The Durability of Formalism in Antitrust

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ABSTRACT: Antitrust formalism consists of commitments to interpretations of the antitrust laws that require courts to discount and even disregard relevant competitive effects. The phenomenon is more known as the use of rigid rules resting on premises that are correct under some circumstances but not all. Examples of antitrust formalism include per se rules, the analysis of collusion, the interpretation of the distinction between horizontal and vertical restraints, the "direct-purchaser" doctrine, and Twombly*'s pleading standard. Competition-law rules that downplay competitive effects appear to run afoul of the goals of antitrust and, as such, antitrust formalism is counterintuitive. Antitrust formalism, however, has been a fixture in antitrust policy to which both liberal and conservative antitrust experts—lawyers and economists—have contributed since Congress enacted the Sherman Act. One way to describe antitrust formalism is that many individuals believe that their beliefs should define the law and that, in every generation, some individuals have the power or ability to promote such beliefs. This Essay explains the durability of formalism in antitrust law and policy through some of the key facets of the phenomenon.*

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I. INTRODUCTION

"Antitrust formalism" consists of commitments to interpretations of the antitrust laws that require courts to discount and even disregard relevant competitive effects. Examples of antitrust formalism include the per se rule against price fixing[1]—and per se rules in general,[2] the Structure-Conduct-Performance ("SCP") paradigm that inferred competitive conduct from market structures and considerably influenced antitrust policy in the 1950s and 1960s,[3] the "direct-purchaser" doctrine,[4] *Twombly*'s pleading standard,[5]

1. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 398–99 (1927) (declaring price-fixing agreements among competitors per se unlawful).

2. *See* 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 305, at 60 (3d ed. 2007) ("The so-called per se rules are the most 'formal' [though less than] might appear at first blush or in conventional usage."). *See generally* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165 (1988).

3. *See* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 95 MINN. L. REV. 311, 350–66 (2009). *See generally* Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 ANTITRUST BULL. 3 (1984).

4. The direct purchaser doctrine provides that only direct purchasers have standing to bring an antitrust lawsuit under section 4 of the Clayton Act. *See infra* Part III.C.

5. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that a complaint alleging agreement in restraint of trade must include enough "factual matter" to justify proceeding to discovery); *see also infra* Part III.D.

and *Linkline*'s rule regarding price squeezes.[6] By instructing courts to disregard competitive effects when they apply U.S. competition laws, antitrust formalism is somewhat paradoxical.[7] Notwithstanding, formalism under many names has been a fixture in antitrust policy since the enactment of the Sherman Act.

Formalism, interpretations of reality that discount the significance of actual circumstances, is a practical working instrument used in law, economics, and other disciplines.[8] Debates over the merit of formalism were common in the past century and may appear somewhat baffling.[9] It is practically impossible to consider all circumstances and, therefore, standard analytical methods rely on presumptions, assumptions, models, and procedures. It is obvious—or at least should be obvious—that both rigid formalism that curtails the ability of courts to exercise discretion and informality that leaves courts with unguided discretion tend to lead to arbitrary outcomes and cannot persistently serve society.[10] It is also quite obvious that informality and formalism are not distinct approaches, rather they are two ends of a spectrum.[11] Stated differently, there is probably no serious controversy that some formalism is required to structure a meaningful decision-making process and that exclusion of sources of information may

6. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457 (2009) (holding that that "price squeeze" claims cannot be brought under the federal antitrust laws unless the defendant firm has a separate antitrust duty to deal with the plaintiffs in the first place).

7. Indeed, writing for the Court in *Eastman Kodak*, Justice Blackmun suggested that formalism was foreign to antitrust, stating that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466–67 (1992). Justice Blackmun's dictum paraphrased Justice Holmes's famous line from *Lochner*: "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); *see also* John J. Flynn, *The Role of Rules in Antitrust Analysis*, 2006 UTAH L. REV. 605, 605–06 ("Rule rigidity and concept calcification are curious afflictions for a field of law conceived by Congress as one granting the courts power to fashion antitrust rules in light of the common law's experience with restraints of trade.").

8. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*."); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 639 (1999) ("Formalism . . . entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law.").

9. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Frederick Schauer, *Formalism: Legal, Constitutional, Judicial*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 428 (2008); Sunstein, *supra* note 8.

10. *See generally* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

11. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 610–20 (1992) (clarifying that rules and standards tend to represent degrees of discretion, not types of legal norms).

impair the quality of the decision-making.[12] The actual choice is of the degree of formalism: what information may be excluded from the analysis?

Antitrust formalism combines formalistic rationales from law *and* economics. When both rationales are pressed to the extreme, antitrust policy does not respond to actual economic realities. This Essay explains the durability of the phenomenon.

To understand antitrust formalism, consider the contrast between "per se" and "rule of reason" in antitrust analysis. Congress enacted the Sherman Act to serve as a statutory common law framework,[13] yet it outlawed "[e]very contract . . . in restraint of trade," leaving no apparent room for discretion for courts.[14] Many courts, however, refused to apply a formalistic approach and developed a reasonableness standard. In *Addyston Pipe*, Judge Taft famously criticized this "relaxation of the rules," which he believed "set sail on a sea of doubt."[15] The Supreme Court settled the issue in *Standard Oil*, where it endorsed the "rule of reason."[16] In doing so, the Court formalized two defined categories of antitrust analysis: "per se" and "rule of reason."[17]

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12. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); William J. Baumol & Richard E. Quandt, *Rules of Thumb and Optimally Imperfect Decisions*, 54 AM. ECON. REV. 23 (1964); Paul Krugman, *Two Cheers for Formalism*, 108 ECON. J. 1829 (1998).

13. *See generally* Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013). On the development of antitrust common law in specific circumstances, see Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015); Roger D. Blair & Christine Piette Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 IOWA L. REV. 1943 (2015); Roger D. Blair & D. Daniel Sokol, *Quality-Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969 (2015); John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015); Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025 (2015); Keith Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 IOWA L. REV. 2069 (2015); William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015); Christopher R. Leslie, *The Commerce Requirement in Tying Law*, 100 IOWA L. REV. 2135 (2015); Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161 (2015); Spencer Weber Waller & Matthew Sag, *Promoting Innovation*, 100 IOWA L. REV. 2223 (2015).

14. Section 1 of the Sherman Act provides that "[e]very contract . . . in restraint of trade . . . is declared to be illegal." Sherman Act, 15 U.S.C. § 1 (2012).

15. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898).

16. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60–62 (1911). The Court subsequently clarified the rule of reason in *United States v. American Tobacco Co.*, 221 U.S. 106, 180–84 (1911).

