

# THE SHERMAN ACT AND AVOIDING VOID-FOR-VAGUENESS

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## ABSTRACT

*In Johnson v. United States, the Supreme Court reaffirmed the viability of void-for-vagueness doctrine, including the use of facial challenges. This Article demonstrates that under prevailing doctrine, the Sherman Act could not survive such a challenge. Although previous high-profile attempts to invalidate this core statute of antitrust law as unconstitutionally vague were unsuccessful, the landscape has changed considerably since then. Longstanding deficiencies in the statutory text in terms of notice and consistency have been exacerbated by a pattern of judicial gloss that tolerates and maintains ambiguity—between categories of analysis as well as within them. The Sherman Act’s penalties and enforcement, moreover, have been enhanced and increased, making the cost of good-faith missteps particularly high. Additionally, the Sherman Act’s tension with activities protected by the First Amendment has increased considerably, not only directly, but indirectly through the proliferation of information and communication markets. Finally, judicial attempts to incorporate a limiting mens rea requirement into the law—a saving grace in other vague statutory schemes—has proved unworkable and incomplete, if not entirely mooted in this context. In light of these trends, the Sherman Act requires some form of congressional or judicial alteration to maintain constitutionality moving forward. This Article concludes by briefly exploring such potential solutions, and likely outcomes with respect to antitrust law’s vagueness problem for the years ahead.*

I. INTRODUCTION.....	710
II. NOTICE, CONSISTENCY, AND THE SHERMAN ACT .....	712
A. Vagueness Doctrine, Then and Now .....	712
B. The Prima Facie Case for Sherman Act Vagueness .....	717
1. Text and Historical Implementation: A Century of Ebb and Flow .....	717
2. Judicially-Created Framework: From Bright-Line Rules to I-Know-it-When-I-See-it.....	721
3. Enforcement Policy: Empty Self-Restraint .....	729
III. PENALTIES AND THE SHERMAN ACT.....	732
A. Penalties and Vagueness.....	733
B. Nash v. United States.....	734
C. The Sherman Act Today .....	736
IV. CONSTITUTIONALLY PROTECTED ACTIVITY AND THE SHERMAN ACT.....	737
A. Constitutionally Protected Activity and Vagueness .....	737
B. National Dairy Products Corporation v. United States.....	739
C. The Sherman Act Today .....	741
V. MENS REA AND THE SHERMAN ACT .....	744
A. Mens Rea and Vagueness.....	744
B. United States v. U.S. Gypsum Company .....	748
C. The Sherman Act Today .....	750
VI. DIVERGENT SOLUTIONS .....	757
VI. CONCLUSION .....	761

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## I. INTRODUCTION

More than a century of judicial gloss has failed to repair the defect latent in the Sherman Act<sup>1</sup> since its conception: unconstitutional vagueness. As this Article demonstrates, the issues of notice and consistency associated with antitrust law's central statute<sup>2</sup> have swelled to a strained crescendo—while void-for-vagueness doctrine has grown only more exacting and more strident. It's not a matter of *if* the two will clash—it's a matter of *when*.

For a punitive statute to pass constitutional muster, it must satisfy minimum standards of notice and consistency. Without “sufficient definiteness [so] that ordinary people can understand what conduct is prohibited,” and so that “arbitrary and discriminatory enforcement” is prevented, a statute becomes void for vagueness.<sup>3</sup> Despite this constitutional benchmark—and the ostensibly regulatory goals of antitrust—the Sherman Act features neither textual specificity nor administrative delegation. Instead, the courts have adopted a wholly atextual, common-law approach to antitrust, shifting and changing standards dramatically over the years with prevailing economic theory and climate, and without legislative action. In particular, recent decades have shown a pattern of courts eliminating or muddying bright-line antitrust rules that might otherwise have provided clarity and stability.

This paradigm alone raises significant vagueness concerns and has led to a fair amount of Supreme Court case law analyzing anti-

1. 15 U.S.C. §§ 1-7 (2012); 21 Cong. Rec. 2456 (1890).

2. The main antitrust statutes consist of the Sherman Act (15 U.S.C. §§ 1-7 (2012)), the Clayton Act (15 U.S.C. §§ 12-27 (2012)), and portions of the Federal Trade Commission (FTC) Act (15 U.S.C. § 45 (2012)). The Sherman Act broadly covers “restraint[s] of trade or commerce,” “monopoliz[ation],” and “attempt[s] to monopolize.” 15 U.S.C. §§ 1-2. The Clayton Act supplemented the Sherman Act by more explicitly covering a handful of particular practices which, at the time, were not clearly within the scope of the Sherman Act: price discrimination, exclusive dealing and tying, and anticompetitive mergers and acquisitions. 15 U.S.C. § 13-19. All have since been covered, at least in part, by Sherman Act case law. *See, e.g., infra* notes 85-95 and accompanying text (discussing tying under the Sherman Act). The FTC Act has broad language similar to that of the Sherman Act, prohibiting “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). And in practice, the FTC Act's scope has been pegged to “conduct that would violate the Sherman Antitrust Act.” *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/5XNP-ASRX>]. Accordingly, the Sherman Act is the focus of this Article, though many of the vagueness concerns presented herein can thus be mapped onto the FTC Act implicitly.

3. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also* *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”); *see generally infra* Section II.A.

trust through the lens of vagueness.<sup>4</sup> Though none of these historical void-for-vagueness challenges succeeded, the logic of the Court's analyses has been undercut in each case by modern trends in antitrust law. In particular, the statutory penalties for Sherman Act violations today are much higher, the tension with constitutionally protected activity is much greater, and the attempt to implement a meaningful and limiting mens rea requirement has proven a failure. Although other scholars have repeatedly criticized antitrust law as "vague,"<sup>5</sup> or included antitrust cases in more general discussions of the contours of vagueness doctrine,<sup>6</sup> there has been no genuine attempt in recent decades to apply void-for-vagueness analysis to antitrust law directly, systematically, and rigorously—confronting historical case law with the contemporary landscape. As this Article demonstrates, doing so reveals glaring constitutional infirmity.

Part II of this Article briefly outlines the development and current status of void-for-vagueness doctrine. Part II also sets forth what might be called the "prima facie" case for vagueness with respect to the Sherman Act. That is, it analyzes to what extent the text of the Sherman Act itself provides adequate notice and prevents arbitrary and discriminatory enforcement. Even taking into account the evolution of judicially-created Sherman Act rules and standards, Part II concludes that the intrinsic issues of vagueness remain pervasive—and, if anything, have grown markedly worse over time.

