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Reinvigorating Antitrust Enforcement in the United States: A Proposal

BY WILLIAM KOLASKY

A GENERATION AGO, THE HISTORIAN Richard Hofstadter asked in a justly famous article, "What Happened to the Antitrust Movement?"[1] We now have the answer: it has moved to Europe.

At a recent conference attended by leading competition experts from around Europe,[2] Karel Van Miert and Mario Monti, both former European Union Competition Commissioners, spoke eloquently about the growing success of competition policy in Europe in promoting both the integration of the common market and greater competition within that market. Both former Commissioners showed visible pride in the leadership position the EU is taking in shaping global competition policy and in carrying the gospel of antitrust to other jurisdictions around the world. And both bridled at criticisms of some of their most visible enforcement actions—GE/Honeywell and Microsoft, for example—from U.S. antitrust officials and the *Wall Street Journal*. Also expressing concern about "erosion from within," Mario Monti responded vigorously to French President Nicholas Sarkozy's attacks on the EU competition regulators in Brussels—drawing appreciative laughter from the audience.

In short, the antitrust movement in Europe is alive and well. Competition policy is a central part of the political debate at the very highest levels of government, and the degree of interest in competition policy is breathtaking. The news out of Brussels in January of this year—with yet another investigation of Microsoft and a series of dawn raids on pharmaceutical companies across Europe—illustrates the energy European competition authorities are bringing to the enforcement of their laws.

Contrast this to the state of antitrust enforcement in the United States. One leading Democratic candidate for president has described the Bush Administration as having "one of the weakest records of antitrust enforcement in the last half century"[3]—a view privately shared by many antitrust practitioners and academics. The Justice Department has not filed a single monopolization case during the Bush Administration's seven-year term, and merger enforcement is at historic lows.[4] Our Supreme Court, especially under the leadership of Chief Justice John Roberts, seems equally intent on cutting back on private enforcement. It has been more than fifteen years since the Supreme Court last decided an antitrust case in favor of a plaintiff. Over this fifteen-year period, plaintiffs have gone 0-for-16, with not a single plaintiff winning an antitrust case in the Supreme Court since the first George Bush was president. This record led ANTITRUST to ask in its last issue whether the Supreme Court's recent antitrust decisions represent "The End of Antitrust as We Know It?"

What accounts for this seeming divergence between the United States and Europe in the trajectory of antitrust policy? One possible explanation is that antitrust enforcement is still relatively young in Europe. Although EU competition laws have been on the books for over fifty years, those laws have been vigorously enforced only over the last two decades. Until the 1990s, cartels were widespread throughout Europe and went largely unprosecuted, whereas U.S. authorities have been prosecuting cartels aggressively for decades. In addition, until recently, many sectors of the European economy were dominated by state-owned monopolies, and transition markets are always fertile ground for antitrust enforcement.

A second contributing factor may be the role that competition policy plays in Europe in promoting greater integration of the common market. In order for the EU to promote deepening integration of its national economies, member states must be restrained from following policies that promote national champions and "pick winners" through state aid and other policies. Active promotion of competition policy—based on the "protect competition, not competitors" principle—can help spread a common set of principles in which winners emerge naturally via the competition process, rather than as a result of government-mandated industrial policy. Adopting an agreed set of competition principles also can help mute national rivalries and thereby foster economic integration. But both objectives will naturally encounter resistance from those Member States that seek to put their own national interests ahead of those of the common market. There are no parallel considerations in the United States, where we have had a fully integrated economy since 1789.

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A third factor contributing to the dynamism of competition policy in Europe may be that the competition regime in Europe has only recently been converted from a highly bureaucratic system with formalistic rules and procedures to a more effects-based system in which economics plays a more central role in shaping competition policy and enforcement. It was only in 2001—in the wake of GE/Honeywell—that the European Commission fully embraced the consumer welfare model of competition policy in which the goal of competition law is to protect competition, not competitors. And it was not until the European Commission appointed a chief economist in 2003 that economics began to play a central role in shaping and enforcing European competition laws. No wonder it feels like spring when you discuss competition policy in Europe.