17. The Supreme Court did not use the phrase "per se" until 1940. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 211 (1940). In *Standard Oil*, Chief Justice White described the per se rule as "a conclusive presumption" that establishes "the plain judicial duty of enforcing the law." *Standard Oil*, 221 U.S. at 65. The Chief Justice defined the rule of reason as

> the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given

Delivering the 1911 State of the Union Address, then-President Taft responded to critics of the rule of reason,[18] rejecting the claim that it "committed to the court the undefined and unlimited discretion to determine whether a . . . restraint of trade is within the terms of the statute."[19] "A reasonable restraint of trade at common law," he argued "is well understood and clearly defined [and] does not rest in the discretion of the court."[20] Taft's argument was, of course, an overstatement.[21] A few years later, in *Chicago Board of Trade*, the Supreme Court made clear that the rule of reason encompasses all relevant circumstances.[22] To determine whether a restraint is illegal under the rule of reason, a court

> must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are *all relevant facts*.[23]

During the decades that followed, antitrust evolved largely through "two complementary categories of antitrust analysis"—per se and rule of reason.[24] In the late 1970s, the Supreme Court started blurring the formalistic distinction between the two categories. Closing the millennium, in *California Dental Ass'n*,[25] the Court declared that "our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear."[26] Several lower courts and commentators used this statement to further the transition in antitrust jurisprudence from categorical analysis to a continuum.[27] The evolution of the standards of analysis of restraints of trade is not entirely coherent, is not

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> case a particular act had or had not brought about the wrong against which the statute provided.

Id. at 60.

18. 48 CONG. REC. 21, 22 (Dec. 5, 1911) (statement of Pres. Taft).

19. *Id.*

20. *Id.*

21. *See* Herbert Pope, *The Reason for Continued Uncertainty of the Sherman Act*, 7 ILL. L. REV. 201, 201 (1912).

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

23. *Id.* at 238 (emphasis added).

24. Nat'l Soc'y Prof'l Eng'rs v. Fed. Trade Comm'n, 435 U.S. 679, 692 (1978).

25. Cal. Dental Ass'n (CDA) v. Fed. Trade Comm'n, 526 U.S. 756 (1999).

26. *Id.* at 779. The term "quick look" is discussed *infra* Part III.B.

27. *See, e.g.*, HERBERT HOVENKAMP, ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 116 (2005) ("In its *California Dental Association* (*CDA*) decision the Supreme Court observed that there is no bright line between per se and rule of reason analysis, but rather a continuum."); *see also* Polygram Holding, Inc. v. Fed. Trade Comm'n, 416 F.3d 29, 33–37 (D.C. Cir. 2005); Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002).

properly understood (at least yet) by courts and lawyers, and surely does not represent a general trend in antitrust law.[28]

In other dimensions, the Supreme Court has developed formalistic rules and categories. For example, in the late 1970s, when the Court started blurring the distinction between per se and rule of reason, it also introduced the "direct purchaser" doctrine as a standing requirement.[29] This rule bars indirect purchasers from bringing antitrust lawsuits, regardless of the circumstances.[30] Also in the late 1970s, the Court began drawing a categorical distinction between horizontal and vertical restraints.[31] The distinction is exceptionally important for the understanding of economic relationships but it does not necessarily define competitive effects as some suggested.[32] Likewise, since the late 1970s, the Supreme Court has been using procedure—namely by applying formalism—to narrow the scope of antitrust through rules that disfavor plaintiffs.[33]

Existing literature describes antitrust formalism and its transformations in several ways.[34] Many works criticize specific historical patterns of formalism.[35] Other works explain the functions of antitrust formalism and describe how its changes over time.[36] The most famous debate over antitrust formalism is the arguments made by Donald Turner and Richard Posner regarding antitrust standards for collusion, where Turner advocated for

28. *See generally infra* Part III.B.

29. *See infra* Part III.C.

30. *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115 (2015).

31. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (establishing the distinction between horizontal and vertical agreements); *see also* Business Electrs. Corp. v. Sharp Electrs. Corp., 485 U.S. 717 (1988) (clarifying the distinction); Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (extending the distinction to vertical price restraints, namely, resale price maintenance arrangements).

32. *See infra* Part II.D.

33. *See infra* Part III.

34. *See, e.g.*, Flynn, *supra* note 7; Leon B. Greenfield & Daniel J. Matheson, *Rules Versus Standards and the Antitrust Jurisprudence of Justice Breyer*, 23 ANTITRUST 87, 87 (2009); Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?* 79 ANTITRUST L.J. 881 (2014); William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1 (1995); Judd E. Stone & Joshua D. Wright, *Antitrust Formalism Is Dead! Long Live Antitrust Formalism! Some Implications of* American Needle v. NFL, 2010 CATO SUP. CT. REV. 369.

35. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); LOUIS KAPLOW, COMPETITION POLICY AND PRICE FIXING (2013); Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

36. *See, e.g.*, Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007); Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813 (2011); Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207 (2008).

formalism and Posner called for substantive assessments.[37] Professor Herbert Hovenkamp has described formalism as "the principal tool of the intellectual monopolist."[38] Both in law and economics, he observed, formalism "is not so much a methodology as a rhetoric."[39] Professor Hovenkamp's enormous corpus of work is both the most definitive source of the phenomenon and appears to have a moderating effect on its extreme forms—confused informality and rigid formality.[40]

This Essay offers a general framework for the understanding of antitrust formalism and its durability in the spirit of Professor Hovankamp's definition of formalism. Trends in antitrust formalism tend to reflect changes in beliefs held by the Supreme Court Justices, and those beliefs are not always tied to modern economics or reality.

II. SUBSTANTIVE ANTITRUST

A. PRELIMINARIES

When addressing substantive questions, courts often use presumptions and rules that answer factual inquiries and economize the need to examine actual circumstances.[41] For example, under present law, price fixing is illegal per se,[42] a price squeeze is practically per se legal,[43] and market share often defines monopoly power or lack thereof.[44] Such doctrines are adopted when the Supreme Court believes that circumstances are "always or almost always" irrelevant.[45] When beliefs of this kind are imprecise—and historically many

37. *See generally* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

38. Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 167 (1989) (internal quotation marks omitted) (referring to formalism in both law and economics).

39. *Id.*

40. *See generally* Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015).

41. *See* Flynn, *supra* note 7, at 605 ("The analysis of antitrust issues is captured from time to time by rigid rules comprised of fixed concepts that are deductively applied to pre-ordained facts in disputes deemed subject to the antitrust laws. The rules are characterized by narrow assumptions of what will be permitted to be facts, by concepts that are fixed in concrete by rigid definitions, and by unstated normative assumptions underlying the rules and concepts.").

42. United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927).

43. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009).

44. Judge Learned Hand famously articulated this presumption stating that a 90% market share "is enough to constitute a monopoly" and a 33% market share is "certainly" not enough to constitute a monopoly. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (1945). For a critique of this formalism see Kaplow, *supra* note 35.

45. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (stating that a per se rule is used for a practice that "always or almost always tend[s] to restrict competition and decrease output").

such beliefs turned out to be flawed—doctrines addressing substantive antitrust issues establish poor policies.

Past concerns regarding vertical price and nonprice restraints are a prime example of beliefs that shaped formalism and their abandonment, which led to relaxation of that formalism.[46] But the relaxation of per se bans on vertical restraints (formalistic rules) was facilitated through the adoption of a formalistic distinction between vertical and horizontal restraints.[47] Another example of troubled formalism is the Supreme Court's section 2 jurisprudence in recent decades. Heavily influenced by outdated economic theories and beliefs,[48] in recent decades the Supreme Court developed several doctrines that considerably narrowed the scope of section 2 of the Sherman Act.[49] These doctrines are likely to evolve and allow courts greater discretion when they consider exclusion claims.