Parts III, IV, and V broaden the analysis by examining how the Sherman Act interacts with additional considerations and guiding principles used in void-for-vagueness doctrine. Specifically, Part III considers the line between criminal and civil Sherman Act violations, and how penalties and enforcement have been enhanced in practical and absolute terms over time. Part IV examines the increasingly tense relationship between the Sherman Act and constitutionally protected activity; in particular, First Amendment expression. And Part V analyzes the Sherman Act's judicially-created mens rea requirement, finding it blurred and myopic in application. Each of these Parts is centered on one of the landmark Supreme Court cases rejecting an antitrust void-for-vagueness challenge, leveraging them as a rubric against which to measure the Sherman Act's modern con-

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4. See *infra* Sections III.B, IV.B, & V.B.

5. See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 57 (4th ed. 2011); RICHARD A. POSNER, *HOW JUDGES THINK* 5 (2008); Daryl Lim, *Patent Misuse and Antitrust: Rebirth or False Dawn?*, 20 MICH. TELECOMM. & TECH. L. REV. 299, 370-73 (2014); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

6. See, e.g., John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 336-40 (2002); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 307 & n.46 (2016); Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1185-86 & n.76 (2013).

stitutional shortcomings. Taken together, these analyses indicate that the case for vagueness with respect to the Sherman Act is even stronger than the textual, *prima facie* examination suggests.

Part VI looks to the future, outlining and weighing a variety of solutions to the Sherman Act's vagueness problem. Setting aside more fundamental and complete overhauls of the antitrust regime, the most straightforward options include either eliminating antitrust law's criminal application, drastically increasing reliance on bright-line rules, or crafting a much stricter *mens rea* requirement. But of those three, only a robust and limiting *mens rea* requirement would likely be sufficient to truly foreclose a well-crafted void-for-vagueness challenge to the Sherman Act—and do so without rendering modern antitrust enforcement entirely ineffective.

## II. NOTICE, CONSISTENCY, AND THE SHERMAN ACT

### A. *Vagueness Doctrine, Then and Now*

Void-for-vagueness doctrine evolved out of a “principle of construction . . . focused on notice.”<sup>7</sup> In one of the earliest cases discussing the issue of vagueness, for example, the Supreme Court stated that when “the legislature undertakes to define by statute a new offence . . . it should express its will in language that need not deceive the common mind.”<sup>8</sup> Sixteen years later, the Court reiterated that “[l]aws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”<sup>9</sup> By the 1920s, this heretofore freestanding notice principle took constitutional root in the Fifth Amendment right to due process:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential [element] of due process of law.<sup>10</sup>

From this reorientation around the right to due process emerged another key focal point of vagueness doctrine: arbitrary enforcement.<sup>11</sup>

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7. Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263-64 (2010).

8. *United States v. Reese*, 92 U.S. 214, 220 (1875).

9. *United States v. Brewer*, 139 U.S. 278, 288 (1891).

10. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

11. Sarah Sparks, *Deteriorated vs. Deteriorating: The Void-for-Vagueness Doctrine and Blight Takings* *Norwood v. Horney*, 75 U. CIN. L. REV. 1769, 1772 (2007) (citing *Screws*

By 1983, the Court articulated the test for impermissible vagueness as essentially two independent prongs: “[1] sufficient definiteness [so] that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>12</sup> That is, failure to satisfy either prong is sufficient to render a statute unconstitutional.<sup>13</sup>

In addition to the more direct two-pronged vagueness test, the Court has established a handful of additional considerations and guiding principles over time. First, vagueness concerns correlate on a sliding scale with the severity of punishment at issue.<sup>14</sup> In particular, criminal laws are held to a far higher standard of clarity than civil laws due to the greater potential for loss of liberty.<sup>15</sup> Second, when a statute implicates constitutionally protected activity, such as the right of free speech or of association under the First Amendment, a more stringent vagueness test applies due to fears of chilling effects and self-censorship.<sup>16</sup> Third, the inclusion of a *mens rea* requirement in a statute can act to minimize otherwise compelling vagueness concerns by acting to limit the statute’s scope and impute notice to violators.<sup>17</sup>

The relationship between these additional concerns and antitrust law will be addressed in greater detail in Parts III-V. The remainder of Part II is instead dedicated to applying the aforementioned two-pronged test for vagueness to the Sherman Act directly and facially, without second-order considerations. That is, to what degree does the Act offer satisfactory notice and cabin arbitrary enforcement? Even without accounting for the additional concerns outlined above, the Sherman Act exhibits considerable shortcomings. The text itself offers nothing in the way of specificity or definiteness, which has al-

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v. United States, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting) as the earliest example of arbitrariness concerns); *see, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”).

12. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also* *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

13. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (noting a separate “element of the [vagueness] doctrine” as the “requirement that [the] legislature establish minimal guidelines to govern law enforcement”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (“This ordinance is void for vagueness, both in the sense that it ‘fails to give a person of ordinary intelligence fair notice’ . . . and because it encourages arbitrary and erratic arrests and convictions.”). *See generally* Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395, 413-17 (2015) (discussing the evolution of two-pronged vagueness analysis).

14. *See infra* Section III.A.

15. *See infra* notes 121-24 and accompanying text.

16. *See infra* Section IV.A.

17. *See infra* Section V.A.

lowed interpretation and implementation to fluctuate dramatically with economic theory and climate. Exacerbating this pattern, judicially-created bright-line rules—rules that arguably maintained at least some clarity and notice—have been eroded considerably, if not eliminated entirely. And although prosecution under the antitrust laws is currently governed by a policy of self-restraint from the U.S. Department of Justice (DOJ), even that policy does little to resolve or address *prima facie* vagueness concerns, either as a practical matter or as a matter of law.

It is worth noting at the outset that on other constitutional issues with respect to statutes, the Court has endorsed two alternative modes of analysis: “facial” challenges and “as-applied” challenges.<sup>18</sup> A facial challenger argues that “no application of the statute could be constitutional,”<sup>19</sup> whereas an as-applied challenger argues more narrowly that the application of the statute in the particular case at hand is unconstitutional.<sup>20</sup> Given the relatively extraordinary remedy for a successful facial challenge—wholesale invalidation of a legislative act—the burden on challengers is high, and the Court demonstrates a general preference for the more restrained option of as-applied challenges instead.<sup>21</sup> For a time, that same dichotomy (and preference) was applied more or less straightforwardly in vagueness cases.<sup>22</sup> But more recent jurisprudence appears to have made all vagueness analysis implicitly facial—or at the very least markedly

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18. See, e.g., Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33, 46-52 (2017) (discussing the distinction generally and collecting cases); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 663-73 (2010) (same).

