ABA SECTION OF ANTITRUST LAW: PROCEEDINGS AT THE ANNUAL MEETING SAN FRANCISCO, CALIFORNIA, SEPTEMBER 17-18 (1952)); Edward R. Johnston & John Paul Stevens, *Monopoly or Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949).

33. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) [hereinafter 1955 ATTORNEY GENERAL'S REPORT]. The 1955 Attorney General's Report was preceded by the Temporary National Economic Committee of the 1930s which was a combination of primarily an empirical study of the structure and performance of the American economy and only secondarily a study of the current and recommended role of antitrust law. *But see* M. Handler, A Study of the Construction and Enforcement of the Federal Antitrust Laws (TNEC Monograph No. 38 1941). Subsequent to the 1955 Attorney General's Report, there have been blue ribbon commissions in 1969, 1979, an internationally focused study in the 1990s, and the most recent Antitrust Modernization Commission. There is a general consensus that the 1955 Attorney General's Committee was the most prestigious and most influential exercise of this nature. Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421 (2006); Albert A. Foer, *Half-Time at the Antitrust Modernization Commission*, 40 U.S.F. L. REV. 601, 617-18 (2006) [hereinafter Foer, *Half-Time*]; Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029 (2003) [hereinafter Foer, *Antitrust Modernization Commission*].

34. 1955 ATTORNEY GENERAL'S REPORT, *supra* note 34, at vii.

35. Other members of the group included: Walter Adams, Morris Adelman, John Maurice Clark, Clare Griffin, George Hale, Milton Handler, Alfred Kahn, Kenneth Kimble, Eugene Rostow, Blackwell Smith, and George Stigler with Burke Marshall and Stanley Barnes as conferees. See Milton Handler Collection, Records Group I, Box 10, File 63.

there are many letters going back and forth disputing different portions of the drafts, there is no correspondence to indicate any disagreement on Stevens's part with the materials circulated.³⁶

The Report ultimately proved to be more of a restatement of the current law than a critique, particularly with respect to the analysis of Section 1.³⁷ It listed, rather than analyzed, when the full rule of reason applied and when practices were per se unlawful. Stevens joined in the report in full and there are no publicly available papers indicating that he expressed any differing views as to the description of the antitrust world as it existed in 1955.³⁸

Stevens's only public discussion of the report came in a conference at Northwestern Law School organized by Professor Rahl marking the release of the report. Stevens contributed a brief comment echoing, but extending, the report's discussion of tying doctrine, suggesting that the description of tying as per se unlawful masked a number of situations where tying was in fact helpful or benign in terms of competitive effect.³⁹

These scholarly and professional endeavors, while important in their own right, represent just the foundation upon which Justice Stevens built his antitrust world view. They also represent the foundation for Justice Stevens's articulation of a unitary rule of reason based on competitive effects, and competitive effects alone.

III. JUSTICE STEVENS IN ACTION

More than any other justice in recent times, Justice Stevens has articulated a comprehensive view of the rule of reason as a rule of interpretation for all of Section 1 of the Sherman Act. For Stevens, the rule of reason is not a stark choice between per se illegality and an endless exploration of intent, effects, and balancing. Instead, he appears to regard the rule of reason as a continuum where some conduct is presumed to unreasonably restrict competition (and is hence unlawful) where no potential justifications are permitted. Other conduct is similarly presumed unreasonable only after proof of certain market facts (usually market power) with no potential justifications allowed in this situation either. Sliding down the scale is the "quick look," or truncated, rule of reason, which is really a rebuttable presumption of unreasonableness unless the defendant comes forth with a cognizable procompetitive justification.⁴⁰ If none is

36. *See id.*

37. S. Chester Oppenheim, *Highlights of the Final Report of the Attorney General's National Committee to Study the Antitrust Laws*, 1 ANTITRUST BULL. 6 (1955) [hereinafter Oppenheim, *Highlights*]; S. Chesterfield Oppenheim, *Remarks on the Report of the Committee, in CONFERENCE ON THE ANTITRUST LAWS AND THE ATTORNEY GENERAL'S COMMITTEE REPORT* at 9 (1955) [hereinafter Oppenheim, *Remarks on the Report*].

38. The only substantive dissent was by Louis Schwartz, who urged a more expansive view of the role of antitrust for many of the areas covered by the Report. 1955 ATTORNEY GENERAL'S REPORT, *supra* note 34, at 390.

39. Stevens, *Tying Arrangements*, *supra* note 33, at 135.

40. Federal Trade Commission, *The Truncated or "Quick Look" Rule of Reason*, <http://www.ftc.gov/opp/jointvent/3Persepap.shtml> (last visited Feb. 2, 2009).

forthcoming, then the conduct is deemed unreasonable, even without proof of competitive harm.⁴¹ If the defendant comes forth with legally cognizable and non-pretexual justifications, then the agreement will be deemed unreasonable if the plaintiff can demonstrate that the harm to competition outweighs the asserted justifications and benefits.

As the number of true per se rules (presumptions for Stevens) shrinks, the focus moves toward the middle range of the continuum and the legitimacy of the justifications offered the defendants takes the spotlight. In case after case, Justice Stevens was willing to limit the application of presumptions of illegality, but he was unwilling to consider any justifications other than those that related to the competitive impact of the practice under consideration. Social justifications, no matter how appealing, were relevant only if Congress wished to consider an exception or immunity to the Sherman Act's regime of economic competition. Such considerations were irrelevant to the question of whether the agreement unreasonably restricted competition, as were arguments that competition itself was inappropriate for a particular industry or that the defendants had fixed a reasonable price. These, too, were questions for Congress; they were not questions for the Court in adjudicating a particular case under a statute that mandated economic competition and forbade those agreements which unreasonably restricted such competition.

This Part begins with a brief look at why it is fair to conclude that Justice Stevens's rule of reason opinions in fact reflect a deep personal philosophy rather than a compromise with the other justices who join his opinions. Part III.B next traces the origin and development of Justice Stevens's unified rule of reason approach. Part III.C sets forth his focus on only competitive impacts in applying the rule of reason. Part III.D examines the curious case of tying agreements where he appeared to follow a slightly different approach, but it concludes that the difference is not as great as most observers would imagine. Finally, I briefly discuss the least explored portion of the rule of reason: what to do when the defendant has in fact offered a legitimate pro-competitive justification, and the Court must balance the pro-competitive and anti-competitive consequences of a particular business practice. Neither Justice Stevens nor any other member of the Court has offered much guidance in this area.

A. A JUSTICE'S VOICE

Several factors complicate analyzing the text of Supreme Court opinions to determine the personal philosophy of an individual justice.⁴² The

41. *Id.*

42. I am ignoring entirely the body of literary theory that argues that the meaning of a text reflects the perceptions of the interpretative community that is reading and analyzing the text rather than the intent of the author. See generally SEAN BURKE, *THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT, AND DERRIDA* (1998); H.L. HIX, *MORTE D'AUTOR: AN AUTOPSY* (1990); ROLAND BARTHES, *The Death of the Author*, in *IMAGE MUSIC TEXT* 142 (Stephen Heath trans., 1977).

certiorari and assignment processes make the results of which cases are heard and who writes the opinions somewhat unpredictable in nature, because of the need for four votes at the certiorari stage, the decisions at the weekly conference, and the assignments of the opinions.⁴³ These assignments balance the need to accommodate work loads and prior assignments, the need to preserve coalitions on a particular case, interpersonal dynamics among the justices, and any preferences the justices may have as to the available opinions.⁴⁴

The opinions themselves typically are not entirely a solo effort by the individual justice who draws the assignment. The final opinion often is researched and drafted by law clerks; edited, improved, and approved by the authoring justice; and then subject to revision and negotiation with other justices who must decide whether to join, concur, or dissent.⁴⁵ Finally, the general secrecy surrounding the Supreme Court makes it particularly tricky to opine with confidence about the views of an individual justice, particularly for current or recently retired justices whose papers are not yet in the public domain.