In the United States, by contrast, antitrust is now well into its second century—and it sometimes feels more like fall. The battles over antitrust as the Magna Carta of our free market economy were fought nearly a century ago—first, during the administration of Teddy Roosevelt and then again during the presidency of his younger cousin, Franklin. Likewise, the battles over the purpose of competition law—protecting competition vs. competitors—were fought and resolved in the United States a quarter-century ago, whereas there are still lingering traces of those battles in Europe. Indeed, the antitrust decisions of the Supreme Court over the last fifteen years can be seen largely as a mopping-up operation. Many, if not most, of those decisions involved applying the consumer welfare model developed in the 1970s and '80s to roll back and, where necessary, overrule decisions of the Warren Court that reflected a more Brandeisian view of antitrust as designed to protect "the yeoman farmer and small shopkeeper."

As these decisions attest, the generation of antitrust lawyers and economists now nearing retirement age has largely devoted its intellectual energy to carrying out the agenda that was set by the great antitrust scholars of the last generation—led by such giants as Donald Turner, Phillip Areeda, Richard Posner, and William Baxter. It has fallen to this generation to apply the teachings of these prophets to real-world cases and to convert them into an economically coherent body of judicial decisions. But as important as it was, this effort involved essentially a negative agenda—cutting back, rather than expanding, antitrust enforcement.

That job is now nearly complete. In a long line of decisions beginning with such cases as *GTE Sylvania*[5] and *BMI*[6] and continuing through *Independent Ink*[7] and *Leegin*,[8] the Supreme Court has now substantially abolished the Warren Court's overly simplistic per se rules and restored the rule of reason to its rightful place as the analytical framework for deciding all antitrust claims except those involving hard-core criminal cartel behavior. And in its far-reaching decision in *Bell Atlantic v. Twombly*[9] "retiring" the overly lenient pleading standard the Warren Court adopted in *Conley v. Gibson*,[10] the Court has made it no longer possible for plaintiffs to file an antitrust case based on little more than a wing-and-a-prayer, and then impose years of enormously burdensome discovery on the defendants in order to extract extortionate settlements. In this sense, Deputy Assistant Attorney General David Meyer's assessment that the Court's decisions do not necessarily mean "less antitrust," but rather may mean "better antitrust,"[11] may well be right.

The Rehnquist and Roberts Courts, having deconstructed the Warren Court's populist approach to antitrust, the question now is: Where do we go from here? One path—which the editorial writers of the *Wall Street Journal* would have us take—sees only a very limited role for antitrust. Adherents to this school believe that markets generally perform well and that market failures are rare. They argue that government intervention—be it regulation or antitrust—will almost always do more harm than good. Advocates for the other path—the one European competition authorities are taking—see a larger role for antitrust enforcement. They see market failures as more common and therefore envision a correspondingly larger role for antitrust intervention. Those supporting the European model also have greater confidence in the ability of antitrust authorities to get it right and therefore see less danger that vigorous antitrust enforcement will chill competition and innovation.

Some see these differences of view—and the resulting differences in the direction of antitrust enforcement—as rooted in the different political cultures of the United States and Europe. They see the United States as being more free market oriented and more distrustful of government generally—what some have termed "Cowboy capitalism."[12] Europe, by contrast, is seen as having a more *dirigiste* tradition and a more "gentlemanly" model of competition.

Others attribute the differences to the corrosive effect of our private enforcement regime in the United States—with lay judges and juries, treble damages, one-way fee shifting, wide-ranging discovery, class actions, joint and several liability, and no-contribution rules combining to give an entrepreneurial plaintiffs' bar both the ability and incentive to bring non-meritorious suits and to extract extortionate settlements.[13] This, they say, justifies our courts having a greater fear that the risk of false positives will chill procompetitive business conduct.

My own view, based on thirty years as an antitrust litigator, is that the risk of false positives is now much less serious than it was, thanks in large part to the Supreme Court's rulings over the last fifteen years. The lower courts now have the tools to dismiss frivolous claims at the pleadings stage, to manage discovery effectively, and to dispose of non-meritorious claims through summary judgment or post-trial motions if the jury gets it wrong. Recent experience shows that the courts know how to use these tools to dispose of non-meritorious claims either at the pleadings stage or through summary judgment, and that most judges manage discovery more effectively than the Supreme Court seems to acknowledge.[14] I also have much greater confidence than the Supreme

Court in the ability of juries to get it right in antitrust cases. If one studies antitrust decisions over the last decade, it is hard to find many cases in which an obviously erroneous jury verdict survived appeal. I also believe—based on thirty years' experience as an antitrust counselor—that few companies forgo conduct that would constitute competition on the merits or procompetitive transactions because of fear of antitrust liability. The risk of false positives is further reduced by the growing transparency of the enforcement agencies, which are doing a much better job than in the past of explaining publicly the reasons for their enforcement decisions (and especially for their decisions not to pursue a challenge), thus providing both businesses and courts more guidance as to how sound antitrust principles should be applied in practice.

