

# Gj Ü)Ú s í,X z ä ÿÿ ©@ñ ( c Ó = Y ;>ñ80 C+± ú ± Ú" )

• ÷

, ?U Œc Ó = Y ;>ñ80 C+± ú ± Ú" ) G>ÿ Ó@ç@î³5)3 Ì F+± 70 ! s ° |  
 • ]' » ý.ú : o+± 5)3 Ì F }1" , ! Q ; W 5)3 Ì F2(A^U' û59A Q £ c Ó = Y !" , Z  
 2 XD° g êAŽ+± Ì FU'3ü\*^ W u50Fü — • € C —1" , C+±Dô/8E=#= Ä 3ó C !5)3 Ì F ý È  
 ³E .ú3ó C g GU' 6 Ö »Kz {>ñ F+± c Ç = YU'4 ± , 5)3 Ì F \ '3ó CDô/8+±4 É !(Ý=y  
 ú ± Ú" 80 < 83ü" { " \ : C4g+± ðU' , % Bf\*U £L' •F\* • » » 5)3 Ì F ! 1.ú3ü" { "  
 )3@ç\$ Bà ò>® Ž # # t U W u ZE/\*UU' £ 3à '>ñ F €2(! Ì w6 @ö(' YCØ : \ ÁE\*!o+±  
 , +±U' £ A@a G=•AŽ Ö, ³,L Ë+± Ì w6 @ö(' ! ( ú ± Ú" )+±>ñ80 C xC U » 5)3 Ì F  
 g '-mU'EGDô 1)3 TFü u #/ 2\3üO¹U' £3ü\*^1" , C p ,4 ± , 5)3 Ì F !

GK A; Ö5)3 Ì FU D™ [ \$ i! .U " ,>ñ80U 1" , CU ;7È Í ""k  
 UÀ Z + 31" \$UÀ % UÀ '([@ó X-UÂ " '04& \$UÂ U• UŽ

é?Ô

1

2

RPM

1		2019	4	1004– 1024
2				
"	"		per se rule of illegality	per se rule
"	"		per se rule	"
"	"	5 2	"	" per se rule "
"	"		"	"
"	"			2016 2

RPM 3 “ ”

rule — standard

“ ” 1017—1018 1 2

3 4 “ ” 1006

“ ” 1024 RPM

“ ‘ ’ ..... ” 1023

“ ”

4

“ ”

5

---

3

4

5

1024

2019 4 1016 “

”

2019 4 1023 “ ..... ”

2019 4 1017 1019 1023

“ ”

“

” 7

Ô Ã(ÁLI)Ú?· Ü)Ú s í Đ7ÈAÃÄ J z ä

“ ” 8

9

10

“

” 1015

“

” 1015

“

” 1014

“ ” 1014

“

” 1015

“

” 1015

“

”

” 1015

“

”

1015

“

”

1015

“

”

1017

“

”

1017

“

”

“

”

1014

6

2020 2

7 Ronald Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 719 (1992).

8 2019 4 1011-1017

9 2019 4 1012-1014

10 2019 4 1014-1017

“

” 1016 “ “ ’

” 1016 “

“ ’ ” 11

12 “

” 1017

1017

“

” 1017

13

14

“

” 1017

“ ”

“ ” 1006

“ ‘ ’ ” 1009 “

.....

---

11 2019 4 1016 See Frank H. Easterbrook,  
*The Limits of Antitrust*, 63 TEX. LAW REV. 1 1984

12 2019 4 1016-1017

13 *Topco* “ ’ ” 1017  
 ” *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607  
 1972 . “ Schwinn

14 2017 5 184-186  
 ” *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 (1977).

” 1011 “

” 1014 “

” 1015 “ ” 1017 “

.....