While these concerns are important, they are somewhat less significant in the case of Justice Stevens' body of antitrust work. First, Justice Stevens tends to be more personally involved in case selection and opinion writing than many of his contemporaries on the Court.⁴⁶ Stevens, virtually alone on the modern Court, does not participate in the "cert pool," an informal arrangement where one law clerk reviews all the petitions for certiorari that arrive during a specified period.⁴⁷ In addition, he has had less clerks over the years than his contemporaries, relying on three law clerks rather than the full four clerks that Supreme Court Justices are allowed to hire.⁴⁸ Stevens also has a general tendency not only to write his own first drafts but also frequently drafts short concurrences and dissents in order to offer short comments on the majority opinions when he believes something is missing or incorrect.⁴⁹

One could thus infer that more of Justice Stevens's personal effort was involved in the creation of the opinions, even if the initial draft of any particular case was prepared by his clerks. Stevens also had the luxury of developing a line of thought about the rule of reason across a series of cases in a relatively short period of time. This was followed by a long period where the Court stopped deciding substantive questions of antitrust and another period where it began to address different areas of anti-

43. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 28-30 (2007). The opinions are assigned by the Chief Justice when in the majority and otherwise by the most senior Associate Justice in the majority. *Id.*

44. *Id.*

45. *Id.* at 156.

46. *Id.*

47. *Id.* at 156. See also BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 272 (1979) (describing origins of the certiorari pool during the Nixon Administration).

48. *Id.*

49. TOOBIN, *supra* note 44, at 156; *Confirmation Hearing*, *supra* note 3, at 41.

trust law, so Stevens's voice remains relatively undiluted and unmuddied as to the operation of the rule of reason.

Finally, while we do not have access to Justice Stevens's papers, we do have access to those of three of his contemporaries. Justices Powell, Blackmun, and Marshall all made their papers available almost immediately, allowing access to their files on cases during the periods where they served with Justice Stevens, breaking with a tradition where a retiring justice's papers were not available during the working lifetimes of his peers. In particular, the papers of Justice Powell and Blackmun provide a treasure trove of information for the antitrust scholar.⁵⁰ Each was a pack rat in slightly different ways. Justice Powell kept meticulous notes on each vote for certiorari, while Justice Blackmun kept similarly meticulous notes on each case discussed at the weekly conference where initial votes were taken and opinions assigned. These two Justices also had seemingly complete case files with correspondence between the Justices about the cases as draft opinions, concurrences, and dissents were circulated, revised, and finalized. Together, all these sources strongly suggest that Justice Stevens's voice was his own in the series of important antitrust opinions discussed in the following Sections.

B. THE UNITY OF THE RULE OF REASON

Stevens began to outline his vision for a broad unitary rule of reason in his 1978 opinion in *National Society of Professional Engineers*.⁵¹ The case involved a civil Section 1 challenge to a trade association rule which prohibited competitive bidding by engineers on public works projects. Under this rule, an engineer could not discuss price terms with a client until they had already been selected for the job (presumably on the basis of reputation, the plans submitted for the project, and any other non-price factors). Only then would price negotiations ensue. If the client and engineer could not then reach agreement on price, the whole process was to repeat itself until the client selected another engineer and then negotiated an acceptable price arrangement.⁵² The defendant argued that the ethical rule in question was necessary to promote the public health, safety, and welfare, and prevent substandard engineering resulting from low ball bids, an argument that Justice Stevens quickly rejected as incompatible with any version of the rule of reason.⁵³

As to the nature of the rule of reason itself, Stevens traced its origins

50. See Andrew I. Gavil, *Sylvania and the Process of Change in the Supreme Court: A First Look at the Powell Papers*, 17 ANTITRUST 8 (2002).

51. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978). Interestingly, Justice Stevens voted against taking certiorari in the case, and the initial vote of the Justices was not to hear the case. Powell Papers, Case No. 76-1767 (Sept. 27, 1998).

52. *Prof'l Eng'rs*, 435 U.S. at 684.

53. See *infra* notes 128-32 and accompanying text.

from the English common law case of *Mitchel v. Reynolds*;⁵⁴ Judge Taft's circuit opinion in *Addyston Pipe*,⁵⁵ the early Supreme Court cases interpreting the Sherman Act in literalist terms;⁵⁶ and finally the Supreme Court's invocation of the rule of reason in *Standard Oil*.⁵⁷ He described the rule of reason derived from *Standard Oil* as:

[W]hether 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.⁵⁸

While he acknowledged that the nature of a learned profession might allow certain practices which might otherwise violate the rule of reason in purely commercial contexts,⁵⁹ he noted shortly thereafter: "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement" because they operated as a total ban on competitive bidding in all contexts and involving all clients and projects.⁶⁰

Justice Stevens's most explicit analysis of the unitary rule of reason came in *NCAA v. Board of Regents of the University of Oklahoma*.⁶¹ Here, the Universities of Oklahoma and Georgia challenged an NCAA rule that limited the number of times that any member school's football team could appear on television in a given season as a violation of Section 1 of the Sherman Act.⁶² The plan was adopted in the early days of television to reduce the adverse effect of television on attendance at live football games among the hundreds of NCAA schools.⁶³ Under the version of the plan in effect at the time of the case, the television networks paid the NCAA fixed sums to broadcast a set number of games during the season.⁶⁴ The networks then negotiated directly with member schools at set fees for a limited number of appearances for any four-year period.⁶⁵ The plan was challenged by schools with strong national followings and

54. 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711). See also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983) (discussing the common law origins of the Sherman Act and the rule of reason).

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

56. *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

57. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

58. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978).

59. *Id.* at 686. Justice Stevens's approach tracks the approach of the 1955 Attorney General's Report, *supra* note 34, at 11, although at the time this was viewed by the chair of the Report as merely a semantic clarification. Oppenheim, *Highlights, supra* note 38, at 7.

60. *Prof'l Eng'rs*, 435 U.S. at 692.

61. 468 U.S. 85 (1984).

62. *Id.* at 92.

63. *Id.* at 91.

64. *Id.* at 92-93.

65. *Id.*

sold out football stadiums who had everything to gain and nothing to lose from the revision or scrapping of the plan and the very real possibility of separately negotiating a more lucrative contract on their own.⁶⁶ The lower courts characterized the arrangement as a per se unlawful horizontal price fixing or production agreement and rejected each of the defendant's proffered competitive justification.⁶⁷

Justice Stevens began by recognizing that the practices had many of the characteristics that the antitrust laws summarily held unreasonable.⁶⁸ He stated:

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 televised 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.⁶⁹

Nonetheless, the Court decided that it would be inappropriate to apply a per se rule to this case.⁷⁰ The decision was not based on a lack of judicial experience with such arrangement or the NCAA's non-profit status, but rather because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."⁷¹ In the Court's view, the product of amateur college sports, and college football in particular, could not exist without a variety of agreements between the member schools, ranging from prohibiting payments to student athletes to the actual rules of the games played between the teams on the field.⁷² Because the NCAA rule structure helped create a new product that could not exist without the horizontal agreement and because the new product could enhance overall market competition, the Court refused to condemn the arrangement outright and instead considered the defendant's justifications for the restraint.⁷³

Justice Stevens explained the continuum of the rule of reason in two key footnotes.⁷⁴ In footnote 26, he stated: "Indeed, there is often no bright line separating per se from rule of reason analysis. Per se rules may require considerable inquiry into market conditions before the evi-

66. *Id.*

67. *Id.* at 95-99. See also *infra* notes 131-41 and accompanying notes.

68. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99-100 (1984).

69. *Id.*

70. *Id.* at 100.

71. *Id.* at 100-01.

72. *Id.* at 101-02.

73. *Id.* at 103.