I am concerned that, if anything, we are now in greater danger of false negatives, rather than false positives. The *Conley v. Gibson* notice pleading standard and the per se doctrine both became a kind of narcotic for many in the plaintiffs' bar. Plaintiffs too often try to shoehorn their claims into the per se box, causing them to be dismissed on the pleadings, when they might well have been able to plead a rule of reason claim that would survive a motion to dismiss, entitling them to the discovery they need to prove their claim. This problem is compounded by the paucity of civil nonmerger cases brought by the federal enforcement agencies that are not resolved through consent settlements filed at the same time as the complaint. If the agencies litigated more cases, their actions could serve as a teaching tool for how to plead and litigate a rule of reason case. The absence of such exemplars may lead to the view that rule of reason cases are too costly to litigate and too difficult to win to make the game worth the candle. I believe this perception is wrong, and that both the Supreme Court and the courts of appeals have provided a roadmap that can be used by plaintiffs to bring and win more rule of reason cases. The Supreme Court's seemingly exaggerated fear of false positives may likewise grow out of the same misperception that a rule of reason inquiry is too costly and the outcome too uncertain. The Court, unfortunately, seems not to appreciate fully the analytical rigor its own decisions have introduced into the rule of reason.

Unless we are ready to cede leadership in shaping global competition policy to Europe, it is now time—indeed, past time—to devote the same intellectual energy we devoted to dismantling the Warren Court antitrust jurisprudence to showing that the rule of reason can be an effective tool for antitrust enforcement, both by government enforcers and private plaintiffs.

Reviving the Rule of Reason

Ten years ago, Joel Klein and I debated in the pages of this magazine the pros and cons of his proposed "stepwise approach" to the rule of reason.[15] We agreed that the rule of reason required a step-by-step analysis of the likely competitive effects of an alleged restraint, but we disagreed as to the order of those steps and the nature of the proof required at each step of the analysis.

A better way to think of the rule of reason is as a sliding scale in which the degree of scrutiny to which a court subjects the alleged restraint at each step of the analysis depends on the nature of the restraint and the strength of the evidence presented at the previous steps.

In 1999, the Supreme Court, in its under-appreciated decision in *California Dental Association v. FTC*,[16] resolved that debate.[17] Citing our articles, it ruled that in all rule of reason cases, the plaintiff has the initial burden of proving, with empirical evidence, that the alleged restraint was likely to injure competition, not merely eliminate rivalry. It also ruled that courts should apply a "sliding scale" in conducting a rule of reason analysis, so that the degree of proof required at each step of the analysis should depend on the nature of the conduct and the strength of the proof offered at the previous step—what Justice David Souter, in his inimitable New Hampshire Yankee style, called "an enquiry meet for the case."[18] And, importantly, the Court ruled, following Phillip Areeda, that this analysis could sometimes be done in the "twinkling of an eye," with the analysis being truncated at any point where the outcome was clear.[19]

In order to translate this model into practice, we need to move away from the conventional view of the rule of reason test as a balancing test and toward the sliding scale paradigm endorsed by the Supreme Court in *California Dental.* The conventional view of the rule of reason can be depicted graphically as a decision-tree with four steps:

- Step 1, the plaintiff must show that the alleged restraint harms competition;
- Step 2, the defendant must respond by showing that the alleged restraint serves a legitimate, procompetitive business purpose;
- Step 3, the plaintiff can try to show that there are less restrictive alternatives; and
- Step 4, the court balances the anticompetitive and procompetitive effects to determine the likely net effect on consumers.

As John Nash was portrayed as saying in *A Beautiful Mind* when he is shown conceiving the Nash Equilibrium in a singles bar, "Incomplete! Incomplete!" It is now conventional wisdom for antitrust lawyers to observe that courts rarely reach step 4—they almost never explicitly balance the procompetitive and anticompetitive effects of an alleged restraint. That is true, but what these observers generally overlook is that this is because the balancing occurs at each preceding step of the analysis, rather than at the end.

A better way to think of the rule of reason is as a sliding scale in which the degree of scrutiny to which a court subjects the alleged restraint at each step of the analysis depends on the nature of the restraint and the strength of the evidence presented at the previous steps.