The subsequent Subparts examine three core substantive antitrust distinctions: (1) the distinction between single firm and separate firms;[50] (2) the distinction between concerted action and independent or

46. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling *Dr. Miles* and holding that resale price maintenance arrangements would be reviewed under the rule of reason); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling *Schwinn* and holding that nonprice vertical restraints would be reviewed under the rule of reason); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (declaring that that all nonprice vertical restraints were illegal per se), *overruled by GTE Sylvania*, 433 U.S. 36; Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (declaring resale price maintenance as illegal per se), *overruled by Leegin*, 551 U.S. 877.

47. *See infra* Part II.D.

48. For modern economic theory see generally Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2145 (Mark Armstrong & Robert Porter eds., 2007).

49. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (arguing that it "can be difficult" to distinguish "the means of illicit exclusion [from] the means of legitimate competition" (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)) (internal quotation marks omitted)); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013); Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* HOW THE CHICAGO SCHOOL HAS OVERSHOT THE MARK 141 (Robert Pitofsky ed., 2008). *See generally* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* http://www.justice.gov/atr/public/reports/236681.pdf, *withdrawn by* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

50. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010) (clarifying the meaning of "single entity"); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984). *See generally* Hovenkamp & Leslie, *supra* note 36.

interdependent conduct;[51] and (3) the distinction between horizontal and vertical restraints.[52]

The distinction between single firm and separate firms is about the significance of the corporate form in antitrust inquiries (or about boundaries of the firm).[53] A single business entity cannot conspire with itself in violation of section 1 and separate business entities can monopolize a market in violation of section 2 through a conspiracy. In the past, antitrust exhibited rigid formalism and followed the corporate form to define "business entity." Present antitrust law deemphasizes the corporate form requiring courts to focus on the substance of the business enterprise.

The distinction between concerted action and independent or interdependent conduct is mostly evidentiary and, as such, is somewhat confusing and counterintuitive.[54] Actual collusions are often tacit, but antitrust law requires plaintiffs to prove that the conspirators had an explicit agreement. Stated differently, in cases of alleged conspiracy in violation of section 1, the plaintiff is required to prove an element of conduct that is not necessary for collusion. This evidentiary aspect of the distinction emphasizes its formalistic nature.

The third distinction—between vertical and horizontal restraints—separates arrangements among competitors from those along the production and distribution chain. Certain horizontal restraints are considered anticompetitive, while vertical restraints are generally treated as pro-competitive. Chicago School scholars like Robert Bork, Frank Easterbrook, and Richard Posner have argued that vertical restraints should be legal per se.[55] This formalistic distinction emerged from a formalistic view that

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51. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 768 (1984) (addressing "the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts" and holding that proof of a section 1 conspiracy must include evidence tending "to exclude the possibility of independent action"); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (clarifying that "parallel business behavior" does not constitute, in itself, a Sherman Act offense); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (declaring that the Sherman Act "does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion").

52. *See Leegin*, 551 U.S. at 881–82 (extending the distinction between horizontal and vertical agreements to vertical price restraints—namely resale price maintenance arrangements); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 733–36 (1988) (clarifying the distinction between horizontal and vertical agreements); *GTE Sylvania Inc.*, 433 U.S. at 57–59 (establishing the distinction between horizontal and vertical agreements). *See generally* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5 (2004).

53. *See generally* Hovenkamp & Leslie, *supra* note 36.

54. *See, e.g.*, Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CAL. L. REV. 683 (2011) (describing the relationship between the prohibition on certain horizontal agreements and the evidence required to prove those agreement as paradoxical).

55. *See, e.g.*, Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

condemned vertical restraints.[56] Thus, in the context of vertical restraints, antitrust practically replaced one formalistic approach with another.

B. THE LEGAL FORM: SINGLE FIRM VS. SEPARATE FIRMS

The legal form of a firm defines the scope of its liabilities but does not circumscribe economic units in the marketplace. This discrepancy between the scope of legal entities (form) and that of economic units (substance) has been a source of confusion in antitrust analysis since the days of the trusts.[57]

Courts did not and sometimes still do not fully recognize that firms use the legal form for many purposes that do not define their economic substance. When a few firms are affiliated in some manner, the question that arises is whether, for antitrust purposes, the affiliation turns those firms into a single entity. For example, firms may invest in wholly owned or partially-owned subsidiaries. They often do so in collaboration with competitors setting up joint ventures of one type or another. Similarly, very often, rivals join business associations—such as trade associations, news organizations, sports leagues, and credit card networks. In these circumstances and others, the reliance on the legal form may distort antitrust analysis. Specifically, basic antitrust inquiries such as the existence of market power and the possibility of conspiracy require clear definitions of market participants that focus on the substance of firms.

Two general issues that have particularly confused courts are: (1) organizational choices of the firm; and (2) the use of the legal form for collaboration among independent firms.

(1) Organizational Choices. Until the 1980s, antitrust law expressly dismissed the significance of "common ownership," which allowed courts to conclude that firms "affiliated or integrated under common ownership" were capable of conspiring in violation of section 1.[58] That is, a parent company and its subsidiary and sister companies were legally capable of conspiracy.[59]

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56. *See supra* note 52 and accompanying text.

57. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (analyzing the NCAA as a business association); N. Sec. Co. v. United States, 193 U.S. 197 (1904) (departing from *E.C. Knight* by holding that the Sherman Act covers mergers and acquisitions); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the Constitution did not give Congress the power to prohibit the acquisition of one company by another).

58. United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) (holding that "[t]he test of illegality under the [Sherman] Act is the presence or absence of an unreasonable restraint . . . [that] may result . . . from a conspiracy among those who are affiliated or integrated under common ownership").

59. In his classic paper about the decline of the so-called "intraenterprise conspiracy doctrine," Philip Areeda argued that, when the Supreme Court invoked the doctrine, it used "rhetoric reflect[ing] either an unexamined adherence to formalism or, perhaps a vague feeling that traditional antitrust law [was] incomplete. Phillip Areeda, *Interdependence Conspiracy in Decline*, 97 HARV. L. REV. 451, 452–53 (1983).

In 1984, the Court in *Copperweld*[60] denounced the formalism of the so-called "intraenterprise conspiracy doctrine," stating that "the intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality."[61] Rather than formalism, the Court declared, "the broader principle [is] that *substance, not form*, should determine whether a separately incorporated entity is capable of conspiring under [s]ection 1."[62] Notwithstanding, by applying this principle the Court replaced one formalistic rule for another, holding that a firm and its wholly owned subsidiaries constitute a single entity for antitrust purposes (creating the so-called "*Copperweld* immunity").[63] Focusing on wholly-owned subsidiaries in such a formalistic manner, the *Copperweld* standard did not provide lower courts with guidance for common business relationships,[64] such as those among sister companies,[65] between agent and a principal,[66] and in situations of partial ownership.[67]

(2) Collaborations Among Independent Firms. Independent firms often use the corporate form to organize legitimate collaborations. Commonly used collaborations include joint ventures, trade associations, sports leagues, and business associations.[68] The analysis of such collaborations often turns out to

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

61. *Id.* at 772.