74. See *id.* at 104 n.26, 109 n.39.

dence justifies a presumption of anticompetitive conduct.”⁷⁵ At the other end of the spectrum of the rule of reason continuum, he also noted that the rule of reason can sometimes be applied in “the twinkling of an eye” when the anticompetitive harm is obvious.⁷⁶

He unfortunately then fell back on a more categorical view of the rule of reason in rejecting the first of the proffered justifications.⁷⁷ The defendant argued that the arrangement could not have injured competition because it lacked market power in a broader market for sports broadcasting.⁷⁸ In response, Justice Stevens held that “naked” restraints on price and output have never required proof of the defendant’s market power and would thus require some affirmative competitive justification, even in the absence of a detailed market analysis.⁷⁹ Second, he concluded that the record had ample evidence of market power in a market for college football broadcasts that was uniquely appealing to advertisers.⁸⁰ He concluded that given the substantial restraints on competition, the defendants had a “heavy burden of establishing an affirmative defense which competitively justify[d] this apparent deviation from the operations of a free market.”⁸¹ Given that Stevens rejected each of the proffered justifications as not legally cognizable, the arrangement was easily condemned under the rule of reason.⁸²

Board of Regents was unnecessarily complicated in many ways. While Justice Stevens was correct that a number of rules governing amateur college sports should not be treated as per se unreasonable, that had little to do with the restrictions on broadcast rights at issue in the case.⁸³ There are certain rules (six points for a touchdown, sixty minutes to a game, fifteen yard penalty for a flagrant foul) that may not be commercial at all and are beyond the scope of the Sherman Act entirely.⁸⁴ Other rules relating to the non-payment of athletes may be commercial in nature, and, hence, subject to some version of the rule of reason, but they are

75. *Id.* at 104 n.26.

76. *Id.* at 109 n.39 (citing Phillip Areeda, THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES 37-38 (1981)). Despite invoking this wonderfully apt metaphor, Justice Stevens in fact spent a good deal of time discussing competitive effects and possible justifications in *Board of Regents* and other cases, suggesting that the so-called quick look was never as quick as its name suggested. See Jeffrey L. Harrison, *Price Fixing, The Professions, and Ancillary Restraints: Coping with Maricopa County*, 1982 U. ILL. L. REV. 925, 947 (“Despite its sweeping language condemning horizontal maximum price fixing, the *Maricopa County* Court reached its decision after careful consideration of the restraint’s ancillary nature.”).

77. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1980).

78. *Id.*

79. *Id.* at 110.

80. *Id.* at 111.

81. *Id.* at 113.

82. *Id.* at 113-20.

83. See generally *id.*

84. See e.g., *Bassett v. NCAA*, 528 F.3d 426, 433-34 (6th Cir. 2008) (enforcement of rules relating to standards for recruiting student athletes not commercial in nature); *Brentwood Academy v. Tenn. Secondary Schools Athletic Ass’n*, No. 3:97-1249, 2008 WL 2811307 at *4 (M.D. Tenn. July 18, 2008) (recruiting rules for athletes is athletic and not commercial in nature).

necessary to create and maintain the amateur nature of the sport. Others may arise in an amateur sports setting but are the kind of traditional commercial naked restriction of market behavior that warrant a heavy presumption of unreasonableness.⁸⁵

In *Board of Regents*, the restrictions on broadcasting rights had nothing to do with the non-commercial aspects of college sports or any of the characteristics of what make it uniquely amateur. Justice Stevens could easily have acknowledged the need for some version of the rule of reason for amateur athletes in general and still condemned the specific agreement before him as per se unreasonable. In short, he correctly identified the spectrum of options along the rule of reason, but may have simply located this particular restraint farther away from the presumption of illegality than necessary. Whether he did so out of a starry-eyed view of the amateur athletics, the need to obtain or retain votes for his majority opinion, or any other of the myriad of potential reasons cannot be teased out of the currently available public sources.

He returned to the theme of a single rule of reason continuum again in his partial concurrence and partial dissent in *United States v. U.S. Gypsum Co.*, where he objected to a distinction in substantive antitrust rules between civil and criminal cases.⁸⁶ In discussing the rule of reason, he cited James Rahl in stating:

[P]roperly understood, rule-of-reason analysis is not distinct from “per se” analysis. On the contrary, agreements that are illegal per se are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.⁸⁷

Then in the landmark *Broadcast Music* decision Justice Stevens dissented, not to disagree that the agreement should be judged under the rule of reason, but to explain why he believed that the agreement was illegal under the rule of reason and why no remand was necessary.⁸⁸ Even in a seemingly unrelated case about the availability of injunctive relief in private antitrust cases, Justice Stevens paused to observe: “Two of the most famous prosecutions [of the Theodore Roosevelt era] concluded in 1911, with decisions from this Court endorsing the ‘Rule of Reason’ as the principal guide to the construction of the Sherman Act’s

85. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (fixing of salaries for graduate assistant coaches for college basketball teams).

86. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 474 (1978).

87. *Id.* at 476 (citing James A. Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U. L. REV. 137, 139 (1962)). Justice Stevens cited this same article by Rahl in two other cases as well. See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 349 (1990) (Stevens, J., dissenting); *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 348 (1982).

88. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 25 (1979) (Stevens, J., dissenting). This was an apparent change from the views Justice Stevens expressed in the initial court conference on the case where he indicated that the block licensing arrangement was “classic per se.” Justice Harry Blackmun, Conference Notes 1-17-79, *Broadcast Music, Inc. v. CBS, Inc.*, No. 77-1578, 77-1583.

general language.”⁸⁹

The majority of the Court endorsed, but muddied, this view of the rule of reason in the more recent *California Dental Association v. FTC* case.⁹⁰ *California Dental* concerned rules of an association of dental societies in California which effectively prohibited certain kinds of price and non-price advertising in order to stop false and misleading claims.⁹¹ The Federal Trade Commission (FTC) found that the restrictions on price advertising were per se unreasonable.⁹² A split Ninth Circuit disagreed, but nonetheless found that the restrictions violated the abbreviated rule of reason set forth in *Board of Regents*, citing the language that the rule of reason can be applied in the “twinkling of an eye” in the appropriate case.⁹³ The majority opinion in the Ninth Circuit that the restrictions on price advertising were close to a naked restraint of trade and considered the defendant’s justifications of discouraging false advertising unrelated to the specific restrictions at issue in the case.⁹⁴

The Supreme Court was unanimous that a quick look or truncated rule of reason was appropriate in some cases, but split five-to-four on the question whether it was appropriate under the facts of the case.⁹⁵ In a short and cryptic opinion by Justice Souter, the Court held that the FTC erred in applying the quick look standard to any of the California Dental Association’s advertising restrictions.⁹⁶ The Court summarized Justice Stevens’s earlier opinions in *Professional Engineers* and *Board of Regents* as permitting a quick look or abbreviated rule of reason where “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.”⁹⁷ The majority was not confident that the price and non-price restrictions on advertising were either procompetitive, anticompetitive, or merely benign given the uncertainties of how restrictions on advertising operate in markets for professional services.⁹⁸ It reversed the finding of liability in the absence of a detailed market analysis and a clear showing of competitive harm.⁹⁹

The Court, however, endorsed the basic framework of the rule of reason as laid out by Justice Stevens in the previous cases.¹⁰⁰ Souter acknowledged that terms like “per se,” “quick look,” and “rule of reason”

89. *California v. Am. Stores Co.*, 495 U.S. 271, 286 (1990).

90. See generally *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999). For a more detailed discussion of the case, see Stephen Calkins, *California Dental Association: Not a Quick Look but the Full Monty*, 67 ANTITRUST L.J. 495 (2000).

91. *Cal. Dental Ass’n*, 526 U.S. at 760-62.

92. In the matter of *Cal. Dental Ass’n*, 121 F.T.C. 190 (1996).

93. *Cal. Dental Ass’n v. FTC*, 128 F.3d 720, 727 (9th Cir. 1997).

94. *Id.* at 727-28.

95. *Cal. Dental Ass’n*, 526 U.S. at 782.

96. *Id.* at 770.

97. *Id.*

98. *Id.* at 778.

99. *Id.* at 781.