At step 1, the amount of empirical evidence a plaintiff must produce to meet her burden of showing anticompetitive effect depends on the nature of the conduct. Some conduct—for example, an agreement to fix prices or limit output between partners to a joint venture as to products outside the venture—is "inherently suspect" and should require little additional proof of anticompetitive injury. This is illustrated by the D.C. Circuit's decision in *PolyGram Holding, Inc. v. FTC*,[20] where the court affirmed an FTC decision finding unlawful an agreement between two recording studios that jointly produced a new Three Tenors CD not to advertise or discount their two prior Three Tenors CDs around the period of the launch of their new joint CD. While I disagree with how the Court applied it to the facts in *PolyGram*, the decision nevertheless illustrates the sliding scale that courts use to determine how much proof of anticompetitive effect is required.

In other cases involving practices that generally benefit consumers—for example, technological tying that adds new functionality to an existing product—the courts require more proof of market power and potential anticompetitive injury before shifting the burden of justifying the alleged restraint to the defendant. The defendant must, of course, be given an opportunity to rebut the plaintiffs' attempted showing of anticompetitive effect. In addition, the court must evaluate not only the severity of the alleged anticompetitive effects, but also their probability.

At step 2, the extent to which the court scrutinizes the justifications proffered by the defendants should also vary depending on the nature of the conduct and the strength of the proof of anticompetitive harm. The government's case against Microsoft provides a good illustration. In the contempt proceeding brought by the Justice Department against Microsoft for allegedly violating a prior consent decree, the D.C. Circuit held that because adding functionality generally benefits consumers, courts should apply a very deferential standard before second-guessing a firm's decision to add new functions to an existing product.[21] At the opposite end of the spectrum, the Supreme Court's decisions in *NCAA v. Board of Regents*[22] and *FTC v. Indiana Federation of Dentists*[23] illustrate that where there is a strong showing that the alleged restraint has raised price and restricted output, the courts will subject the purported justifications to much closer scrutiny.

As with step 1, the plaintiff should have an opportunity to show that the proffered justifications are pretextual or themselves anticompetitive, as was the case in both *NCAA* and *Indiana Federation*. And again, as with step 1, the court should evaluate not only the proffered justifications for the alleged restraint but also how the restraint benefits consumers, taking into account both the potential magnitude of those benefits and the probability of their being realized.

This step-by-step balancing generally ends with step 3, where the courts look at whether there are less restrictive alternatives to the alleged restraint. Again, the extent to which the courts second-guess the defendant's decision as to how to achieve its legitimate business justifications should depend on the severity of the potential anticompetitive effects and on how consistent the alleged restraints are with customary business practice. The courts should also consider how great the differences are among the various available alternatives, both in terms of their likely effects on consumers and their relative costs to the defendant.

Because, under this model, the balancing occurs at each step along the way, it should not be surprising that courts rarely reach the fourth step where they explicitly "balance" the procompetitive and anticompetitive effects when applying the rule of reason. Nor is it realistic to expect them to do so. As much as our economic models may suggest that there is some mathematical way to determine the net effect of an alleged restraint on consumer welfare or total welfare (depending on which you believe should be the test), doing so with any precision within the limitations of our judicial system is simply not realistic. This is especially so when one seeks to take into account not just short-term effects under a static model, but also long-term effects under a dynamic model that takes into consideration the indirect ripple effects of the alleged restraint or the potential effects on future innovation incentives. Within the limits of our judicial system and our own "bounded rationality,"[24] to use Oliver Williamson's term, the most we can seek is to do rough justice. This should remind us, as Joel Klein liked to say, of the need to be humble, and that we should intervene in the operation of the market only when we are reasonably confident that we will do more good than harm—remembering, as Klein put it, that "the tie belongs to the runner."[25]

This step-by-step balancing version of the rule of reason parallels the sliding scale developed by the Supreme Court to structure analysis of First Amendment, Due Process, and Equal Protection issues.[26] For example, the Court subjects racial classifications and content-based speech restrictions to "strict scrutiny" and upholds them only if the government can prove that they are necessary to achieve a compelling purpose. Classifications based on gender and content-neutral speech regulations are subject to "intermediate scrutiny" of whether they are substantially related to an important government purpose. Under the permissive "rational basis" test—which applies to most laws, including those that regulate commercial speech or make age-based distinctions—courts will not strike down legislation unless a challenger proves it is not rationally related to a legitimate government purpose.[27]