19. *Sabri v. United States*, 541 U.S. 600, 609 (2004).

20. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (finding the statute at issue, “as applied to the advertisements . . . in these cases,” to be unconstitutional). See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1081 (16th ed. 2007) (“Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; if the litigant prevails, the courts carve away the unconstitutional aspects of the law by invalidating its improper applications on a case-by-case basis.”).

21. See, e.g., Kreit, *supra* note 18, at 663-64 (“The Court has stated its general preference for as-applied challenges consistently, albeit often without much elaboration as to exactly how the preference should be implemented.”); Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1648 (2009) (“The preference for as-applied challenges, which is hardly unique to the Roberts Court, arises from concerns about judicial restraint and respect for the work of politically accountable branches.”). But see Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 917 (2011) (“[T]he assumption that facial challenges are and ought to be rare. . . . is false as an empirical matter and highly dubious as a normative proposition.”).

22. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any *specific case* where reasonable persons would know that their conduct is at risk.” (emphasis added)); *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (“It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined [as-applied].”).



lowered the bar for facial challenges. As the Court stated in *Johnson v. United States*, addressing a vagueness challenge to provisions in the Armed Career Criminal Act<sup>23</sup>:

In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. [*United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).] We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. [*Coates v. Cincinnati*, 402 U.S. 611 (1971).] These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?<sup>24</sup>

Notably, the majority opinion in *Johnson* dispenses with the terms "facial" or "as-applied" entirely, further suggesting a collapse between the two when addressing vagueness concerns.<sup>25</sup> One may contrast the above language with the Court's more familiar treatment—that same term—of a *non*-vagueness constitutional challenge. Addressing a challenge under the Fourth Amendment, the Court noted: "Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is

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23. 18 U.S.C. §§ 922(g), 924(a)(2), (e)(1) (2012).

24. *Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) (citations omitted).

25. Justice Alito's dissent in particular takes issue with the majority for seemingly dispensing with the typical dichotomous approach. See *Johnson*, 135 S. Ct. at 2580-83 (Alito, J., dissenting) (discussing the historical treatment of vagueness challenges facially versus as-applied).

unconstitutional in all of its applications.’ ”<sup>26</sup> This difference highlights the uniquely permissive treatment towards contemporary vagueness challenges.

A more robust examination of *Johnson*, situating this development in broader constitutional law, is beyond the scope of this Article. But at a minimum—and of key importance to the analysis herein—*Johnson* clearly holds that: (1) facial vagueness challenges remain viable, even outside the First Amendment context; and (2) the existence of some non-vague applications is insufficient to defeat such a challenge.<sup>27</sup> The Court’s reaffirmance of *L. Cohen Grocery Co.*, moreover, hints towards a third key takeaway: the current Court is particularly skeptical of broadly defined economic proscriptions.

As noted above in *Johnson*, the *Cohen* Court found unconstitutionally vague the reenacted Lever Act, which prohibited persons from “mak[ing] any unjust or unreasonable rate or charge in handling or dealing in . . . any necessities.”<sup>28</sup> In particular, the Court found it clear that Congress had failed to “fix[] . . . an ascertainable standard of guilt . . . adequate to inform persons”:

Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, *to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.* And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed.<sup>29</sup>

That the Court today would choose to reaffirm this scathing vagueness analysis—in particular, directed towards “unreasonable” market behavior “detrimental” to the public—should raise red flags to anyone familiar with the broad arc of antitrust law, and should be kept

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26. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

27. *See Johnson*, 135 S. Ct. at 2558-63.

28. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 81-82 n.1 (1921) (quoting 41 Stat. 297 (1919)).

29. *Id.* at 89-90 (emphasis added).



in mind throughout the analysis herein. As the next Section in particular outlines, the text, historical practice, and judicially-created framework for the Sherman Act is at least as vague as what the Lever Act demanded, if not more so.

### *B. The Prima Facie Case for Sherman Act Vagueness*

#### *1. Text and Historical Implementation: A Century of Ebb and Flow*

Whether by design, compromise, or oversight, the text of the Sherman Act is quite open-ended. Section 1 declares as illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce.”<sup>30</sup> But of course, all contracts restrain trade or commerce; by definition, the two contracting parties are prevented from doing their agreed-upon business with anyone else without incurring the costs of breach.<sup>31</sup> This has forced the Court to flatly reject the plain-text, “literal” terms of section 1—that is, *not every* arrangement in restraint of trade is illegal, only “unreasonable” ones.<sup>32</sup> The text of section 2 is no more clear. That section makes it illegal to “monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize,” but it does not define or elaborate on the crucial term “monopolize.”<sup>33</sup> The plain meaning of that term would seem to suggest that the act of acquiring 100% market share is itself rendered illegal, or perhaps any act with the intention towards that ultimate goal.<sup>34</sup> But again, the Court has rejected the literal terms of the Act—it is not illegal to obtain a monopoly position.<sup>35</sup>

Faced with this level of textual ambiguity, the Court has adopted a “common-law”—almost “constitutional”—approach to interpreting the Act.<sup>36</sup> That is, over time and through precedent, the Court has

30. 15 U.S.C. § 1 (2012).

31. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”); see also Matthew Sipe, *Patent Privateers and Antitrust Fears*, 22 MICH. TELECOMM. & TECH. L. REV. 191, 223 n.174 (2016).

32. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63 (1911).

33. 15 U.S.C. § 2 (2012).

34. See D.N. DWIVEDI, *PRINCIPLES OF ECONOMICS* 247 (2d ed. 2009) (“[A] monopoly market is one in which there is only one seller of a product having no close substitute.”); U.S. DEPT OF JUSTICE & FTC, *HORIZONTAL MERGER GUIDELINES* 18 n.9 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [<https://perma.cc/4C6D-R6SZ>] (defining a “pure monopoly” as a market with Herfindahl-Hirschman Index of 10,000, which means a single firm has market share of 100 percent).

35. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“[T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” (emphasis omitted)).

36. *E.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”);

created a complex framework of tests, presumptions, and mitigating factors wholly absent from the text of the Sherman Act itself. To some extent, this may be charitably viewed as “an implicit delegation of lawmaking power to courts.”<sup>37</sup> But there are clear limits to the propriety of this common-law delegation approach.