100. *Id.* at 779.

are less fixed than they appear.¹⁰¹ Some restraints can be condemned without a “plenary” market analysis, while others may require considerable market analysis before they can be condemned under even a *per se* analysis.¹⁰² The Court classified the rule of reason as a “spectrum” or a “sliding scale” and stated: “[T]here 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.”¹⁰³ The majority then concluded that “a less quick look” was necessary for the “initial assessment of the tendency of these professional advertising restrictions,” but it did not offer further guidance on how one should locate future cases on the spectrum of the rule of reason.¹⁰⁴

Justice Stevens joined Justice Breyer’s dissent without writing separately, a relative rarity for him.¹⁰⁵ The dissent found that the FTC’s decision was supported by substantial evidence and the court of appeals properly applied a form of the quick look.¹⁰⁶ Justice Breyer found the anticompetitive effect of each of the advertising restrictions as applied “obvious.”¹⁰⁷ He then acknowledged the legitimate aim of preventing false and deceptive advertising, but found a lack of empirical support for the restrictions at issue in the case.¹⁰⁸ He also assumed that the commission was required to show market power, but found sufficient evidence in the record that such market power was present.¹⁰⁹ He concluded by noting that the burden of persuasion had evolved over the years and represented an advance over either an open-ended inquiry where the FTC had to present and rebut every theory and fact in order to win or where the government always won with little or no theory or analysis presented.¹¹⁰

California Dental is probably the hardest of the rule of reason cases the Supreme Court has considered, but it is also the most unsatisfying. The Court has always struggled with the application of antitrust principles to professional and health care markets. Unlike some of the earlier cases, it was not easy to completely dismiss the justifications offered by the defendants.¹¹¹ In addition, *California Dental* itself involved changing theories by the plaintiff and the courts at each level of the case, as well as the general administrative law issue of the proper level of deference given to the findings of the FTC. These factors, plus the general imprecision of the majority and the dissenting opinions, leave readers with the notion that the rule of reason is a continuum, with some cases requiring little market analysis before consideration of the defendant’s justifications and

101. *Id.*

102. *Id.*

103. *Id.* at 780-81.

104. *See id.* at 781.

105. *Id.* (Breyer, J., dissenting).

106. *See id.* at 781-85.

107. *Id.* at 784.

108. *Id.* at 787.

109. *Id.* at 788-89.

110. *Id.* at 793-94.

111. *See generally id.*

others requiring more so, but offer little guidance as to how to choose where any individual case falls on that spectrum.¹¹²

Justice Stevens saw a single unitary rule of reason and ultimately persuaded the majority of his colleagues on the Court, but what implication does this have on antitrust as a whole? Several important consequences flow from this view. First, he viewed the rule of reason as a rule of interpretation for all of Section 1 of the Sherman Act, rather than a separate category applying only to some cases. This has both substantive and methodological implications. He tended to see the rule of reason in a common law historical framework so that English common law cases like *Mitchel v. Reynolds*,¹¹³ nineteenth century Sherman Act cases like *Addyston Pipe*,¹¹⁴ and the 1955, Attorney General's Report¹¹⁵ play a prominent role in many of Stevens's opinions to determine the inherent or factual reasonableness or unreasonableness of modern commercial agreements. It also made him less willing to modify or jettison precedent with strong common law roots.

Stevens also puts more emphasis than many of his colleagues on the defendant's procompetitive justifications than the plaintiff's proof of harm. Without such justifications, hard cases become easy since the restraints on competition are not ancillary to any lawful purpose and hence are unreasonably restrictive on their face.

Viewing the rule of reason in this fashion also leads to a certain unpredictability. In *Copperweld Corp. v. Independence Tube Corp.*,¹¹⁶ Justice Stevens dissented because he viewed the case not as being whether intra-enterprise conspiracy fell outside the Sherman Act, but whether agreements between corporate affiliates could ever unreasonably restrict competition within the meaning of the rule of reason.¹¹⁷ He concluded that the answer was not often, but refused to join the majority's opinion requiring an agreement between two economically independent actors for

112. See Calkins, *supra* note 91, at 556-57. Following *California Dental*, the action moved out of the courts and back to the enforcement agencies to better define how to apply the middle ground of the rule of reason. The Department of Justice and the Federal Trade Commission issued joint guidelines as to agreements between competitors which explore this issue in more detail in different settings. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (last visited Feb. 10, 2009). The Federal Trade Commission also has continued to refine and apply its "inherently suspect" test as its principled analytical tool to determine when the burden shifts to a defendant to justify an agreement or risk condemnation under the rule of reason, and it has received important support from the Courts of Appeals in the *Polygram* and *North Texas Specialty Physicians* cases. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 360-61 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32-33 (D.C. Cir. 2005).

113. 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

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

115. See generally 1955 ATTORNEY GENERAL'S REPORT, *supra* note 34. The 1955 Report has been cited in thirteen Supreme Court cases during Justice Stevens's tenure. All but two references came in opinions by Justice Stevens.

116. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

117. *Id.* at 796.

Section 1 of the Sherman Act to even apply.¹¹⁸

Similarly, in *Business Electronics Corp. v. Sharp Electronics Corp.*,¹¹⁹ Justice Stevens dissented based on his reading of the rule of reason.¹²⁰ The majority held that a dealer-plaintiff terminated as a result of price cutting could not prevail on a claim of what was then per se unreasonable minimum resale price maintenance unless it could show that the defendant had not only terminated the plaintiff by agreement, but also had an ongoing agreement as to price or price levels with its remaining dealers or distributors.¹²¹ Instead, Justice Stevens viewed the case through the historical lens of the unified rule of reason and concluded that the agreement was unreasonable regardless of its vertical versus horizontal status, or its price versus non-price nature.¹²² Because the agreement to terminate the plaintiff was not ancillary to any potential pro-competitive policy or practice as required by *Addyston Pipe*, the agreement was a “naked” restraint of competition and was thus illegal on its face.¹²³

There are conceptual as well as pedagogical advantages to viewing the rule of reason in this fashion. Students, scholars, practitioners, policy makers, and judges struggle with the central question: when does an agreement unreasonably restrict competition? The unified rule of reason provides a consistent approach, even if it does not always provide easy answers. As set forth in Figure 1,¹²⁴ one way to conceptualize what Stevens has done for antitrust is to examine virtually every agreement in the following fashion.

Another important consequence of thinking about the rule of reason in this fashion is to shift the focus from whether a particular type of agreement was or was not per se unlawful to a consideration of whether the defendant had any pro-competitive justification to offer that are sufficient to avoid summary condemnation under any version of the rule of reason. I address this second contribution by Justice Stevens in the next Section.

C. WHAT DOES AND DOESN'T COUNT UNDER THE RULE OF REASON

The other great theme for Justice Stevens was to focus the application of the rule of reason on the effect of the agreement on competition, and competition alone. This prevents the consideration of arguments as to the societal reasonableness of the agreement once the effect on competition is proved or presumed. While this view of the rule of reason long predated his tenure on the Court¹²⁵ and was expressed in a different con-

118. *Id.* at 778-79.

119. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

120. *Id.* at 736-58.

121. *Id.* at 736-37.

122. *Id.* at 736.

123. *Id.* at 736-37 (Stevens, J., dissenting).

124. For a slightly different graphical representation of the rule of reason, see GAVIL, KOVACIC & BAKER, *supra* note 16, at 210.

125. See, e.g., 1955 ATTORNEY GENERAL'S REPORT, *supra* note 34, at 5-12.

FIGURE 1
THE RULE OF REASON CONTINUUM

<u>Presumed Unreasonable</u>	<u>Presumed Unreasonable</u>	<u>Presumed unreasonable</u>
No Justifications/Affirmative Defenses Permitted	After Proof of Certain Market Facts then no Justification/Affirmative Defenses Permitted	<i>unless</i> defendant has cognizable pro-competitive justification
Not ancillary to lawful purpose	Certain tying, certain boycotts	Inherently suspect conduct in non-typical market settings
or		
Traditional per se unreasonable offenses		
<u>No Presumption of Illegality</u> Plaintiff must demonstrate actual harm or infer from market definition and power then and only then must defendant provide procompetitive justification	Can Plaintiff Rebut the Procompetitive Justification? <u>Is it legally cognizable?</u> Is it pretext? Is it established in record?	Does harm to competition outweigh <u>procompetitive justifications?</u>
	<i>Professional Engineers NCAA Trial Lawyers Ass'n</i>	<i>Chicago Board of Trade & the Modern Empty Set</i>

text in *Sylvania*,¹²⁶ Justice Stevens became its greatest champion.