1019 “ ” 1019

“ ” 1021

1 “ ”

2 “ ” 3 “ ” 4 “ ”

5 “ ” “ ” 6 “ ” “ ”

、Ã j X •"©)Ú ,X Ü)Ú s í4§ X ê

“ ” 1918 15

“

” 16 Markham

“

” 17

“ ”

“

+

”

prima facie

case

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

16 *Id.*, at 238.

17 Jesse W. Markham *J&ailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 613 (2012).

18

“ ” Occam's Razor

19 “

” 20

21

“

” full-blown/

full/comprehensive rule of reason “

” structured rule of reason

probable

“ ” 25

“

” 26

“ ”

” 27

RPM

RPM

28

“

/

101 1 ” 29

30

25 *Supra* note 23 , at 1309.

26 Joel Klein, *A Stepwise Approach to Antitrust Review of Horizontal Agreements*, U.S. DEPARTMENT OF JUSTICE (Nov. 7, 1996), pp. 4-5, <https://www.justice.gov/atr/speech/stepwiseapproach-antitrust-review-horizontal-agreements> (last visited Sep. 18, 2019).

27 *Supra* note 23 , at 1309.

28 RPM See Thomas A. Lambert, *Dr. Miles is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937 (2009); Christine A. Varney, *Antitrust Federalism : Enhancing Federal/State Cooperation*, REMARKS AS PREPARED FOR THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, New York, October 7, 2009, pp. 7-14, <https://www.justice.gov/atr/file/519861/download> (last visited Sep. 18, 2019).

29 *Supra* note 23 , at 1322.

“ ” 32

“ ” 1022

“ ” 1023

“ ” 33

RPM

34

“ ” “ ” “ ”

RPM

35 1 RPM

2

HHI 1 500 3

4 a RPM

30%

---

31 . 2018 6 40-42

32 . 2003 133

33 “ ” “ ”

34 See Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 62 SMU LAW REVIEW 693, 700-701 (2009).

35 5



b

50% 5 a HHI 1 500  
30% b RPM c

“ ”

“ ”

“ ”

43

44

/

45

“

” 46

“

“ ” “ ”

” 47

“ ” “ ”

“ ” “ ” “ ”

\_\_\_\_\_

”

“

“ ” “ ” “ ”

” 48

“

”

“

” 49

“ ”

“ ” “ ”

“ ”

43 *Supra* note 38 , at 44.

44 “ ” 348

2013

45 Frederick Schauer, *The Convergence of Rules and Standards*, 1 NEW ZEALAND LAW REVIEW 303, 309 (2003).

46 . 2003 96

47 . 2003 156

48 . 2003 171

49 . 2003 172

“ ” “ ” ”

50

“

“ ’ \_\_\_\_\_

\_\_\_\_\_ ‘ ’

‘ ’ ‘ ’

‘ ’ ” 51

“

‘ ’

‘ ’

” 52

“

.....

” 53

“ ”

/

---

50	.			2003	173	
51	.	“	” _____			1999
97						
52	.	“	” _____			1999
95						
53	.			2003	174	

RPM

“

RPM

RPM

RPM

RPM

” 55

“

“

” “

.....

” 56

2

“

” “

”

2001

“

”

57

“

”

“

”

2013

58

“

”

1015

“

” 1015

“

”

1016

59

54

2016 2 109-110

55 *Supra* note 23, at 1303.

56

2003 93

57 2001 52 “

.....”

“ ”

2019

501

58 2013 57 “

.....”

59

“ ” “ ” 60

63 \_\_\_\_\_

64 \_\_\_\_\_

“ ”

“ ” 65 “

” 66

.....

2008

134 —366

67 2008

11.86

68

63

2019 4 1013 “ *Leegin*

”

64 See Herbert J. Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. LAW REV. 214, 214 (1985).

65 Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (Vol. 9) 261 (3rd ed., 2011).

66 *Id.*, at 416.