First and foremost, it is clearly established that federal courts lack the power to create common-law crimes,<sup>38</sup> and the Sherman Act is a criminally-enforced statute.<sup>39</sup> That is, where a statute incorporates a body of common or constitutional law, it becomes a *static* snapshot of the relevant common law at the time of enactment—not a conduit for the common law as it evolves. For example, 18 U.S.C. § 1584 criminalizes “involuntary servitude,”<sup>40</sup> a term “clearly borrowed” from the Thirteenth Amendment.<sup>41</sup> While the Court recognized that this was an attempt to “incorporate by reference a large body of potentially evolving federal law,” they also recognized the due process requirement “that a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt.”<sup>42</sup> As the Court elaborated:

It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in

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State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act . . . .”); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (comparing the Sherman Act to “the Magna Carta” and “the Bill of Rights”); Sugar Inst., Inc. v. United States, 297 U.S. 553, 600 (1936) (“We have said that the Sherman [Antitrust] Act . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

37. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345, 347; see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44-45 (1985) (“It thus seems reasonable to construe section 1 of the Sherman Act as federalizing the common law of unlawful restraints of trade—in other words, as reflecting a decision by Congress to transform a body of existing common law . . . into federal law and to authorize federal courts to continue to build upon that law through the incremental case-by-case process.” (footnote omitted)).

38. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (“[A]ll exercise of criminal jurisdiction in common law cases we are of opinion is not within [the courts’] implied powers.”); see also *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” (citation omitted)); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (“[T]here is no federal common law of crimes . . .”).

39. See *infra* Section III.C.

40. 18 U.S.C. § 1584 (2012).

41. *United States v. Kozminski*, 487 U.S. 931, 932 (1988); see also U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.”).

42. *Kozminski*, 487 U.S. at 941.

which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.<sup>43</sup>

For that reason, the Court held that the meaning of the statute could not be driven by dynamic, evolving Thirteenth Amendment jurisprudence. Rather, the proper interpretation of the statute must be based on a snapshot of “the understanding of the Thirteenth Amendment that prevailed at the time of § 1584’s enactment.”<sup>44</sup>

The courts have not taken this approach with the Sherman Act. Although some early decisions were explicitly pegged to extant common law restraint-of-trade doctrine,<sup>45</sup> the Sherman Act as interpreted today is no longer based on a “static” snapshot of the understanding of those terms in 1890.<sup>46</sup> Instead, the Court has allowed the meaning of the Sherman Act to fluctuate dramatically with changes in reigning economic theory, policy, and climate—without warning to defendants.

A cursory examination of the last sixty years will suffice. By the 1950s and early 1960s, the dominant conception of antitrust law was essentially populist in nature; small, local businesses were to be protected and concentrations of economic power were to be strictly limited.<sup>47</sup> This conception may be exemplified by what is generally considered the “high-water mark”<sup>48</sup> of antitrust enforcement, *United*

43. *Id.* at 951.

44. *Id.* at 945. *See generally* Kahan, *supra* note 37, at 361-63.

45. *See, e.g.*, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 51 (1911) (“It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the [Sherman Act].”).

46. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

47. The work of Carl Kaysen and Donald Turner represents a highly influential capstone to that era. CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 22 (1959); *see* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1414-16 (1990) (describing the prominence and historical context of Kaysen and Turner’s book). For scholarship detailing the reign of the populist antitrust conception retrospectively, *see* Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1 (2015); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 207 (2008); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1515, 1520-21 (1984); and Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

48. Dennis A. Yao, Fed. Trade Comm’n, Challenges in Merger Analysis: The 1992 Merger Guidelines and Beyond 3 (Dec. 2, 1992), [https://www.ftc.gov/system/files/documents/public\\_statements/694541/19921202\\_yao\\_challenges\\_in\\_merger\\_analysis\\_the\\_1992\\_merger\\_guidelines\\_and\\_beyond.pdf](https://www.ftc.gov/system/files/documents/public_statements/694541/19921202_yao_challenges_in_merger_analysis_the_1992_merger_guidelines_and_beyond.pdf) [<https://perma.cc/XD9F-7ARS>]; *see also* BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION 1968-1985, at 48 (1987); KY P. EWING, JR., COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA’S EXPERIENCE 128 (2d ed. 2006).

*States v. Von's Grocery Co.*,<sup>49</sup> a case which prohibited the merger of two grocery stores that would have had less than ten percent combined market share. Over the course of a few decades, however, this value system was thoroughly ousted by the so-called Chicago School of economic theory—led most notably by Judge Robert Bork<sup>50</sup>—that prioritized economic efficiency over pure disaggregation of economic power.<sup>51</sup> As Judge Douglas Ginsburg explains, this efficiency-promoting conception of the antitrust laws went from entirely “novel” and heterodox in the 1960s to “the conventional wisdom of the federal courts” by the 1980s.<sup>52</sup> Now, another few decades later, the Chicago School appears to be waning, while a fresh consensus emerges—this time focusing largely on consumer welfare and protection directly.<sup>53</sup>

Even within these antitrust epochs, criminal liability under the Sherman Act has fluctuated based on macroeconomic cycles. Consider, for example, the arc between *United States v. Trenton Potteries Co.*,<sup>54</sup> *Appalachian Coals, Inc. v. United States*,<sup>55</sup> and *United States v. Socony-Vacuum Oil Co.*<sup>56</sup> In 1927, *Trenton* unambiguously held that for charges of price fixing, the reasonableness of the underlying arrangement was no defense.<sup>57</sup> In 1933, *Appalachian Coals* seemingly flipped the policy, finding that an “essential standard of reasonableness” prevented prosecution of a group of coal sellers forming a cartel and setting uniform prices.<sup>58</sup> Finally, in 1940, *Socony-Vacuum* flipped back, holding that the “reasonableness” of a price-fixing arrangement was “wholly irrelevant.”<sup>59</sup> Though the Court in each case took pains

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49. 384 U.S. 270 (1966).

50. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 196 (1978); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 44 (1966).

51. Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 225-27 (2006).

52. *Id.* at 27.

53. See, e.g., RICHARD A. POSNER, *ANTITRUST LAW*, at ix (2d ed. 2001) (“Almost everyone professionally involved in antitrust today . . . agrees that the only goal of the antitrust laws should be to promote economic welfare . . .”); Kirkwood & Lande, *supra* note 47, at 192 (“[C]urrent Supreme Court opinions focus much more on protecting consumers than on increasing efficiency. . . . When conduct presents a conflict between protecting consumers and promoting the efficiency of the economy . . . the courts have always chosen consumer protection over efficiency.”); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 338 (2010) (“[T]he standard legislated by Congress in adopting the Sherman Act—the standard currently used by antitrust agencies and our judicial system—is the true consumer welfare standard.”).