In *Professional Engineers*, this meant summary rejection of the defendant's proposed affirmative defense that competitive bidding could produce a threat to public safety in the form of shoddy engineering work by unscrupulous engineers making unrealistic low ball bids and then using substandard materials or construction techniques.¹²⁷ This undoubtedly could be true in particular instances, but it was legally irrelevant to Justice Stevens,¹²⁸ just as it was legally irrelevant in earlier cases that competition might not be an appropriate public policy for certain industries or that the defendants in fact agreed upon a reasonable price.¹²⁹ He concluded that under either a per se presumption of unreasonableness or a full rule of reason analysis,

the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy

126. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

127. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 698-99 (1978).

128. *Id.* This was not irrelevant to Justice Blackmun who concurred in part, but expressed concern that the *Professional Engineers* did not require a decision where the rule of reason could ever take account of benefits other than increased competition. *Id.* at 699. Justice Blackmun and Justice Stevens would again disagree on this point in the *Trial Lawyers* case in 1990, with Justice Stevens again writing for the majority in a more controversial case. See *infra* text and accompanying notes 142-50.

129. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.¹³⁰

Anything else would be a “frontal assault on the basic policy of the Sherman Act.”¹³¹

Similarly, the effect on competition was the sole criteria used in considering the justifications offered by the NCAA in *Board of Regents*.¹³² The defendants could not plausibly argue that the broadcast limitations were necessary to create a new product, as in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*¹³³ No new blanket license was created for college football; in fact the same rights were still sold on a school-by-school basis, “only in a non-competitive market.”¹³⁴ Moreover, a desire to protect live game attendance was inconsistent with the basic policy of the Sherman Act and was tantamount to the long rejected argument that competition itself was unreasonable.¹³⁵

Justice Stevens then inexplicably appeared to lose focus in considering the defendant’s final argument, that the need for “competitive balance among amateur athletic teams” was a legitimate justification that supported the limitations on broadcast rights.¹³⁶ He assumed without analysis that competitive balance on the field was both legitimate and important, but rejected this justification as a *factual matter* since there was no evidence that the broadcast limitations served this interest in any way.¹³⁷ He stated:

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court’s unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.¹³⁸

130. *Profl Eng’rs*, 435 U.S. at 692 (citing in part to the 1955 ATTORNEY GENERAL’S REPORT, *supra* note 34).

131. *Id.* at 695.

132. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984).

133. *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 23-24 (1979).

134. *Bd. of Regents*, 468 U.S. at 113-14.

135. *Id.* at 117.

136. *See id.* at 117-20.

137. *Id.*

138. *Id.* at 119-20. There is a more sophisticated argument that competitive balance can lead to greater fan interest and greater output (or viewership), therefore constituting a legitimate competitive rather than social justification. The Supreme Court in *Board of Regents* did not pursue this line of argument because it so quickly rejected the factual basis that the broadcast restrictions could achieve this result. The lower courts have split on whether competitive balance is a proper potential justification for a competitive restraint. Compare *Mackey v. NFL*, 543 F.2d 606, 621 (8th Cir. 1976), with *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187 (D.C. Cir. 1978). *See also* Stephen F. Ross, *The Misunderstood*

One would have expected a very different way of reaching the same result based on the rest of the opinion in *Board of Regents* and Justice Stevens's other rule of reason decisions. He appeared to conflate competitive balance, the athletic competition on the field, with the economic competition that the rule of reason protects. Whether Northwestern's football team is 0-12, 6-6, or 9-3 in a particular season is simply a different question than whether limitations on the sale of broadcast rights unreasonably limit competition in that commercial market.¹³⁹ Perhaps Justice Stevens simply took the easy way out and accepted a conceptually shaky justification precisely because it could be so easily rebutted by the record at trial. However, it is not clear why he did not dismiss this justification with a wave of the hand, as he did the similar justification that restricting broadcast rights to bolster live attendance at games was inconsistent with the fundamental premises of the rule of reason.¹⁴⁰

If he appeared to waver on competitive effects as the sole concern of the rule of reason in *Board of Regents*, Justice Stevens returned to the topic with more clarity and precision in the controversial *FTC v. Superior Court Trial Lawyers Association* decision.¹⁴¹ There, the Court considered an effort by independent criminal defense counsel in the District of Columbia to get the hourly rates for court appointed representation of criminal defendants increased from abysmally low levels.¹⁴² Following various lengthy unsuccessful lobbying efforts to obtain an increase in the budget for their work, an informal association of appointed counsel organized a "strike" where they refused to accept additional appointments unless a raise was forthcoming.¹⁴³ This action threatened to paralyze the

Alliance Between Sports Fans, Players, and the Antitrust Laws, 1997 U. ILL. L. REV. 519, 540-47.

139. Northwestern's football team was 4-4-1 during both the 1945 and 1946 seasons while Stevens was a law student, although they had been dreadful for some years when the *Board of Regents* case was decided. Wildcats: A History of Football at Northwestern, <http://www.library.northwestern.edu/archives/exhibits/football/5.html> (last visited Feb. 10, 2009).

140. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 116-17 (1984). The dissent by Justice White, a former college football star, viewed the majority as improperly ignoring all non-economic goals of the defendants. *Id.* at 134 (White, J., dissenting).

141. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). The controversy and the politics underlying the case are set forth in Donald I. Baker, *The Superior Court Trial Lawyers Case—A Battle on the Frontier Between Politics and Antitrust*, in *ANTITRUST STORIES* 258-59 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

142. D.C. had an unusual system for meeting its constitutional obligations to provide representation for indigent criminal defendants during the relevant time period. Baker, *supra* note 142, at 258-59. A relatively small public defender's office handled less than 10% of the case load and outside lawyers were appointed to handle the rest. *Id.* at 259. The bulk of these appointments went to a group of less than 200 "regulars" for whom these cases were typically the bulk of their practice and income. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 415. By operation of a 1964 statute, compensation was set at \$30 an hour for court appearances and \$20 for out of court work, *id.*, with ceilings of \$400 for misdemeanors and \$1000 for felonies and appeals. Baker, *supra* note 142, at 259. These minuscule fees were further eroded by inflation between their enactment and the events in the 1980s which led to the law suit. *Id.* at 259-60.

143. *Id.* at 262.

courts.¹⁴⁴ The mayor, D.C. city council quickly responded with an increase in the budget and the hourly rate of compensation and matters returned to normal.¹⁴⁵

The FTC challenged these events as a per se unlawful boycott in support of a horizontal price-fixing agreement.¹⁴⁶ By the time the matter came before the Supreme Court years later, the issues had been distilled down to whether the First Amendment required use of the rule of reason, rather than the per se rule as used by the Federal Trade Commission, and whether the defendants' conduct was protected by the *Noerr-Pennington* doctrine as lawful petitioning for governmental action.¹⁴⁷

While the wisdom of an enforcement action against low paid criminal defense lawyers representing the indigent is subject to challenge, the case nevertheless fit nicely into Justice Stevens's framework for the rule of reason. Although most of the debate between the majority and dissent was over the application of the per se rule against the background of the First and Sixth Amendment issues implicated in the case,¹⁴⁸ for Justice Stevens it was clear that the case would have come out the same way under the rule of reason. As he noted early on in the opinion:

Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, we may also assume that without the boycott there would have been no increase in [the] fees at least until the Congress amended the federal statute. These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements.¹⁴⁹

An important part of Justice Stevens's rejection of non-economic and social justifications under the rule of reason related to institutional concerns. Under his view, it was Congress in the Sherman Act that had mandated a regime of competition for the economy and foreclosed the Court from accepting otherwise appealing arguments that competition was not appropriate for a particular industry, that price fixing was reasonable in a particular circumstance, or that non-economic or social justifications could justify otherwise anticompetitive agreements. For Justice Stevens, these were all arguments that should be directed to Congress to either

144. *Id.* at 263.