62. *Id.* at 773 n.21 (emphasis added).

63. *Id.* at 773; *id.* at 778 (Stevens, J., dissenting) (criticizing the majority for "announc[ing] a new *per se* rule.").

64. *See, e.g.*, Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 834 (3d Cir. 2010) ("Although *Copperweld* did not set clear parameters for what constitutes a single economic entity beyond the parent-subsidiary context, 'it nonetheless encouraged the courts to analyze the substance, not the form, of economic arrangements.'" (citation omitted)).

65. *See, e.g.*, Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1134 (3d Cir. 1995) (extending *Copperweld* to sister companies); Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984) (extending *Copperweld* to companies under common ownership); Gucci v. Gucci Shops, Inc., 651 F. Supp. 194, 198 (S.D.N.Y. 1986) (extending *Copperweld* to companies under common ownership).

66. *See, e.g.*, Palmer v. Gotta Have It Golf Collectibles, Inc., 106 F. Supp. 2d 1289, 1301 (S.D. Fla. 2000) (extending *Copperweld* to agency relationships); Sample Inc. v. Pendleton Woolen Mills, Inc., 704 F. Supp. 498, 501 (S.D.N.Y. 1989) (same).

67. *See, e.g.*, Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 344 (N.D. Ill. 1997) (applying the *Copperweld* rationale to a parent company and its 82.3% owned subsidiary); Leaco Enters., Inc. v. Gen. Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990) (applying the *Copperweld* rationale to a parent company and its 91.9% owned subsidiary); Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc., No. C85-2674A, 1986 WL 15507, at *6 (N.D. Ga. Dec. 23, 1986) (applying the *Copperweld* rationale to find that a parent company and its 51% owned subsidiary are incapable of conspiring in violation of section 1); *see also In re* Term Commodities Cotton Futures Litig., No. 12 Civ. 5126, 2014 WL 5014235, at *4 (S.D.N.Y. Sept. 30, 2014) (noting that *Copperweld* left lower courts "without the benefit of a bright line rule" but using control as the determinative factor.).

68. *See* FED. TRADE COMM'N & U.S. DEPT. OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000); *see also* AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216 (2d Cir. 1999) (addressing the status of Associated Press and its

be confusing. For example, in *Dagher*,[69] Texaco and Shell Oil consolidated their operations in the western United States by forming a joint venture that, among other things, set uniform prices for both brands.[70] Focusing on the corporate form, Justice Clarence Thomas identified the combination—Texaco, Shell Oil, and their joint venture—as a "single entity."[71] He, therefore, concluded that although the joint venture's pricing policy might "be price fixing in a literal sense, it [was] not price fixing in the antitrust sense," since it "amount[ed] to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products."[72] Notwithstanding the case before the Court, Justice Thomas recognized that under antitrust law joint ventures might constitute a restraint of trade in violation of section 1.[73]

In *American Needle*,[74] the Court emphasized that, for antitrust purposes, the corporate form does not guide the analysis of business organizations. Instead, courts should use a "functional analysis."[75] More specifically, in an opinion authored by Justice John Paul Stevens, the Court held that an enterprise owned by several entities, "[e]ach of [which] is a substantial, independently owned, and independently managed business," is a combination rather than a single entity under antitrust law.[76] Applying this rule, the Court held that the National Football League's licensing arrangements with the individual teams regarding their individual trademarks were a combination.[77] The ruling has significant implications for trade

members); United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (describing the structure of Visa and MasterCard).

69. Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

70. *Id.* at 6.

71. *Id.* at 7.

72. *Id.* at 6.

73. *Id.* at 7 n.3.

74. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

75. *Id.* at 192; *see id.* at 200–01 (applying a functional analysis to the National Football League).

76. *Id.* at 196.

77. *Id.* at 199–201.

associations,[78] sports leagues,[79] credit card companies,[80] news organizations,[81] and other business associations.[82]

Two older cases that illustrate the point are *United States v. Sealy, Inc.* and *Appalachian Coals*.[83] *Sealy* demonstrates that antitrust formalism combines both legal and economic formalism and that both suffer from similar vulnerabilities. *Appalachian Coals*, in turn, offers a good example for the use of "functional analysis" (or informality) to promote perceived fairness in a manner that is inconsistent with the law.

Sealy. Sealy is the successor of the "Sealy System"—a licensing organization established in 1925 by the mattress division of Sugar Land Industries.[84] Within the organization, the licensor, Sealy Corporation, was owned by various independent mattress licensees and engaged in national advertising of the brand. Licensees had exclusive territories and operated under a wide range of price and output agreements. In 1967, the Supreme Court declared that the Sealy System—namely Sealy's contractual arrangements with its licensees—was illegal per se under section 1.[85] The Court's companion case to *Sealy* was *United States v. Arnold, Schwinn & Co.*, where it ruled that all non-price vertical restraints were illegal per se.[86] But in *Sealy*, the Court was unwilling to condemn territorial restrictions as illegal per se. Instead, it ruled that the territorial arrangements among the licensees constituted "unlawful price-fixing and policing" restraints and, as such, constituted a per se section 1 violation.[87] Chicago School scholars harshly criticized the *Sealy* decision, arguing that it represented undesirable

78. *See, e.g.*, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 2:12-CV-103-J, 2013 WL 2297104, at *3–4 (N.D. Tex. May 24, 2013) (finding that the American Quarter Horse Association and its members acted as a single entity to exclude competition from cloned horses), *rev'd*, 776 F.3d 321 (5th Cir. 2015).

79. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1001–02 (N.D. Cal. 2014), *appeal docketed*, Nos. 14-16601, 14-17068 (9th Cir. Jan. 22, 2015); Washington v. Nat'l Football League, 880 F. Supp. 2d 1004, 1006–07 (D. Minn. 2012) (distinguishing *American Needle* where a league owns the assets).

80. *See, e.g.*, Nat'l ATM Council, Inc. v. Visa Inc., 922 F. Supp. 2d 73, 96 (D.D.C. 2013) (holding that "there is no question that Visa, MasterCard, and the banks are separate entities" and correctly pointing out that "*American Needle* did not create a new test for the sufficiency of conspiracy allegations").

81. Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp., 947 F. Supp. 2d 88, 100–01 (D.D.C. 2013) (holding "that C-Span . . . may be capable of violating [s]ection 1").

82. Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 286 (4th Cir. 2012) (finding that specific rules of a multiple listing service constituted concerted action).

83. United States v. Sealy, Inc., 388 U.S. 350 (1967); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

84. This summary is adapted from Willard F. Mueller, *The Sealy Restraints: Restrictions on Free Riding or Output?*, 1989 WISC. L. REV. 1255, 1265–68.

85. *Sealy*, 388 U.S. at 357–58.

86. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

87. *Sealy*, 388 U.S. at 357.

government interference with an efficient business that utilized vertical restraints.[88]

Both the decision and its critique present rigid formalism. The Supreme Court's use of a per se rule is by definition formalistic, and the Chicago School's approach to vertical restraints—that they should be per se legal—is equally formalistic.[89] The Sealy System is an example of a complex set of agreements among independent firms using the platform of a larger corporation (Sealy itself) to facilitate their economic activities. It was not a single entity organizing its operation through subsidiaries and distributors. Under such circumstances, there is no good reason to believe that the system would be necessarily competitive or necessarily anticompetitive, as the formalistic approaches suggested.