54. 273 U.S. 392, 397-98 (1927).

55. 288 U.S. 344 (1933).

56. 310 U.S. 150 (1940).

57. *Trenton*, 273 U.S. at 401.

58. *Appalachian Coals*, 288 U.S. at 360, 378.

59. *Socony-Vacuum Oil*, 310 U.S. at 243.

to distinguish between the facts at issue, rather than explicitly overrule, contemporary scholars generally explain this doctrinal zig-zag as a direct result of the economic environment of the Great Depression.<sup>60</sup> That is, the seemingly fragile Appalachian coal industry was permitted to fix prices—an otherwise per se violation—in order to stay afloat; the Court was loath to force yet another industrial sector to go underwater in such harsh economic times.

In short, the text of the Sherman Act—already ambiguous and open-ended—has been rejected at face value by the courts in favor of a common-law approach that far exceeds the bounds of permissible delegation. Even if such an approach were permissible in the abstract, a review of the Sherman Act's actual historical application reveals a pattern of judicially-driven (and defendant-borne) ebbs and flows, a pattern fundamentally at odds with notice and consistency.<sup>61</sup>

## 2. *Judicially-Created Framework: From Bright-Line Rules to I-Know-it-When-I-See-it*

The aforementioned changes over time in underlying theory and climate have been coupled with a long-term increase in flexibility in the borders of Sherman Act doctrine itself. Nowhere is this clearer than in the general retreat from per se rules,<sup>62</sup> which might otherwise

60. See, e.g., DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 38 (4th ed. 2005); 2 EARL W. KINTER, *FEDERAL ANTITRUST LAW: PRACTICES PROHIBITED BY THE SHERMAN ACT* (2002); RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* (2d ed. 1981); W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* (4th ed. 2005); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 48 (2000); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 288-90; Stucke, *supra* note 5, at 1400 (“Nonetheless, in the height of the Great Depression, the Court did not apply its per se rule to an agreement among competitors to fix price.”); Diane P. Wood, *The U.S. Antitrust Laws in a Global Context*, 2004 COLUM. BUS. L. REV. 265 *passim*.

61. Professors William Eskridge and John Ferejohn, among others, have argued that the historical malleability of the Sherman Act is evidence that it is a kind of “super-statute”—foundational, fundamental, and potentially exercising “a gravitational pull on constitutional law itself.” William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1236 (2001). Even if one accepts that the Sherman Act once occupied that position, it is unlikely that it continues to do so. The trend more recently has been profound skepticism towards antitrust—even outright preemption by other, non-“super” statutory schemes. See, e.g., *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 279-81 (2007); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004). See generally Matthew G. Sipe, *Patents v. Antitrust: Preempting Conflict*, 66 AM. U. L. REV. 415, 418-25 (2016) (outlining the modern shift towards antitrust skepticism and preemption). This trend, coupled with the sharp decline in antitrust’s political and popular salience, makes it highly unlikely that the Sherman Act today would be sheltered or exempt from otherwise controlling constitutional doctrines—including void-for-vagueness. See *infra* notes 135-39 and accompanying text.

62. Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW 435, 436 (2012) (“The Supreme Court has . . . continually narrowed the types of conduct subject to per se condemnation.”).

provide clear notice and predictability. Per se rules treat certain “categories of restraints [of trade] as necessarily illegal,” thereby “eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work.”<sup>63</sup> As the Court itself has recognized: “Without the per se rules, businessmen [are] left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.”<sup>64</sup> In spite of this recognition, the Court has consistently replaced per se rules with the open-ended, catchall rule of reason—a rule flexible enough to serve shifting economic theories or policy goals:

[T]he 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.<sup>65</sup>

The Court has eliminated per se rules explicitly, as well as implicitly, in favor of a flexible and holistic analysis—which, for all its virtues,<sup>66</sup> exacerbates concerns of vagueness.<sup>67</sup>

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63. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

64. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) (emphasis omitted). The comparatively greater uncertainty of the rule of reason has near-universal recognition among legal scholars as well. *See, e.g.*, Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMPETITION L. & ECON. 543, 546 (2011) (“Full-blown rule-of-reason analysis subjects defendants to considerable expense and uncertainty.”); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 738 n.28 (2012) (“The proposition that rule of reason litigation can be uncertain and costly . . . does not appear to be controversial.”).

65. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). Even today, this remains the “classic articulation” of how to proceed under the rule of reason. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 341 (S.D.N.Y. 2001); *see also* 1 CALLMANN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:37 (4th ed. 2010) (“Modern attempts to refine or further develop the rule of reason, as announced by Justice Brandeis in 1918, are virtually nonexistent.”).

66. *See infra* Part VI.

67. *See, e.g.*, Devlin & Jacobs, *supra* note 64 at 546 (“Full-blown rule-of-reason analysis subjects defendants to considerable expense and uncertainty.”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984) (“Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.”); *see also Leegin*, 551 U.S. at 917 (Breyer, J., dissenting) (“Are there special advantages to a bright-line rule? Without such a rule, it is often unfair . . . for enforcement officials to bring criminal proceedings.”). *But see, e.g.*, Gavil, *supra* note 64, at 734 (arguing that, in its contemporary applications, the rule of reason has been “honed to focus on specific, core economic concepts” instead of “vague, throw-in-the-kitchen-sink formulations”). Even accepting, *arguendo*, the merits of this more skeptical position, a well-grounded rule of reason is still by definition more open-ended and less certain than an outright categorical approach as used in classic per se analysis.



For example, minimum resale price maintenance<sup>68</sup> was long held to be a per se violation of the Sherman Act. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the Court stated unequivocally that the rule of reason does not apply to minimum resale price maintenance arrangements, treating them identically to horizontal price fixing:

[R]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable . . . .

. . . .

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.<sup>69</sup>

Reversing almost one hundred years of precedent, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court overruled *Dr. Miles* explicitly.<sup>70</sup> Agreeing to set a minimum price *vertically*, the Court reasoned, may actually have “procompetitive effects”; interbrand competition is increased at the expense of intrabrand competition, and retailers are encouraged to offer more services as free-rider incentives are eliminated.<sup>71</sup> Accordingly, the Court held that the more open-ended rule of reason ought to apply—asking the lower courts, in particular, to take into account “the number of manufacturers that make use of the practice,” whether those manufacturers have “market power,” and the practices of downstream retailers.<sup>72</sup>

Far from an isolated example, *Leegin* is the apotheosis of a “major turning point in antitrust law.”<sup>73</sup> The Court has consistently and “systematically [gone] about the task of dismantling many of the per se rules it [has] created.”<sup>74</sup> Another vertical restraint, territorial division, has gone from being considered “so obviously destructive of

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68. Resale price maintenance is a form of vertical price fixing, whereby an upstream market participant (such as a manufacturer) conducts business only with downstream market participants (such as retailers and distributors) who agree to sell the product at or above a certain price. See, e.g., *Leegin*, 551 U.S. at 885.

69. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406-08 (1911).

70. *Leegin*, 551 U.S. at 889.

71. *Id.* at 890-93; see also Michael L. Denger & Joshua Lipton, *The Rule of Reason and “Leegin Policies”: The Supreme Court’s Guidance*, 22 ANTITRUST 45 (2007).

72. *Leegin*, 551 U.S. at 896-98.

73. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 36 (2007), [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) [<https://perma.cc/9C8L-FRFS>].

74. ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002).

competition that [its] mere existence”<sup>75</sup> is intolerable to a welcome method of “stimulati[ng] . . . interbrand competition” and “achiev[ing] certain efficiencies in . . . distribution.”<sup>76</sup> Maximum resale price maintenance underwent a similarly stark reversal—from a practice that “cripple[s] the freedom of traders” and is intrinsically “injurious to the public”<sup>77</sup> to a practice with “procompetitive effects” that “benefit[s] consumers regardless of how those prices are set.”<sup>78</sup> The result is that lower courts—and hence, market participants seeking to comply with antitrust law—are increasingly asked *ex ante* to measure and balance factors including market structure, price changes over time, output quantity and quality, and consumer behavior.<sup>79</sup> And, to be clear, this trend has operated exclusively in one direction; once the rule of reason has conquered a given category of economic behavior, *per se* analysis does not recover that lost ground.<sup>80</sup>

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75. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379, 382 (1967) (“Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred . . . is a *per se* violation of § 1 of the Sherman Act.”).

76. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52, 54, 57-58 (1977) (“[T]here is substantial scholarly and judicial authority supporting their economic utility. There is relatively little authority to the contrary. . . . Accordingly, we conclude that the *per se* rule stated in *Schwinn* must be overruled.”). See generally Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and Its “Rule of Reason”: The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 135-44 (1989) (discussing in detail the doctrinal arc between *Schwinn* and *GTE Sylvania*).

77. *Albrecht v. Herald Co.*, 390 U.S. 145, 151, 152, 154 (1968) (affirming that “agreements to fix maximum [resale] prices” are “*per se* violation[s] of the law”).

78. *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). See generally Richard M. Steuer, Khan and the Issue of Dealer Power—Overview, 66 ANTITRUST L.J. 531 (1998) (analyzing the shift in economic rationale between *Albrecht* and *Khan*).

79. See, e.g., *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-44 (2d Cir. 2003). It is worth mentioning, moreover, the implicit need to weigh and consider competing economic theories on each of those factors as well. See Stucke, *supra* note 5, at 1386 (“The courts will weigh not only conflicting testimony by Industrial Organization economists but conflicting economic theories, with the rise of behavioral, evolutionary, and New Institutional Economics.”).

80. See Jesse W. Markham, Jr., *Sailing A Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 612 (2012) (“[T]he Court has . . . created no new *per se* rule in at least a half century.”); Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1754 (1994) (concluding that the rule of reason has “prevail[ed]” over *per se* analysis). The doctrinal switch between *Appalachian Coals* and *Socony-Vacuum Oil* arguably provides a counterexample—the only one of its kind. See *supra* notes 54-60 and accompanying text. But, as noted earlier, even the *Appalachian Coals* Court did not express its holding as “overruling” the *per se* analysis stated in *Trenton Potteries*. And the *Socony-Vacuum Oil* Court characterized its holding as simply staying true to the supposedly undisturbed line of *per se* horizontal price-fixing cases, including *Trenton Potteries*. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (“Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act . . .”).

Today, “[t]he vast majority of trade-restraint categories receive rule of reason treatment.”<sup>81</sup> But even where per se categories have not been replaced by the rule of reason explicitly, the divide between per se and rule-of-reason analysis has broken down considerably. That is, case law increasingly demands that courts apply the same holistic, case-by-case analysis embodied by the rule of reason in order to apply the “per se” label in the first place. Put differently, the detail and vagueness of the rule of reason have been transformed into a *threshold inquiry* for per se cases. This per se step zero undermines any precision or clarity in the Sherman Act that the use of per se rules might have otherwise maintained.

Consider the case law governing boycotts. In *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, the Court examined a group of appliance manufacturers and distributors boycotting a particular retail store.<sup>82</sup> The Court unambiguously stated that such boycotts were per se Sherman Act violations:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned. . . .

. . . .

It clearly has, by its “nature” and “character,” a “monopolistic tendency.”<sup>83</sup>

Without explicitly overruling this seemingly bright-line and straightforward per se rule, the Court has blurred its boundaries significantly.<sup>84</sup> For example, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, the Court reversed the Ninth Circuit’s application of the per se rule against boycotts to a purchasing cooperative’s boycott of a certain retailer.<sup>85</sup> Although reaffirming that “group boycotts are so likely to restrict competition . . . that they should be condemned as per se violations of § 1 of the Sherman Act,” the Court warned that “[e]xactly what types of activity fall within the forbidden

81. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1214 (2008).

82. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

83. *Id.* at 212-13 (internal quotation marks omitted) (footnotes omitted).

84. See Donald L. Beschle, *Doing Well, Doing Good and Doing Both: A Framework for the Analysis of Noncommercial Boycotts Under the Antitrust Laws*, 30 ST. LOUIS U. L.J. 385, 391 (1986) (“It has become evident in recent years that this initial step of categorization . . . often requires a judicial effort approaching the level of complexity involved in the full rule of reason analysis.”).

85. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

category is, however, far from certain.”<sup>86</sup> The Court’s analysis provided a number of threshold factors to be considered prior to application of the per se rule, which the Ninth Circuit later summarized as whether: “(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition.”<sup>87</sup>

But these threshold inquiries—market structure, efficiency, and market power—are classic components of the more flexible and amorphous rule of reason. In other words, the case law dictates that “courts must apply the rule of reason in order to determine whether the per se rule applies” in the first place.<sup>88</sup> To the extent that the ambiguities inherent in the rule of reason are effectively imported into per se analyses as a step-zero inquiry, the latter category is no less vaguely defined.