145. *Id.* at 263-64.

146. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 418-19.

147. *Id.* at 411-33. For a discussion of the ups and downs of the case and how truly little other than principle was at stake, see Baker, *supra* note 142.

148. The Court was unanimous in rejecting the argument that the joint conduct was immune as purely political petitioning. *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 413, 425-27.

149. *Id.* at 421-22. See also *id.* at 424 ("The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful.")

amend the antitrust laws or grant statutory exemptions as it has in myriad situations.¹⁵⁰

However, the question remains whether any of these concerns validly applied in *Trial Lawyers*. While the respondents could not point to an exempting statute, they could make credible arguments that their conduct was justified under the First and Sixth Amendments to the Constitution, which arguably enshrine the non-economic and social concerns that prompted their conduct. Justice Stevens may well have reached the correct conclusion in this matter, but he appeared to have given short shrift to a line of argument that in fact fit the framework for the rule of reason he had been advocating since joining the Court.

Finally, the focus on competitive effects as the sole subject of the rule of reason also helps explain *Maricopa County*, where most of the attention has focused on the question of whether horizontal maximum price fixing should have been treated as per se unlawful or subject to the rule of reason.¹⁵¹ While this was obviously an important and controversial question for the Court, it obscures the fact that Justice Stevens would not consider the potential public interest benefits of price fixing, either maximum or minimum, as a cognizable affirmative defense under either the per se or full rule of reason any more than he would consider the argument that price fixing for a particular industry actually benefits the public or that the agreed-upon price was reasonable.¹⁵²

150. See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991) (Stevens, J., dissenting) ("The antitrust laws reflect a basic national policy favoring free markets over regulated markets. In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions."); *S. Motor Carriers, Inc. v. United States*, 471 U.S. 48, 67 (1985) (Stevens, J., dissenting) ("Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances."); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689-90 (1978) ("That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason.")

151. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982). This case was a 4-3 plurality opinion with two justices not participating. *Id.* at 357. William Kovacic has detailed how Justice Powell drafted what he thought would be the majority opinion reversing summary judgment with guidance for the lower court on the application of a full rule of reason analysis on remand only to lose key votes and be forced to write instead in dissent. William E. Kovacic, *Antitrust in the O'Connor-Rehnquist Era: A View from Inside the Supreme Court*, 20 ANTITRUST 21, 21-23 (2006).

152. *Maricopa County*, 457 U.S. at 350 n.22. The lower courts are not always faithful to Justice Stevens's vision of the rule of reason as a rule solely about competitive consequences. See *United States v. Brown Univ.*, 5 F.3d 658, 661 (3d Cir. 1993) (analyzing agreement to jointly calculate student aid under rule of reason). See generally Robert P. Taylor, *Rule of Reason Cases Since National Society of Professional Engineers*, 51 ANTITRUST L.J. 185, 294-95 (1982) (discussing lower court cases permitting health and safety justifications when competitive impact was slight).

D. THE CURIOUS CASE OF TYING

In the tying area, Justice Stevens is best known for his defense of the quasi-per se rule that as a formal matter still governs this area of the law. This rule, last reaffirmed in *Jefferson Parish Hospital District No. 2 v. Hyde*,¹⁵³ holds that the sale or lease of one product or service on the condition that the purchaser also buy or lease a second product or service is per se unreasonable if: 1) there is separate demand for the two products or services; 2) the seller has appreciable economic power over the tying product; and 3) the tying arrangement affects an appreciable volume of commerce in the tied product.¹⁵⁴

This unusual quasi-per se rule is, charitably speaking, hanging by a thread. In *Jefferson Parish*, Justice O'Connor's concurrence, joined by three other justices, points out how the majority's rule requires most of the work of the full rule of reason but offers none of the benefits, and how it is facially inconsistent with the treatment of exclusive dealing arrangements often covering the exact same conduct.¹⁵⁵

The lower courts have grafted all kinds of exceptions to even the quasi-per se rule retained by the majority of the Supreme Court.¹⁵⁶ Some bolder appellate courts have simply ignored the teachings of *Jefferson Parish* and applied a full rule of reason analysis when they thought it best. For example, the Seventh Circuit shortly thereafter held that it could be legal malpractice not to request a rule of reason jury instruction in a tying case.¹⁵⁷ In *United States v. Microsoft Corp.*, the D.C. Circuit also concluded that a full rule of reason was appropriate for allegations of technological tying involving computer software.¹⁵⁸ At the Supreme Court level, the rejection of per se treatment for resale price maintenance¹⁵⁹ and the jettisoning of the presumption of market power or uniqueness from the presence of intellectual property rights covering the tying product¹⁶⁰ all signal that the Court may be receptive to a future head-on challenge to the existing per se rule.

Justice Stevens's defense of the status quo is somewhat surprising given his prior practice experience, non-judicial writings, and earlier opinions for the Court. The very first antitrust case that he wrote for the court arose in a tying context. In *Cantor v. Detroit Edison Co.*, the Court held that a state regulatory program in which the local electrical utility fol-

153. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

154. *Id.* at 15-17.

155. *Id.* at 35 n.2 (O'Connor concurring). For example, in *Jefferson Parish* itself, the lawsuit concerned exclusive dealing from the point of competing doctors excluded from the operating room of the hospital but could be viewed as tying from the point of view of patients who could only have an operation at that hospital if they used the hospital anesthetic group. *See id.* at 4-6.

156. *See, e.g., United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960).

157. *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, 979 F.2d 546, 551-52 (7th Cir. 1992).

158. *United States v. Microsoft Corp.*, 253 F.3d 34, 89-95 (D.C. Cir. 2001).

159. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007).

160. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

lowed a regulatory filing under which it gave away light bulbs to residential users was not protected by the state action defense.¹⁶¹ The plurality opinion by Justice Stevens simply assumed that the program amounted to unlawful tying and focused on the immunity question as did the dissent.¹⁶² Only Justice Blackmun in a concurrence spent any time analyzing why the program might constitute an unlawful tying arrangement.¹⁶³

Almost immediately, Justice Stevens again wrote for the Court in a case raising more substantive tying issues. In *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, the Court brought to an end an absurdly long running case involving the prefabricated housing market.¹⁶⁴ The defendant, U.S. Steel, had a policy of offering low cost financing in order to help sales efforts for its prefabricated homes.¹⁶⁵ A competitor in the housing (but not the finance) market sued claiming that the defendant was tying the provision of credit to the sale of homes through the use of uniquely low cost financing.¹⁶⁶ An earlier version of the case had made it to the Supreme Court in 1969, before Justice Stevens's arrival.¹⁶⁷ Then the Court reversed summary judgment for the defendant, holding that the plaintiff was entitled to the opportunity to prove that the defendant had "appreciable economic power" in the market for the tying product (credit).¹⁶⁸

On the second go around, Justice Stevens wrote for an unanimous Court that U.S. Steel's willingness to provide relatively cheap credit to sell relatively expensive housing in no way constituted the presence of the appreciable economic power or an otherwise unique product necessary for the invocation of the traditional per se tying rules.¹⁶⁹ Again, the Court did not question or examine the merits of the per se rule itself. Justice Powell's notes on the case indicate that Justice Stevens voted to take certiorari and further suggest that Justice Stevens was ambivalent about the current state of the law.¹⁷⁰ Justice Powell noted: "*Stevens* says any tie could be invalidated if economic power alone is test. Stevens thinks case is weak."¹⁷¹

In *Jefferson Parish*, the Court unanimously refused to impose liability on the basis of the hospital's exclusive dealing contract with one particu-

161. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581, 603 (1976).