67 CEPS, EUR and LUISS, *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios*, Final Report for the European Commission, 2008, p.107, [https://ec.europa.eu/competition/antitrust/actionsdamages/files\\_whitepaper.pdf](https://ec.europa.eu/competition/antitrust/actionsdamages/files_whitepaper.pdf) (last visited Sep. 18, 2019).

1 330

1980

20

2008

6 000

2019 4 1012

68 *EU Cartel Statistics*, Table 1.5, <https://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last visited Sep. 18, 2019).

RPM

“

” 69

“

” 70

“

”

1016

RPM

“

RPM

” 71

RPM

“

”

“

”

72

/

“

”

---

69 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2723 (2007).  
 70 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (Vol. 8) 218 (3rd ed., 2010).  
 71 *Supra* note 23, at 1332-1333.  
 72 Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 14 (1981)

“ ..... ”

73 “

” 74

“ ”

“

” 75

“ ”

“

” 76

“

” 77

“

” 78

“

” 79 “

” 80

---

73 David Bailey, *Scope of Judicial Review under Article 81 EC*, 41(5) COMMON MARKET LAW REVIEW 1327, 1332 (2004).

74 Case T-79/12, *Cisco Systems and Messagenet v. Commission*, para. 50.

75 *Supra* note 73, at 1333.

76 . 2003 172

77 . 2003 174

78 Sotirios Batsakis, George Baryannis, Guido Governatori, Ilias Tachmazidis and Grigoris Antoniou, *Representation and Reasoning in Practice: A Critical Comparison*, in LEGAL KNOWLEDGE AND INFORMATION SYSTEMS 33 (Monica Palmirani *et al.*, 2018).

79 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (Vol. 7) 382 (3rd ed., 2010).

80 *Id.*, at 431.



h Ã â8q t 1 :# â Ü)Ú s í,X G2ĩ

“

” 1012

81

82

“ ”

“

” 83

84

“ ”

“

” 85

81

2017 5 189

82

Daubert

Daubert

2019 4 1014 68

83 *Supra* note 64 , at 268.

84 William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 23–24 (2007). —”

” 1012 —

85 *Supra* note 64 , at 214.

2008

92 “

70

SCP

”

DNA

” 86

87

BMI 88

”

89

“

”

90

91

3

22

92

93

94

“

” 95

2001

86 *Supra* note 84 , at 14.

87 Arnold C. Harberger, *Monopoly and Resource Allocation*, 44(2) AM. ECON. REV. 77, 78 (1954).

88 *BMI v. CBS*, 441 U.S. 1 (1979).

89 *Supra* note 84 , at 29 “

”

90 Herbert J. Hovenkamp, *Chicago and Its Alternatives*, 1(6) DUKE LAW J. 1014, 1016 (1986) and at 1020(21) (RPM).

91 . 2016 1 222

“ ‘ ’ ” *Supra* note 19 , at 37 “

”

92 . 2016 1 219

93 “ . Justice Stephen Breyer ..... ”

*Langdell's West Wing Renamed in Honor of Areeda*, HARVARD GAZETTE, Apr. 25, 1996.

94

” *Supra* note 64 , at 213 “

” *Supra* note 90 , at 1020

95 Herbert J. Hovenkamp, *Harvard, Chicago and Transaction Cost Economics in Antitrust Analysis*, 55 ANTITRUST BULL. 613, 618 (2010).

“ ” 96

“

” 97

“ “ ”

”

“

” 98

“

.....

” 99

“

” 100

“

”

“

” 101

102

Barry

“

” 103

96 Herbert J. Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 269 (2001).

97 *Id.*, at 336.

98 *Supra* note 70, at 104.

99

2016 1 220

100 *Supra* note 84, at 37.

101 William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909, 912-913 (1996).

102 *Supra* note 84 at 29, 30, 34 and 48

103 *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983).

FTC

.....