The case law on tying<sup>89</sup> follows a similar arc. In the earliest tying cases to reach the Court, it was quick to decide that “[t]ying agreements serve hardly any purpose beyond the suppression of competition,”<sup>90</sup> and have a “creeping” tendency to “create a monopoly.”<sup>91</sup> Accordingly, the Court labeled tying arrangements illegal per se, and even highlighted the considerably bright-line nature of that holding:

[In *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947)], [t]he Court ruled that it was “unreasonable, *per se*, to foreclose competitors from any substantial market” by tying arrangements. As we later analyzed the decision, “it was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.”<sup>92</sup>

In the years since, however, that bright line has dimmed—if not darkened completely. Although the Court has remained steadfast in

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86. *Id.* at 290, 294 (emphasis omitted).

87. *Hahn v. Or. Physicians’ Serv.*, 868 F.2d 1022, 1030 (9th Cir. 1988).

88. *Lemley & Leslie*, *supra* note 81, at 1229; *see also* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CALIF. L. REV. 757, 774 (1992) (“A per se rule that applies only when a defendant has market power and cannot show procompetitive effects is no per se rule at all.”).

89. Tying refers to the practice of selling one product—the “tying” product—only on the condition that the buyer purchases a different product as well—the “tied” product. *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).

90. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949).

91. *Int’l Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

92. *N. Pac. Ry. Co.*, 356 U.S. at 9 (quoting *Standard Oil Co. of Cal.*, 337 U.S. at 305) (emphasis added).

refusing to abandon the “per se” label,<sup>93</sup> tying cases in practice require that judges wade into murkier waters:

There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.<sup>94</sup>

This step-zero analysis “requires the court to define product markets, examine market power, and consider business justifications”—undoubtedly rule-of-reason elements.<sup>95</sup>

The doctrine on horizontal price fixing—that is, price fixing between direct competitors—offers a final, relatively stark example. Price fixing “has been a per se violation of the Sherman Act from the very beginning.”<sup>96</sup> Beyond the aforementioned back-and-forth of *Tren-ton Potteries*, *Appalachian Coals*, and *Socony-Vacuum*,<sup>97</sup> the case law solidly affirms that price fixing is illegal per se:

The respondents’ principal argument is that the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.<sup>98</sup>

93. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’ ”); see also *id.* at 35 (O’Connor, J., concurring) (urging the majority to “abandon the ‘per se’ label”).

94. *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992), and *Jefferson Parish*, 466 U.S. at 12-18).

95. Lemley & Leslie, *supra* note 81, at 1250, 1251 (referring to the “per se” label for tying as a “lie” outright, and stating that it “belongs in the rule of reason box”); see also Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009) (referring to the post-*Jefferson Parish* test as a “quasi-per se” rule); Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 ANTITRUST L.J. 811, 847 (2011) (referring to contemporary tying doctrine as a “nominal per se rule, which in practice operates as a truncated rule of reason”).

96. Sheldon Kimmel, *How and Why the Per Se Rule Against Price-Fixing Went Wrong*, 19 SUP. CT. ECON. REV. 245, 245 (2011) (emphasis omitted) (citing *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897)); see also Lemley & Leslie, *supra* note 81, at 1225 (“Horizontal price fixing represents the epitome of per se illegal conduct.”).

97. See *supra* notes 55-60 and accompanying text.

98. *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 351 (1982) (emphasis omitted) (footnote omitted).

On the other hand, the Court continues to distinguish between “price fixing in a literal sense” and “price fixing in the antitrust sense”—with only the latter constituting a per se violation.<sup>99</sup> But the matter of distinguishing between the two appears to import considerations that bring to mind the rule of reason: courts must consider “the effect and . . . the purpose of the practice,” including “efficiency” and potentially pro-“competitive” justifications.<sup>100</sup> In other words, the distinction relies, at bottom, on a “functional market analysis.”<sup>101</sup> A per se rule constructed in this way offers enhanced adaptability, to be sure—but it does relatively little over the rule of reason to alleviate vagueness concerns.

Scholars have rightfully observed that this form of category-blurring, beyond undermining the benefits of per se analysis, leads to even less clarity or predictability than an outright rule of reason.<sup>102</sup> That is, the parties are forced to speculate—and litigate—over initial categorization in addition to the actual weighing and balancing of interests on the merits. The courts, meanwhile, have leeway to conceal more complex analyses under the nominal label of “per se” when it is expedient to do so. Indeed, there is little forcing courts to be transparent in their categorization, even when it may be outcome-determinative.

The Sherman Act’s judicially-created framework of rules, instead of providing the notice and consistency otherwise lacking in the statutory text itself, has thus single-mindedly elevated discretion and flexibility. One by one, the courts have eliminated the bright and predictable lines of per se analysis, whether explicitly and outright or implicitly through threshold rule-of-reason inquiry. Compliance in the shadow of Sherman Act jurisprudence thereby means weighing the totality of all economic factors and market effects and determining whether the activity in question will be found “reasonable” down the line by a judge or jury. Or, to circle back to the *L. Cohen Grocery* holding reaffirmed by the Court in *Johnson*: “to attempt to enforce

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99. *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979)).

100. *Broad. Music, Inc.*, 441 U.S. at 19-20.

101. *Lemley & Leslie*, *supra* note 81, at 1226.

102. *See, e.g.*, Gavil, *supra* note 64, at 769 & n.174 (collecting lower court cases exemplifying a “sliding scale” approach between true per se and rule of reason analyses, rather than “discrete and alternate choices” between the two); *Lemley & Leslie*, *supra* note 81, at 1250 (“This ill-conceived and outmoded categorization creates the worst of both worlds—the cost of the rule of reason without its precision.”); Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 839 (2016) (noting that parties are left to “speculate about the status” of certain kinds of economic activity, and that “[s]uch ambiguity increases the cost of . . . analysis”); ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 10 (1999) (“[T]he line between application of the per se rule and the rule of reason has become blurred to the point that these analytical tools are often indecipherable.”).



the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.”<sup>103</sup> Thus, at least on its face, a modern void-for-vagueness challenge would present a serious threat to the Sherman Act.