162. *Id.* at 581, 592, 614-15.

163. *Id.* at 612-14. Based on the information in the Supreme Court opinion, the allegation that Detroit Edison's purchase of light bulbs and subsequent free distribution to consumers seems rather benign, even if the practice caused losses for retail outlets like drug stores which sold competing bulbs. *See id.* at 613-14. Nonetheless, the fact that the Court simply assumed this was a potential violation and reversed on immunity questions, required the remand of the case for trial on the merits and a sub silentio affirmation of the status quo on tying law. *See id.* at 603.

164. *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 611-12 (1977).

165. *Id.* at 614-15.

166. *Id.* at 612 n.2.

167. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969).

168. *Id.* at 503-04.

169. *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 622 (1977).

170. Notes of Justice Lewis Powell, *United States Steel Corp. et al v. Fortner Enterprises, Inc.*, No. 75-853 (Papers of Justice Lewis Powell, Washington & Lee University).

171. *Id.*

lar anesthesiology group, but the justices did so on radically different theories.¹⁷² Justice Stevens, for the majority, first characteristically noted that “[c]ertain types of contractual arrangements are deemed unreasonable as a matter of law.”¹⁷³ He then stated: “It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘*per se*.’”¹⁷⁴

His opinion held that *per se* condemnation, i.e., a finding of unreasonableness without inquiry into actual market conditions, was appropriate only upon proof that a defendant: (1) had market power (or one selling some other type of unique product or service); and (2) forced buyers of a substantial volume of commerce into purchasing two products or services without offering them separately.¹⁷⁵ Only after these threshold issues have been surmounted did Justice Stevens find *per se* prohibition appropriate.¹⁷⁶ Without explicitly using this terminology, he thus situated tying law along the unitary rule of reason, similar to group boycotts, in requiring proof of certain market facts before conclusively presuming unreasonableness.

As to the substance of the tying allegations, Justice Stevens held that the provision of surgical services and anesthesiology services were indeed two distinct services for which there was separate demand, rather than a single functionally integrated bundle.¹⁷⁷ Many patients (usually indirectly through their primary care physician or surgeon) wanted to choose their own anesthesiology provider and use someone other than the doctors affiliated with the hospital where the surgery would be performed.¹⁷⁸ The record further indicated that this was particularly the case with obstetric medicine.¹⁷⁹

On the question of market power and forcing, Justice Stevens concluded that no forcing could be presumed since the defendant had only a thirty percent market share in the New Orleans market.¹⁸⁰ The Court reversed and remanded for consideration of whether liability could be established under the full rule of reason.¹⁸¹

Justice O’Connor wrote a separate concurrence joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist which reached the same conclusion as Justice Stevens, but took direct aim at the existing quasi-per

172. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 3-4, 32 (1984).

173. *Id.* at 9.

174. *Id.* (emphasis added).

175. *Id.* at 11-12.

176. *Id.* at 15-18.

177. *Id.* at 22.

178. *Id.* at 22-23.

179. *Id.*

180. *Id.* at 26-27.

181. *Id.* at 31-32. It is not clear how the plaintiff could prevail under the rule of reason since it has already been found to lack market power, and even if it could otherwise establish anticompetitive harm, the defendants could offer evidence of efficiencies and other justifications.

se rule.¹⁸² In addition to viewing the provision of general hospital services, operating room facilities, and anesthesiology as a single functional item, she forcefully advocated for the treatment of all tying arrangements under the full rule of reason.¹⁸³ She argued that the existing approach required all the work of the rule of reason in defining markets and measuring power and enjoyed none of the benefits by precluding evidence that the specific arrangement had benign or even pro-competitive effects in a particular case.¹⁸⁴

While Justice Stevens was not willing to jettison the limited per se rule that follows proof of market power, he was more than willing to re-examine what constituted, or presumed to constitute, market power in the tying area. In *Illinois Toll Works, Inc. v. Independent Ink, Inc.*, he authored the unanimous opinion of the Court holding that the mere existence of a patent or other intellectual property right would not justify a presumption of market power in a tying case.¹⁸⁵

In this instance, history simply is not a complete guide to Stevens's views on tying in *Jefferson Parish*. In his article *Tying Arrangements* written for a conference following the 1955 Attorney General's Report, Justice Stevens touched on many of the themes that can be found in the O'Connor concurrence.¹⁸⁶ He expanded on a footnote in the report which questioned whether tying should be "almost universally regarded as [a] monopolistic device[]."¹⁸⁷ He began his analysis by noting: "[T]he more one thinks about tying agreements the harder it is to reach a satisfactory conclusion as to just what is that is objectionable about them."¹⁸⁸ He continued with an extended example about the competitive equivalence of a basic sales contract, a requirements contract, and a tying contract in the gasoline industry and questioned why they should be treated differently under either Section 1 of the Sherman Act or Section 3 of the Clayton Act.¹⁸⁹

He then analyzes the seller's motives for such arrangements. He accepted the one monopoly profit theory and, thus, rejected the notion that a seller could ordinarily obtain more profits through foisting a tying arrangement on an unwilling buyer.¹⁹⁰ He recognized the exceptions for a seller trying to avoid either maximum price regulations, minimum resale

182. *Id.* at 32-33 (O'Connor, J., dissenting). Justice Brennan and Marshall concurred and wrote separately briefly to state their support for the long standing precedent of the tying rule. *Id.* at 32.

183. *Id.* at 33.

184. *Id.* at 34. Justice O'Connor also argued that the case at hand was indistinguishable from an exclusive dealing contract which was already subject to examination under the rule of reason. *Id.* at 35 n.2.

185. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

186. Stevens, *Tying Arrangements*, *supra* note 33. For whatever reason, this article by Justice Stevens was not cited by any of the parties or the opinions in the *Jefferson Parish* litigation.

187. 1955 ATTORNEY GENERAL'S REPORT, *supra* note 34, at 138 n.32.

188. Stevens, *Tying Arrangements*, *supra* note 33, at 135.

189. *Id.* at 135-39.

190. *Id.* at 135-42.

maintenance required by state law, or seeking to price discriminate by metering consumption of the tied product.¹⁹¹

He concluded:

I am merely trying to suggest that there may be a variety of reasons for adopting a policy of refusing to sell item A except on condition that item B also be purchased. In some settings the policy may appear entirely reasonable, although in others it might be objectionable I would like very briefly to suggest that in fact the law on tying agreements does not go beyond the law on requirements contract.¹⁹²

One has to work hard to reconcile such statements with the language in the majority opinion in *Jefferson Parish* that “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘*per se*.’”¹⁹³ However, it is not impossible. In 1955, even Justice Stevens acknowledged that the issue of monopoly power was key to distinguishing between those tying arrangements which threatened competition and those which were benign.¹⁹⁴ The rest of the 1955 conference article was premised on demonstrating the need for not condemning outright those tying arrangements where the seller *lacked* monopoly power.

Justice Stevens’s language in *Jefferson Parish* is most concerned with the situation where there is a monopolist and “forcing” is involved, although these factors were not present in the case itself. The emphasis on “forcing” in *Jefferson Parish* was a concern to Justice Rehnquist who wrote to Stevens after seeing the first draft of the opinion indicating:

I think this case offers an opportunity to cut back on the broad sweep of the *per se* prohibition against tying, and I am reluctant to join an opinion which passes up that opportunity, to say nothing of one which may broaden its sweep. Given the difficulties in defining “products,” perhaps Lewis is correct that the *per se* prohibition should be dropped altogether in favor of the Rule of Reason.¹⁹⁵

Justice Stevens quickly replied that same day to all the other justices. He wrote: “As it seems to happen from time to time, the message the author intended to convey is apparently not that which the reader discerned in the opinion. I frankly had intended the ‘forcing’ language to limit the *per se* concept rather than to expand it.”¹⁹⁶ One can thus read Justice Stevens’s writings from the 1950s and the 1980s as at least consistent on the question of how to handle tying claims by firms with market power and

191. *See id.* at 140-44.