Appalachian Coals. Formed in December 1931, Appalachian Coals, Inc. was "an exclusive selling agency" of 137 coal producers.[90] Each producer designated the company as its exclusive sales agent. The company sold all of its members' coal at the best prices obtainable; if all of the coal could not be sold, the company would apportion orders among the members.[91] The government challenged the selling agency as a section 1 violation. The Supreme Court approved the joint venture.[92] Applying the rule of reason, the Court emphasized the informality that the rule of reason could accommodate. Specifically, speaking through Chief Justice Charles Hughes, the Court declared that "[t]he restrictions the Act imposes are not mechanical or artificial. . . . Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it."[93] *Appalachian Coals* emphasizes the vulnerability of judgment when a court can consider all circumstances. Influenced by the hardship small miners experienced, the Court held that the Sherman Act did not condemn their collusion.[94]

In sum, antitrust concerns the analysis of economic units, whereas the corporate form does not. This discrepancy between form and substance emphasizes some of the limitations of antitrust formalism. Indeed, with the decline of the intraenterprise conspiracy doctrine, antitrust has been moving toward functional analysis of the business organizations. This transition has not been completed yet, or at the very least requires some clarifications, because of the narrow scope of *Copperweld*. Properly understood, *Appalachian Coals* is a reminder that functional analysis can lead to outcomes that conflict with the goals of antitrust law.

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88. *See, e.g.*, Bork, *supra* note 55; Easterbrook, *supra* note 55; Posner, *supra* note 55.
89. *See infra* Part II.D.
90. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 356–57 (1933).
91. *Id.* at 375–77.
92. *Id.* at 359–62.
93. *Id.* at 360.
94. *Id.*

C. CONSPIRACY: CONCERTED ACTION VS. INDEPENDENT OR INTERDEPENDENT CONDUCT

The most fundamental prohibition of the Sherman Act, "the first-degree murder of antitrust violations,"[95] is against price fixing—a specific type of coordination among competitors. Should formalism guide the assessment of "murder violations" and similar antitrust conspiracies? In conspiracy cases, formalism that excludes context tends to serve defendants. In such cases, the excluded information typically prevents plaintiffs from meeting the burden of proof since plaintiffs seldom have direct evidence of agreement and must rely on indirect evidence.[96] Nevertheless, modern antitrust jurisprudence has become very formalistic in its analysis of conspiracy claims.[97]

Two layers of formalism guide the modern analysis of conspiracy claims—the first layer classifies forms of business decision-making and the second layer defines the burden of proof. At the first layer, antitrust sharply distinguishes concerted action that may be impermissible from independent or interdependent conduct that is permissible.[98] "Concerted action" is direct coordination among market participants, which the Court has defined as "a conscious commitment to a common scheme."[99] The "phrase . . . is often used as shorthand for any form of activity meeting the [s]ection 1 'contract . . . combination or conspiracy' requirement."[100] As such, concerted action may be illegal under section 1 of the Sherman Act, though not always. Price fixing agreements, horizontal market division agreements, and group boycotts are types of concerted actions that are illegal per se. By contrast, joint ventures, trade associations, and sports leagues are complex forms of concerted actions that are typically legal.[101] "Independent action" is similar or parallel conduct of competitors that is rational for each competitor, such as competing distributors' independent choices to deal with the same large retailers and stop dealing with small ones. Likewise, "interdependent conduct" is similar or

95. Thomas Catan, *Critics of E-Books Lawsuit Miss the Mark, Experts Say*, WALL ST. J. (Apr. 23, 2012, 2:36 PM) (quoting Professor Herbert Hovenkamp), http://www.wsj.com/articles/SB10001424052702303978104577359741232993860.

96. *See* William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 402–05 (2011).

97. *See generally* KAPLOW, *supra* note 35; Kovacic et al., *supra* note 96; William H. Page, Twombly *and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 439 (2009).

98. *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) ("[T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts."). For the classic formulation of the distinction see generally Turner, *supra* note 37. For a discussion of the modern interpretation of the distinction see generally Page, *supra* note 97.

99. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); *Monsanto*, at 722.

100. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 117 n.3 (3d Cir. 1999).

101. *See supra* Part II.B.

parallel conduct of competitors resulting from independent choices that each competitor makes factoring the likely choices of its competitors, such as a decision to raise prices in an oligopolistic market. Independent or interdependent conduct is generally legal.

The second layer of formalism builds on the first layer. The second layer seeks to filter frivolous and unsubstantiated lawsuits. Specifically, referring to concerns regarding false positives and chilling effects,[102] the Supreme Court has shaped a standard of proof that focuses on the concept of direct coordination. To survive preliminary motions and prevail in trial, a section 1 plaintiff must provide evidence of direct coordination or persuade the court that such coordination was plausible.[103]

The combination of these two layers of formalism limits the reach of antitrust law to a very narrow set of collusions—practically, only blatant cartels whose operations are so obvious that they can be classified as such and which the plaintiffs can clearly describe even before discovery.[104] This double-layer formalism is supposedly the outcome of efforts to clearly distinguish between permissible and impermissible conduct.[105] Its explicit technique is disregard of relevant circumstances.

To illustrate the limits of the formalistic distinctions that guide collusion analysis, consider movie distribution and the motion picture industry. Movie distribution is relatively concentrated: a handful of firms have been controlling the trade since the 1930s.[106] Distributors and exhibitors share box-office revenues, and, as a result, across all geographic markets each distributor has always preferred to distribute its profitable films to the theater with greatest box-office revenue potential.[107] To maximize revenues, the distributors concentrate the release of their best films on major holidays such as Thanksgiving, Christmas, and the Fourth of July.[108] When release dates are not otherwise set by major holidays, distributors sometimes respond to

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102. *See infra* Part III.A.

103. *See generally supra* note 97.

104. *See infra* Part III.D.

105. *See, e.g.*, Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) ("[M]istaken inferences in [conspiracy] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763 (1984) ("Permitting an agreement to be inferred merely from the existence of complaints. . . could deter or penalize perfectly legitimate conduct.").

106. *See generally* Barak Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 YALE J. REG. 317 (2004).

107. *See, e.g.*, Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, No. 03 Civ. 1895(PAC), 2007 WL 39301 (S.D.N.Y. Jan. 8, 2007); *see also* Erich Schwartzel & Ben Fritz, *Big Chains Put a Lock on First-Run Movies*, WALL ST. J. (Oct. 20, 2014, 2:47 PM), http://www.wsj.com/articles/big-chains-put-a-lock-on-first-run-movies-1413744450.