Because this sliding scale approach is not as firmly embedded in our antitrust jurisprudence, more work needs to be done to identify the degree of scrutiny to which various types of business conduct will be subjected, as well as to articulate

more clearly the level of proof required to make a "strong" showing of competitive harm as opposed to a "weak" showing. One obvious factor should be the market power of the parties to the transaction—the greater their market power, the closer the scrutiny. This is the source of my disagreement with the D.C. Circuit's decision in *PolyGram Holdings*. There, it seems unlikely that the Three Tenors could have had sufficient market power to cause substantial harm to competition given the hundreds of other opera CDs on the market, or that a restraint lasting for just ten weeks on either side of the launch of a new Three Tenors CD could cause any lasting harm to competition or consumers.[28]

Extending the Rule of Reason to Section 2

In addition to developing a better understanding of how to use the rule of reason framework effectively to prosecute Section 1 cases, major effort should also be devoted to extending that framework to single-firm conduct under Section 2. For reasons that are not entirely clear but that can probably be traced back to Learned Hand's unfortunate opinion in *Alcoa*,[29] many—but thankfully not all—courts seem to have forgotten that the Supreme Court's seminal decision in Standard Oil applied the rule of reason to Standard Oil's conduct under both Section 1 and Section 2.[30] The D.C. Circuit in *Microsoft*[31]—which many view as the government's most important litigated monopolization case since *Standard Oil*—likewise applied the rule of reason to rule in favor of the government on its monopolization claims against Microsoft.

Having won the *Microsoft* case under the rule of reason, the Justice Department—for reasons that are again unclear—seems, in its subsequent amicus filings in monopolization cases, such as *Trinko*, to be trying to walk away from use of the rule of reason for Section 2 cases in favor of an alternative test known as the "no economic sense" test.[32] The proponents of this test argue that the rule of reason leaves too much discretion in the hands of lay judges and juries and creates too great a risk of false positives.[33] They propose instead a test under which business conduct by a monopolist (or near monopolist) could not be found unlawful unless it would make no economic sense but for its exclusionary effects.

With all due respect to its advocates, the "no economic sense" test makes no economic sense. It does not take into account the need to adjust the degree of scrutiny of the purported business justifications for the alleged conduct based on the nature of that conduct, its likelihood of succeeding at its intended objective, and the strength of the empirical evidence of actual anticompetitive effect. It simply makes no sense, for example, to subject the bundling of additional functions into an existing product to the same degree of scrutiny as a refusal by a monopolist to deal with customers who deal with its rivals. Nor does it make sense to subject a refusal to deal with a rival to the same degree of scrutiny in circumstances where there is only a weak showing of anticompetitive effect as in cases where there is a strong showing.

As an increasing number of antitrust experts recognize,[34] the rule of reason provides a superior analytical framework for applying Section 2, as well as Section 1. Most importantly, the rule of reason focuses the court's attention, first, on determining the seriousness of the exclusionary effects of the alleged conduct. The rule of reason also provides a mechanism for adjusting the degree of scrutiny of the defendant's proffered justifications and any potential less-anticompetitive alternatives depending on the nature of the conduct and the strength of the showing of competitive injury. And, finally, the rule of reason more clearly focuses the court's attention on the effects of the conduct on the market and on consumers, rather than just on its effects on the defendant's own business.

While the rule of reason almost certainly provides the best analytical framework for enforcing Section 2, as well as Section 1, the modes of analysis under the two sections will obviously not be identical, just as they are not identical for horizontal and vertical restraints.[35] For horizontal restraints, for example, the courts and enforcement agencies generally apply a 20 percent market share screen—if the parties have a combined market share of less than 20 percent, the courts generally do not inquire further.[36] For vertical restraints, the courts and agencies generally apply a much higher threshold—at least 30 percent for tying and exclusive dealing—for determining whether there is any realistic danger of anticompetitive effects.[37] For single-firm conduct, the case law suggests an even higher threshold, probably a 50-to-60 percent share for attempted monopolization and 70-to-80 percent for monopolization.[38]

Another area of difference is the mechanism by which single-firm conduct may injure competition. A horizontal restraint may restrict output and raise prices directly, so proof of its potential anticompetitive effect is relatively straightforward. Single-firm conduct, by contrast, can generally raise prices and harm consumer welfare only if it first excludes rivals at one of the two levels, raises entry barriers, or facilitates a coordinated price increase. But this is equally true for vertical restraints, which likewise require a similar two-step analysis to evaluate their likely competitive effects.[39]

The Justice Department and the FTC have held a series of workshops over the past year on monopolization policy and have promised a report this spring. It is critical that this report embrace a sliding scale rule of reason analytical framework for enforcing Section 2. If not, and especially if the agencies endorse anything akin to the overtly pro-defendant "no economic sense" test, we may have to remove the question mark from the title of this magazine's last issue—"The End of Antitrust as We Know It?" and answer the question in the affirmative. ■

1 Richard Hofstadter, *What Happened to the Antitrust Movement? in* THE PARANOID STYLE IN AMERICAN POLITICS: AND OTHER ESSAYS (1965).