/

” 104

0

“ ”

14 16 18

Daubert

“

” 105

“ ” RRC

106

A Ã s 6°A•)[ ",X><B56 â

“ ”

107

“

” 1013

“ ” 1021

“

” 1023

“

” 1023

1999

418	495	84%
	14	3%
	6	1%

---

104 *California Dental Association v. FTC*, 526 U.S. 756, 793794 (1999).

105 *Supra* note 96 , at 274-275.

106 *Supra* note 96 , at 337.

107 Michael A. Carrier,*The Real Rule of Reason: Bridging the Disconnect*, 1 BRIGH YOUNG UNIV. LAW REV. 1265 (1999); Michael A. Carrier,*The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

20 4% <sup>108</sup>  
 “  
 ” 1014  
 1999 7.7% <sup>109</sup>  
 “ ” 110  
 .....  
 .....  
 “ ” 111  
 .....  
 “ ” 112  
 “ 2001—2005 3 766 861  
 23% 2 828 75%  
 77 2% ” 113

---

108 Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1 BRIGH YOUNG UNIV. LAW REV. 1265, 1293 (1999).  
 109 20 9 43 129 140 172 187 190 196 198 202  
 9  
 35 36 94 112 113 1 61 79 2 18  
 14 6 38 495 7.7%  
 110 “ ” 2010 5 47  
 111 Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (Vol. 2) 97 (3rd ed., 2007).  
 112 *Id.*, at 95.  
 113 *Supra* note 67, at 86.

114 1973—1983 1 946  
6% 115

Perloff and Rubinfeld

81.23%

92.11% 116

117

“ ”

495

“ ”

“ ” 69

142

70

33

”

118

“

” 119

84%

114

The Georgetown Project on Private Antitrust Litigation

1973—1983 5

See Steven C. Salop and Lawrence J. White

*Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73,73–74 (1986)

115 Stephen Calkins *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1129 (1986).

116 Jeffrey M. Perloff and Daniel L. Rubinfeld *Settlements in Private Antitrust Litigation*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW MEANING 165 (Lawrence J. White *et al.*, 1988). 2001—2005 23%

23%

117

1

2

3

“ ”

118 Michael A. Carrier *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009)

” *Supra* note 67, at 1269 fn.13.

119 *Tops Markets Inc. v. Quality Markets Inc.*, 142 F. 3d 90, 96 (2nd Cir. 1998).

“ ”

20%

7.7%

“

” 120

“ ”

2006

Weyerhaeuser

121

predatory bidding

122

Billing

123

RPM

124

“

---

120 *Supra* note 111, at 153.

121 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

122 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

123 *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

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

” 125

× Ã4§AÁ

126

127

128

”

129

“

”

“

”

“

”

RPM

“

”

“

”

“

“

”

“

”

” 130 “

.....

“



1022—1023

## Re-assessing the Institutional Costs of Rule of Reason: Comments on Li Jian's "Institutional Costs and Normative Antimonopoly Law"

LAN Lei

Abstract: The Article "Institutional Costs and the Normative Antimonopoly Law" articulated many shortcomings of the rule of reason. However, the Article hastily generalized from some complex sub-type of rule of reason to the entire continuum of rule of reason, thereby mistakenly assessed its institutional costs. There are relatively abstract principles/standards in laws, which gradually become concretized through individual-deliberation-justification-categorization. Rule of reason offers opportunities for this concretization, which contributes to reducing the costs of making rules and ends in structured rules of reason. Upon satisfying certain criteria, economic theories from any school may be used in adjudicating individual antitrust cases and may be incorporated into legal rules. Plaintiff's win rate itself is not a goal worth pursuing in itself and factually is not as low as it seems. The rationalization of Antimonopoly Law lies in developing structured rules of reason through accumulating experience by dealing with huge amount of cases and categorizing from those cases, all only possible under the framework of the rule of reason.

Keywords: Rule of Reason; RPM; Legal Norms; Categorization; Post-Chicago School

U•BP (4CD¾Uÿ!œUž