108. *See generally* Liran Einav, *Not All Rivals Look Alike: Estimating an Equilibrium Model of the Release Date Timing Game*, 48 ECON. INQUIRY 369 (2010).

information about release dates of their rivals by changing their own planned release dates.[109]

Despite competition among the few firms in the industry and close antitrust scrutiny, industry culture and norms influence the way each distributor conducts business.[110] For those in the industry, the important question is which theaters secure the blockbuster films, when they receive these films, and under what terms. Using antitrust classifications, the distributors' choice of powerful exhibitors can be explained by independent conduct. The distributors' "release-date game" is supposedly a product of interdependent conduct. And the distributors' tendency to follow specific practices (such as pricing) can be explained by either interdependent conduct or concerted action. Thus, each classification may capture a narrow dimension in the industry operation. This process of classification, however, is highly artificial as the same firms and often the same individuals strategize every dimension of activity. For exhibitors and distributors, the most important issue is the aggregate effect that the individual classifications simply disregard.

In sum, conspiracy, the core target of antitrust laws is a nuanced activity. When parties expressly conspire, it may be easier to identify a conspiracy than in situations when they use sophisticated mechanisms intending to protect them from the reach of antitrust law. Because conspiracy is a nuanced activity, there are good reasons for structured analysis of the phenomenon. That is, some degree of antitrust formalism is warranted. However, the present formalistic approach is too rigid and oversimplifies the phenomenon.

D. DISTRIBUTION ARRANGEMENTS: HORIZONTAL VS. VERTICAL RESTRAINTS

Endorsed by the Supreme Court only in *GTE Sylvania*,[111] the distinction between horizontal and vertical restraints is one of the main features of modern antitrust law.[112] The dogmatic distinction between vertical and horizontal restraints emerged in an era, known today as the "inhospitality tradition in antitrust law,"[113] in which antitrust law condemned procompetitive or otherwise harmless business practices because of misguided formalistic beliefs.[114] Standing alone, the distinction between

109. *Id.* at 379

110. *See id. See generally* Orbach, *supra* note 106; Barak Orbach & Liran Einav, *Uniform Prices for Differentiated Goods: The Case of the Movie-Theater Industry*, 27 INT'L REV. L. & ECON. 129 (2007).

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

112. *See generally* Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983 (2014); D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014).

113. *See* Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B. ASS'N ANTITRUST L. SYMP. 1, 1–2 (describing the "inhospitablty in the tradition of antitrust law"); *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4–9 (1984) (defining and describing the inhospitality tradition in antitrust).

114. *See, e.g.*, Hovenkamp, *supra* note 112.

horizontal and vertical restraints is as formalistic as the beliefs it replaced. Its implicit proposition is that vertical restraints are not an antitrust concern. The normative aspect of the distinction premises that distribution arrangements rarely, if ever, exclude competition. But this premise is inconsistent with theory and evidence.[115]

In its most rigid form, the distinction between horizontal and vertical restraints states that horizontal restraints may be anticompetitive, whereas vertical restraints are procompetitive and tend to enhance efficiency.[116] This thesis prescribes immunity or per se legality for vertical restraints.[117] The distinction is exceptionally important for antitrust analysis. It clarifies a basic substantive concept in contractual arrangements among firms. But its formalistic interpretation is misleading. Vertical restraints may have competitive effects and often do. Many business enterprises employ networks of horizontal and vertical agreements or networks of vertical agreements that have competitive effects. In such networks, vertical restraints are sometimes used to establish and maintain horizontal restraints.[118] Recall that many joint ventures and business associations employ vertical restraints. In these enterprises, vertical restraints may serve both competitive and anticompetitive purposes and their proper analysis must be nuanced.[119] Similarly, antitrust history provides examples of hub-and-spoke conspiracies. In these schemes, a retailer has long-term contractual or other vertical relationships with suppliers and organizes these suppliers to collude in a specific dimension to boycott its rivals, to fix prices, or for another anticompetitive purpose.[120] The formalistic distinction between "good" vertical restraints and "possibly bad" horizontal restraints is naïve at best. As a result, it is likely to erode.

III. PROCEDURAL GUIDANCE

A. PRELIMINARIES

By definition, procedural law establishes formalism because it imposes constraints on the discretion of courts. In antitrust, since 1977, the Supreme Court has been continuously creating and developing procedural hurdles that are advantageous to defendants and that have the effect of narrowing the scope of antitrust.[121] For example, in *American Express*, the Court examined

115. *See* Rey & Tirole, *supra* note 48.

116. *See* Bork, *supra* note 55; Easterbrook, *supra* note 55; Posner, *supra* note 55.

117. *See* Bork, *supra* note 55; Easterbrook, *supra* note 55; Posner, *supra* note 55.

118. *See supra* Part II.B; *see also* Hovenkamp & Leslie, *supra* note 36, at 850 ("It is also important not to be sidetracked by the distinction between horizontal and vertical agreements.").

119. *See supra* note 118.

120. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Toys "R" Us, Inc. v. Fed. Trade Comm'n, 221 F.3d 928 (7th Cir. 2000); United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

121. *See generally* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing*

the legality of class arbitration waivers under the antitrust laws and concluded that the ability of defendants to structure contractual schemes that eliminate the likelihood of private antitrust enforcement is not an antitrust concern.[122] Justice Antonin Scalia, writing for the majority, explained that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[123]

To be clear: while modifying the procedural filters and adding new ones, the Court does not intend to retire—or substantially discount the weight of—competitive effects, although its modifications expressly increase the degree of antitrust formalism. The Justices seem to act under the impression that they are striking a balance between conflicting interests, scarifying speculative concerns in favor of business certainty. As a rationale, the Court has pointed to concerns regarding the costs of false-positive errors.[124] For example, in *Matsushita*, Justice Lewis Powell, writing for the Court, stressed that "mistaken inferences in [antitrust] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[125] In *Trinko*, Justice Scalia, writing for the Court, pressed the proposition that "[a]gainst the slight benefits of antitrust intervention . . . we must weigh a realistic assessment of its costs."[126] And in *Credit Suisse*, Justice Stephen Breyer, writing for the Court, declared that "antitrust courts are likely to make unusually serious mistakes."[127] The theory underlying these arguments provides that (1) both false-negative and -positive errors occur because it is difficult to distinguish competitive from anticompetitive conduct; and (2) false-positive errors are costlier than false-negative errors because of self-correction mechanisms that mitigate the later but not the former.[128] Both tenets are partially correct in the sense that they describe conditions that sometimes hold true. This is the essence of formalism: using rigid rules resting on premises that are correct under some circumstances but not all. Concerns regarding the costs of false-

Importance of Securities and Antitrust, 53 EMORY L.J. 1571 (2004) (describing the trend of reducing plaintiffs' rights).

122. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

123. *Id.* at 2309.

124. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594–95 (1986) (citing, among other things, Easterbrook, *supra* note 55, which explained the nature of false positives); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984) ("Permitting an agreement to be inferred merely from the existence of complaints . . . could deter or penalize perfectly legitimate conduct."); *see also* Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. (forthcoming 2015) (describing the influence of concerns regarding false positives on antitrust law and policy).

125. *Matsushita Elec. Indus. Co.*, 475 U.S. at 594.

126. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004).

127. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007).

128. *See generally* Easterbrook, *supra* note 55; Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11 (2010).

positives are important, and their use as a guiding principle for antitrust represents a choice to discount other costs.