192. *Id.* at 145.

193. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (emphasis added).

194. Stevens, *Tying Arrangements*, *supra* note 33, at 148.

195. Letter from Justice William H. Rehnquist to Justice John Paul Stevens, Re: 82-1031 *Jefferson Parish Hosp. v. Hyde* (Jan. 4, 2004) (Blackmun Papers).

196. Memorandum from John Paul Stevens to the Conference, Re: 82-1031 - *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* (Jan. 4, 1984) (Blackmun Papers).

why both he and O'Connor ultimately were willing to quickly dispose (albeit on different grounds) of a claim by a seller without such power.

However, something else entirely may be going on. While speculative, Justice Stevens may have been engaged in holding the line on per se rules far beyond the limited and questionable per se rule applicable in tying cases. *Jefferson Parish* came only two short years after Justice Powell's attempt in *Maricopa County* to question the more stringent per se presumption in horizontal maximum pricing¹⁹⁷ and almost simultaneous to the attempt in *Monsanto* to limit the per se presumption against vertical price fixing.¹⁹⁸ In fact, that presumption eventually fell as to any form of vertical price fixing in the *Leegin* case, in which Justice Stevens dissented.¹⁹⁹ Although the publicly available papers do not shed light on this view of his defense of per se presumptions more generally, it is one way of seeing Justice Stevens's otherwise partially conflicting views over time about tying in a broader and more consistent historical context.

E. THE UNSOLVED PUZZLE OF BALANCING

The only area of the rule of reason where Justice Stevens has made only a limited contribution is the nearly empty corner of Figure 1 where no conclusive presumptions apply, the plaintiff nonetheless has established harm to competition, and the defendant has offered legally and factually cognizable procompetitive justifications. According to the black letter law, the court (or agency) is supposed to weigh the pro- and anticompetitive effects of the agreement and then decide if the agreement unreasonably restricts competition and does not go beyond what is reasonably necessary to achieve the lawful purpose involved.²⁰⁰ This is the full rule of reason test laid out in *Board of Trade of Chicago*.²⁰¹

In practice, virtually no court ever actually does so.²⁰² When the plaintiff can establish that the defendant lacks a legitimate pro-competitive justification or offers only pre-textual ones, it wins.²⁰³ When the defendant actually has a cognizable pro-competitive justification, it almost always wins.²⁰⁴ The courts almost never explicitly balance the harms and benefits, and they are ill-equipped to do in the average Section 1 case.²⁰⁵

197. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 357-58 (1982) (Powell, J., dissenting).

198. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 755, 764 (1984).

199. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

200. *Id.*

201. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238-39 (1918).

202. Michael A. Carrier, *The Rule of Reason, Bridging the Disconnect*, 1999 BYU L. REV. 1265; GAVIL, KOVACIC, & BAKER, *supra* note 16, at 207-08.

203. Carrier, *supra* note 203, at 1268.

204. *Id.*

205. *See id.* at 1267-68. This is increasingly true in Section 2 cases as well. In *Microsoft*, the court set forth a four part test for unlawful monopolization that closely tracked the rule of reason under Section 1 of the Sherman Act. *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001). However, the government prevailed where it could prove that the defendant's justification was pretextual or legally insufficient, otherwise the defendant carried the day. *Id.* In no instance did the court ever get to the true balancing required

This is particularly true at the Supreme Court level where cases are often vehicles to announce the tests the lower courts should be using, rather than reviewing in detail the lower court's decision for error.²⁰⁶ It would be a rare instance where the Supreme Court both took and resolved a Section 1 case to determine whether the lower court or agency correctly weighed the pro- and anticompetitive consequences of a particular agreement in restraint of trade, although that is precisely what the rule of reason says is supposed to happen in the vast majority of cases. Even if the Court thought the balancing was out of whack, it would more likely remand the case for further proceedings, rather than re-do the balancing on the basis of a cold record.

Justice Stevens thus only undertook such a balancing once in his time on the Court, and then only in dissent. In all of the other cases discussed above, the proffered justifications were rejected for legal or factual reasons and the case only presented harm and no cognizable justification, with no ensuing balancing required. Only in *Broadcast Music* did Justice Stevens take the next step and conclude that the rule of reason applied, but the anticompetitive consequences outweighed the benefits of the new blanket license, and he did so alone in dissent as to this part of the case.²⁰⁷ The majority, including Justice Stevens, held that case should be decided under the full rule of reason, but instead remanded to the lower courts for a new trial.²⁰⁸

The empty set of the balancing portion of the rule of reason depicted in Figure 1 is understandable, but unfortunate. Each case will be heavily fact specific and ill-suited to Supreme Court review, which could offer only affirmance or reversal and remand with generalities that would not necessarily be helpful for the next case in the pipeline. For these cases, we are left with the mush of *Chicago Board of Trade*²⁰⁹ and a general reluctance of the Court to say anything further on the subject.

under its own test when both harm and justification were present. *Id.*; see also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

206. Although not a Section 1 case, this was precisely the issue in *Brooke Group*, where members of the Court wanted to dismiss the case altogether after oral argument until a majority of justices coalesced around using the case as a vehicle to announce a new restrictive theory of predatory pricing. Conference Notes, No. 92-466, *Brooke Group v. Brown & Williamson Tobacco Corp.* (Blackmun papers); Memorandum to the Conference from Justice John Paul Stevens, Re: 92-466 - *Brooke Group v. Brown & Williamson Tobacco Corp.* (Apr. 1, 1993) (Blackmun Papers).

207. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 25 (1979) (Stevens, J., dissenting).

208. *Id.* at 24-25. On remand, the defendant prevailed, the verdict was affirmed on appeal, and the Supreme Court denied certiorari. *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 939 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 970 (1981); *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 607 F.2d 543, 544 (2d Cir. 1979).

209. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238-39 (1918).

IV. CONCLUSION

Justice Stevens's common law methodology is by no means limited to the antitrust area. Scholars have noted the overall common law methodology that is central to other areas of Stevens's jurisprudence as well. For example, Ward Farnsworth, while not addressing the antitrust cases, observed that Stevens tended to rely on the facts of the case, weighing benefits and burdens, and using a sliding scale of review with analytical distinctions along the way.²¹⁰ While Professor Farnsworth was specifically talking about the Equal Protection Clause and the First Amendment, little change would be needed to use the same terms to describe the rule of reason.²¹¹ With respect to the due process limits to punitive damages, Professor Farnsworth describes Justice Stevens as laying out the "factors [that] are considered that produce a judgment on the facts[;] . . . the balancing will have to be repeated by other judges in other cases."²¹²

In the end, Justice Stevens ultimately gave us (at least in the antitrust field) more than case-specific judgments with vague standards for application by subsequent lower courts. He drew on his personal and professional influences, the common law traditions of antitrust, and the ancillary restraints rule to help redefine the rule of reason as a continuum rather than a dichotomous set of choices. He further clarified that the rule of reason was a rule about the competitive consequences of agreements and not their societal or general reasonableness.

This Article has sought to identify some of the influences that led Justice Stevens to rule and write the way he has done in the dozens of antitrust opinions, concurrences, and dissents he has written as a member of the Supreme Court since 1976. Some of those influences are the work and teaching of his teacher and friend James Rahl of Northwestern, Stevens's own practice experience, his antitrust scholarship, and often his service on the 1955 Attorney General Committee. As to the meaning of the rule of reason, the core issue in antitrust law, these influences can be seen in his approach and his prose in his opinions, although one will never know whether they specifically caused or dictated the results, reasoning, and language that he used.

He was not always consistent and did not solve every remaining puzzle in this important field of law, but he was broadly guided by these principles in his antitrust jurisprudence on and off the bench. In so doing, he made antitrust law more rational, more coherent, and dare one say, more reasonable.

210. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 158, 179 (Earl M. Maltz ed., 2003). See generally William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087 (1989).

211. Farnsworth, *supra* note 212 at 163.

212. *Id.* at 179.

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