2 Conference, Fifty Years of the Treaty: Assessment and Perspectives of

Competition Policy in Europe, Public-Private Sector Research Center, IESE, Barcelona (Nov. 19–20, 2007), http://www.iese.edu/en/events/spsp/50years_2007/50years2007.asp.

[3] Barack Obama, U.S. Senator (D-Ill.), Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[4] Jonathan B. Baker & Carl Shapiro, Reinvigorating Horizontal Merger Enforcement (Working Paper Oct, 2007), *available at* http://faculty.haas.berkeley.edu/Shapiro/mergerpolicy.pdf.

[5] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[6] Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

[7] Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

[8] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

[9] 127 S. Ct. 1955 (2007).

[10] 355 U.S. 41 (1957).

[11] David L. Meyer, Deputy Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, We Should Not Let the Rationalization of Antitrust Lead to the Marginalization of Antitrust, Address to George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/227399.htm).

[12] J. Bruce McDonald, Deputy Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Section 2 and Article 82: Cowboys and Gentlemen, Address to the College of Europe Global Competition Law Centre, The Modernization of Article 82, Second Annual Conference (June 16–17, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/210873.htm.

[13] William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, Address to Fifty Years of the Treaty: Assessment and Perspectives of Competition Policy in Europe, Public-Private Sector Research Center, IESE, Barcelona (Nov. 19–20, 2007), *available at* http://www.iese.edu/en/files/6_34526.pdf.

[14] *See, e.g.*, *In re* Insurance Brokerage Antitrust Litig., 2008 WL 141498 (D.N.J. Jan. 14, 2008); *In re* Late Fee and Over-Limit Fee Litig., 2007 WL 4106353 (N.D. Cal. Nov. 16, 2007); Hall v. United Air Lines, Inc., 18 Fed. App'x. 680 (4th Cir. 2003).

[15] *See* William Kolasky, *Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 41, 43; Joel Klein, *Point: A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST Spring 1998, at 41, 42.

[16] 526 U.S. 756 (1999).

[17] *See id.* at 781 n.15.

[18] *Id.* at 781.

[19] *Id.* at 780–81.

[20] 416 F.3d 29 (D.C. Cir. 2005).

[21] *See* United States v. Microsoft Corp., 147 F.3d 935, 946–53 (D.C. Cir. 1998).

[22] 468 U.S. 85 (1984).

[23] 476 U.S. 447 (1986).

[24] OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 30–32 (1985).

[25] Joel I. Klein, Acting Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, DOJ Analysis of Radio Mergers, Address to the Nat'l Ass'n of Broadcasters (Feb. 19, 1997), *available at* http://www.usdoj.gov/atr/public/speeches/1055.pdf.

[26] *See, e.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

[27] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540–41 (3d ed. 2006).

[28] See William J. Kolasky & Richard Eliott, *The Federal Trade Commission's Three Tenors Decision: "Qual Due Fiori A Un Solo Stello,"* ANTITRUST, Spring 2004, at 50; Victor P. Goldberg, *Featuring the Three Tenors in La Triviata*, 1 REV. L. & ECON. Issue. 1, Article 3 (2005), http://www.bepress.com/rle/vol1/iss1/art3.

[29] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

[30] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[31] United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001).

[32] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).

[33] *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006).

[34] *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006); Jonathan M. Jacobson, *"No Economic Sense" Makes No Sense for Exclusionary Dealing*, 73 ANTITRUST L.J. 779 (2006); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004).

[35] A. Douglas Melamed, Principal Deputy Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Exclusionary Vertical Agreements, Address to American Bar Association Antitrust Section Annual Spring Meeting (Apr. 2, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/1623.htm.

[36] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[37] *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 230–32 (6th ed. 2006).

[38] *See id.*

[39] *See* Melamed, *supra* note 35.