The discussion that follows focuses on four primary developments in antitrust procedure: the standard of reasonableness, standing, summary judgment, and pleading standards.

B. PROCEDURAL REASONABLENESS: THE RULE OF REASON VS. PER SE

"Reasonableness" is supposedly a substantive concept, but the reasonableness of restraints of trade is primarily a procedural concept that may include substantive elements. That is to say, antitrust reasonableness is practically a matter of form, not substance. As described at the outset,[129] in the years after Congress enacted the Sherman Act, courts developed a procedural distinction for the evaluation of restraints of trade. The original distinction was between two categories—per se and rule of reason. Over the years, this distinction blurred and turned into a continuum. During this process, "quick look" emerged as an evidentiary tool that courts sometimes use when deciding cases along the continuum.[130]

In theory, under a rule of reason analysis, a court "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[131] In practice, however, a rule of reason inquiry employs a burden-shifting framework that rarely requires courts to balance competitive effects.[132] In this framework, the plaintiff has the initial burden of demonstrating that the alleged restraint produced or threatens to produce substantial adverse effects on competition in the relevant market, such as price increases or output decreases. If the plaintiff succeeds in so showing, then the burden shifts to the defendant, who must provide procompetitive justifications for the challenged restraint. If the defendant meets this burden, the burden returns to the plaintiff to demonstrate either that the restraint is not reasonably necessary to achieve the defendant's objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if the parties meet each of

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129. *See supra* notes 13–33 and accompanying text.

130. "Quick look" offers courts an abbreviated rule of reason analysis. As described by the Supreme Court, "quick look" could be used in situations 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." Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

131. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

132. *See* Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 507 (2d Cir. 2004); United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003); United States v. Brown Univ., 5 F.3d 658, 668–69 (3d Cir. 1993); *see also* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265 (identifying the prevalence of burden-shifting analysis in rule of reason cases); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009) (updating the burden-shifting findings for the decade from 1999 to 2009).

these burdens, then and only then can the court weigh the pros and cons of the challenged restraint. Since it is rare that parties meet each of these burdens, courts decide the overwhelming majority of the cases without balancing anything.

Thus, properly understood, the procedure of reasonableness in antitrust has evolved through formalism and a critique of formalism. At this stage, the content of antitrust reasonableness is inconsistent with its narrative and is somewhat misleading. The content is primarily form and the narrative is about substance. It may be that the procedure is desirable at the present time, but, at the very least, the formulation of reasonableness should be consistent with its substance.

C. *STANDING*

Until 1977, the question of which parties could pursue treble damages under antitrust laws was unsettled.[133] Among other things, courts had limited guidance on standing issues. As a result, different courts used conflicting reasoning and reached inconsistent holdings.[134] In 1977, the Supreme Court issued two decisions that changed that—*Brunswick* and *Illinois Brick*.[135] In *Brunswick*, the Court introduced the concept of "antitrust injury," holding that in order to recover treble damages pursuant to section 4 of the Clayton Act,[136] a plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[137] Then, in *Illinois Brick*, the Court created the direct purchaser doctrine, which holds that only direct purchasers—that is, no subsequent purchasers—have standing to bring lawsuits under section 4.[138] Both in *Brunswick* and *Illinois Brick* the Court considerably trimmed the discretion courts could exercise when considering the standing of private plaintiffs with claims under the antitrust laws.

Despite their similar effect on antitrust law, the decisions present different approaches to antitrust formalism. The antitrust injury doctrine intends to "ensure[] that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior."[139] At least

133. *See* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 810–13 (1977) (surveying the discord between judicial application of the statutory standing provision and the statute's plain meaning).

134. *Id.*

135. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

136. Under section 26 of the Clayton Act, which provides for injunctive relief, a plaintiff may have standing "against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26 (2012).

137. *Brunswick*, 429 U.S. at 489.

138. *Ill. Brick*, 431 U.S. at 745–46.

139. Atl. Richfield Co. v. USA Petroleum Co. (ARCO), 495 U.S. 328, 344 (1990) (emphasis omitted).

in theory, this doctrine expressly directs courts against antitrust formalism, requiring them to evaluate competitive effects. For example, a firm does not suffer antitrust injury when one of its competitors acquires a failing business, even if it is a different competitor.[140] In contrast, the direct purchaser doctrine rests on a simplistic rationale and instructs courts to disregard competitive effects. The doctrine seeks to ensure "the efficient enforcement of the antitrust laws" by motivating the most-informed private plaintiff and by preventing duplicative damages.[141] However, it does not allow courts to factor in situations where the direct purchaser has no incentives to file a lawsuit because of its relationships with the defendants or where it formally cannot do so because of financial or contractual constraints.[142] These circumstances are rather common, as *American Express* illustrates.[143]

Though the antitrust injury and direct purchaser doctrines represent different approaches to antitrust formalism, the difference is not as large as it may appear. In practice, the approaches sometimes converge because "antitrust injury" is merely one factor that a private plaintiff must show to bring a lawsuit under section 4.[144] Additionally, the plaintiff must establish (1) injury to "business or property"; (2) causation: injury-in-fact caused by antitrust violation; (3) proximity; and (4) cognizable injury and reasonably quantifiable damages.[145] Applications of the proximity (or remoteness) factor do not need to consider competitive effects and, as such, may lead to greater antitrust formalism.[146]

D. MATSUSHITA *VS.* TWOMBLY*: INFORMATION BEFORE AND AFTER DISCOVERY*

A procedural distinction with importance to antitrust litigation concerns the information available to the parties and courts before and after discovery. A particular concern is what information is available to plaintiffs regarding

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140. *Brunswick*, 429 U.S. 477.

141. *Ill. Brick*, 431 U.S. at 732.

142. *See* Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1721–25 (1990); Mark A. Lemley & Christopher R. Leslie, *supra* note 36.

143. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Lemley & Leslie, *supra* note 36; *see also supra* notes 20–22 and accompanying text.

144. Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 (1983); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.").

145. 2A AREEDA & HOVENKAMP, *supra* note 2, ¶ 335c–d.

146. The common tests courts use for proximity are "directness" and "target area." Both tests are sometimes applied in a formalistic manner. *Id.* at ¶ 339g. *See, e.g.*, Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 423 (5th Cir. 2001) (holding that smokers lacked standing to sue cigarette makers because of potential action of the distributors and distinguishing the analysis from the indirect purchaser doctrine); Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1377 n.1 (7th Cir. 1987) (equating proximity with "direct injury"); *cf.* de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 522–24 (S.D.N.Y. 1985) (holding that market exchanges had no antitrust liability for failure to stabilize shortfalls of sudden market conditions).

concerted action. Plaintiffs typically must rely on indirect evidence.[147] And, of course, colluding parties have incentives to conceal evidence of collusion.[148]

Procedural devices, including motions to dismiss for a failure to state a claim (Rule 12(b)(6)) and motions for summary judgment (Rule 56(c)), allow judges to filter claims of litigating parties before trial. Motions to dismiss for a failure to state a claim are filed before discovery, whereas summary judgment motions are filed after discovery. Exhibiting radical formalism, the Court brushed aside the significance of discovery information to pleadings, and blurred the distinction between the standards for a motion to dismiss for failure to state a claim and a motion for summary judgment. More specifically, in *Matushita*, the Supreme Court articulated a filtering standard for summary judgment in conspiracy cases.[149] In *Twombly*, the Court extended this standard to motions to dismiss for a failure to state a claim, disregarding the significance of discovery.[150] Further, two years later, in *Iqbal*, the Court extended *Twombly* to all civil federal actions.[151] The leaps from *Matushita* to *Twombly* to *Iqbal* illustrate the degree and nature of formalism that the Roberts Court has been establishing.

Matsushita involved an alleged predatory pricing conspiracy among 21 television manufacturers that arguably existed for more than 20 years.[152] Several years of complex discovery did not yield direct evidence of collusion, leaving the plaintiffs with a theory of interdependent conduct.[153] With such a record, the Court ruled that "antitrust law limits the range of permissible inferences from ambiguous evidence."[154] Specifically, the Court held that "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [s]ection 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[155] Stated differently, under *Matsushita*, a section 1 plaintiff must produce evidence that is both consistent with agreement among the

147. *See, e.g.*, Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) ("[I]n complex antitrust litigation . . . motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012) ("[C]onspiracies are rarely evidenced by explicit agreements."); *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non. . . . Circumstantial evidence can establish an antitrust conspiracy."); United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992) ("[A] conspiracy by its very nature is a secretive operation, and it is a rare case 'where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel.'" (citation omitted)); *see also* sources cited *infra* note 157.

148. *See* sources cited *supra* note 147.

149. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 575, 588–92 (2004).

150. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

151. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

152. *Matsushita*, 475 U.S. at 577–78.

153. *Id.* at 578, 583–84.

154. *Id.* at 588.

155. *Id.* (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).

alleged conspirators and inconsistent with independent or interdependent conduct.[156] *Matsushita*, therefore, clarified the inference standard for summary judgment.[157] It permits judges to consider the record before sending a case to the jury. As such, it supposedly set a low degree of formalism.

Twombly went in the opposite direction. It replaced a pro-plaintiff pleading standard with a pro-defendant standard.[158] Under *Conley v. Gibson*, which governed pleading standards for five decades before *Twombly*, "the accepted rule [was] a complaint should not be dismissed for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim."[159] The *Twombly* Court was critical of this standard, finding that it gave plaintiffs the "the benefit of imagination."[160] To address this perceived weakness, the Court held that a section 1 plaintiff must plead "enough facts to state a claim to relief that is plausible on its face."[161] The Court used a few additional expressions to describe this plausibility standard, including: "[f]actual allegations [that] raise a right to relief above the speculative level,"[162] "plausible grounds to infer an agreement,"[163] "enough factual matter (taken as true) to suggest that an agreement was made,"[164] and "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[165] Under *Twombly*'s standard, claims

156. "Independent conduct" refers to unilateral decision-making that is unrelated to choices of other firms. "Interdependent conduct" refers to parallel decision-making resulting from responsiveness to the market. For example, interdependence exists in a competitive industry where all firms are price takers and prices are competitive. It may also exist when prices are high and no firm has incentives to cut them.

157. Because conspiracy agreements are unlawful, plaintiffs rarely have direct evidence of their existence and must rely on indirect evidence. *See, e.g.*, Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) ("[I]n complex antitrust litigation . . . motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012) ("[C]onspiracies are rarely evidenced by explicit agreements."); *In re* Text Messaging Antitrust Litig. 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy."); United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992) ("[A] conspiracy by its very nature is a secretive operation, and it is a rare case 'where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel.'"(alteration omitted) (citation omitted)).

158. For the pro-defendant trend in the Roberts Court, see generally Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); Barak Orbach, *A State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 THEORETICAL INQ. L. 45 (2015).

159. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

160. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2006) (quoting Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)) (internal quotation marks omitted).

161. *Twombly*, 550 U.S. at 570.

162. *Id.* at 555.

163. *Id.* at 556.

164. *Id.*

165. *Id.*

that are merely "conceivable . . . must be dismissed."[166] Applying its plausibility standard, the *Twombly* Court criticized the plaintiffs' pleadings for failing to mention a "specific time, place, or person involved in the alleged conspiracies. . . . [A] defendant seeking to respond to plaintiffs' conclusory allegations in the [s]ection 1 context would have little idea where to begin."[167] Thus, the *Twombly* Court appeared to require proof of agreement—that is, direct evidence—in order for plaintiffs to proceed to discovery.[168]

Twombly's plausibility standard is a heightened specificity standard of pleading, requiring plaintiffs to plead all essential facts prior to discovery.[169] Despite the Court's fairness narrative, the standard practically intends to protect defendants from discovery costs, which is effectively to serve a class of defendants—namely large businesses—at the expense of others.

In the context of antitrust conspiracy claims, *Twombly* supposedly did not change the substantive law by requiring proof of communication (direct evidence) or by redefining the plus-factor (calibrating the degree of formalism). However in practice, *Twombly*'s plausibility standard narrowed the meaning of "agreement" under antitrust law and influenced lower courts' willingness to grant discovery based on indirect evidence. Even when courts do not require plaintiffs to state "the [w]ho, what, when, and where?" of an alleged conspiracy, they may compare indirect evidence to such level of specificity.[170] *Twombly* is an extreme application of formalism. It is a judicial policy that expressly disregards the meaning of circumstances. As a result, it will inevitably be softened in the future.

IV. CONCLUSION

Antitrust formalism supposedly conflicts with the purpose of antitrust law. It instructs courts to discount and even disregard competitive effects. Properly understood, antitrust formalism provides the structure for antitrust analysis and is critically important. However, the tool is often abused by pressing presumptions and rules to their extremes. In practice, antitrust

166. *Id.* at 570.

167. *Id.* at 565 n.10.

168. *See* Page, *supra* note 97 (explaining the impact of *Twombly* on evidentiary requirements); *see also* Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 437 (6th Cir. 2008) (relying on *Twombly*'s analysis and concluding that "Plaintiffs only offer bare allegations without any reference to the 'who, what, where, when, how or why.'"); *In re* Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 795 (N.D. Ohio 2011) (using *Twombly*'s analysis as an example for required facts); *In re* Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987, 1006 (E.D. Mich. 2010) (stating that "[t]he complaints adequately state facts which address the questions of who, what, when, and where and give the Defendants seeking to respond to the allegations an idea where to begin."); *In re* Florida Cement & Concrete Antitrust Litig., 746 F. Supp. 2d 1291, 1318 n.23 (S.D. Fla. 2010).

169. *See generally* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55 (2010); Page, *supra* note 97.

170. *See, e.g.*, *In re* Se. Milk Antitrust Litig., 555 F. Supp. 2d 934, 942 (E.D. Tenn. 2008).

formalism often functions as the use of rigid rules resting on premises that are correct under some circumstances but not all. In every era, aspects of antitrust formalism are criticized as poor policies. Sometimes the critiques properly present the limits of formalism, but in many instances they seek to replace one formalistic rule with another. As a general matter, in antitrust law competitive effects should matter and their exclusion through formalism is unsound.