### 3. Enforcement Policy: Empty Self-Restraint

It is worth noting, at least in passing, the actual modern practice of antitrust prosecution. To its credit, the DOJ—tasked with enforcing the Sherman Act’s criminal provisions—has expressed a policy of self-restraint. That is, although no such division exists in the law itself, the DOJ limits its criminal enforcement of the Sherman Act to per se violations—pursuing rule-of-reason violations through civil mechanisms only.<sup>104</sup> This policy appears to be based, at least in part, on a desire to apply criminal sanctions only to conduct that is “clearly illegal,” echoing vagueness concerns at least implicitly.<sup>105</sup> And the numbers do appear to plausibly reflect the DOJ’s desire to pursue criminally only the worst offenders; although prison terms and fines per case have all increased,<sup>106</sup> the actual number of criminal antitrust cases filed has “decreas[ed] steadily since 2011.”<sup>107</sup>

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103. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-90 (1921); see *supra* notes 28-29 and accompanying text.

104. See, e.g., THOMAS V. VAKERICS, ANTITRUST BASICS § 2.03[3] (2006) (“Traditionally, the Antitrust Division will seek criminal prosecution only for per se violations.”); Abbe Gluck, *Preserving Per Se*, 108 YALE L.J. 913, 915 (1999) (“[C]riminal antitrust prosecutions typically target only per se offenses.”); *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/PS87-Z3CT] (“Criminal prosecutions are typically limited to intentional and clear violations . . . .”); *Antitrust Resource Manual*, OFF. U.S. ATT’YS, <https://www.justice.gov/usam/antitrust-resource-manual-1-attorney-generals-policy-statement> [https://perma.cc/UW8N-9U4S] (“Virtually all antitrust offenses likely to be prosecuted by a United States Attorney’s office will be governed by the ‘per se’ rule.”); cf. Roxann E. Henry, *Criminal Cartels: Price Fixing and Market/Sales Allocation Agreements*, AM. HEALTH LAW. ASS’N, Feb. 17, 2000 (“Some would believe that this distinction is a necessary step in evaluating potential criminal exposure, that only per se offenses can engender criminal liability. There is no legal support for that position, and criminal cases under the rule of reason have been brought in the distant past.”).

105. ANTITRUST DIVISION, CONGRESSIONAL SUBMISSION: FY 2008 PERFORMANCE BUDGET 28, [https://www.justice.gov/archive/jmd/2008justification/pdf/21\\_atr.pdf](https://www.justice.gov/archive/jmd/2008justification/pdf/21_atr.pdf) [https://perma.cc/ZJ2D-AHT7] (“[T]he Antitrust Division . . . investigat[es] and challeng[es] violations of Section 1 of the Sherman Act, including such *per se* (in and of themselves, clearly illegal) violations as price fixing, bid rigging, and horizontal customer and territorial allocations.”); see, e.g., Press Release, Dep’t of Justice, Justice Department Announces It Would Challenge Pharmaceutical Manufacturers Association Proposal (Oct. 1, 1993), [https://www.justice.gov/archive/atr/public/press\\_releases/1993/211376.pdf](https://www.justice.gov/archive/atr/public/press_releases/1993/211376.pdf) [https://perma.cc/B7UK-QEQF] (describing various per se violations as “clearly unlawful” and “clearly illegal”).

106. See *infra* notes 140-42 and accompanying text.

107. TIMOTHY WESTRICK, ABA SECTION OF LITIG., U.S. ANTITRUST CRIMINAL ENFORCEMENT: RECENT DEVELOPMENTS AND FUTURE TRENDS POST REALIGNMENT 3 (2014),

This policy, however, does little to alleviate vagueness concerns in practice for at least four core reasons. First, because the DOJ's policy of self-restraint is patterned in large part on the dichotomy between per se and rule-of-reason offenses, its value in terms of notice and clarity is significantly undermined by the trend of categorical blurring outlined in Section II.B.2. Where the per se analysis is as flexible and open-ended as the rule of reason, it is sleight-of-hand for the DOJ to treat "per se" and "clearly illegal" as interchangeable concepts. Second, the DOJ's policy of self-restraint is patterned off its *own* interpretation of what constitutes per se violations, not necessarily the courts'. This can (and has) lead to prosecution in the absence of prior case law establishing the conduct-at-issue as per se illegal.<sup>108</sup> Put differently, even the DOJ's policy of self-restraint does not actually preclude it from pursuing entirely novel antitrust theories—to the detriment of the unwary. Third, the probabilistic trend created by this policy—punishing only a handful of offenders immensely—lessens the actual effect of any notice and clarity from a behavioral standpoint vis-à-vis deterrence.<sup>109</sup> In short, although the

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[https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014\\_sac/2014\\_sac/us\\_antitrust\\_criminal\\_enforcement.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014/2014_sac/2014_sac/us_antitrust_criminal_enforcement.authcheckdam.pdf) [<https://perma.cc/YN23-JCAW>].

108. The DOJ's treatment of no-poaching agreements between competitors provides one such example. Compare DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3-4 (2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/LJB6-MR4K>] ("[N]o-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. . . . Going forward, the DOJ intends to proceed criminally against naked . . . no-poaching agreements."), with *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1040 (N.D. Cal. 2013) (declining, on a motion to dismiss, to apply per se analysis to a no-poaching agreement, holding that "[a]t this stage . . . , the court simply cannot determine with certainty the nature of the restraint, and by extension, the level of analysis to apply."), and *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143 (3d Cir. 2001) (applying rule-of-reason analysis to a no-poaching agreement between a company and its former affiliates, and noting in particular that "there are no Supreme Court cases nor any federal cases that have applied the per se rule in similar factual circumstances").

109. See, e.g., WESTRICK, *supra* note 107, at 5 ("Some, including [DOJ Antitrust] alumni, have . . . proposed the theory that the ever-increasing weight of the 'stick' . . . may be having a deterrent effect, not on cartel behavior, but rather, on self-reporting and cooperation."). For leading empirical criminologists reaching the same conclusion, but in a more generalized context, see ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (1999) (finding that certainty of apprehension was associated with declining crime rates, and concluding that there was no basis in existing research "for inferring that increasing the severity of sentences . . . is capable of enhancing deterrent effects"); David P. Farrington et al., *Changes in Crime and Punishment in America, England and Sweden Between the 1980s and 1990s*, 3 STUD. ON CRIME & CRIME PREVENTION 104-31 (1994) (finding no statistically significant relationship between severity of punishment and crime rates); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in CRIME AND JUSTICE IN AMERICA: 1975-2025 at 199-263 (Michael Tonry ed., 2013); Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extra-legal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 865 (2001) ("[P]unishment certainty is far more consistently found to deter crime than is punishment severity . . .").

DOJ's policy is in some respects admirable, it does not actually rebut any of the vagueness issues raised in this Part with respect to the Sherman Act. Finally, because this restraint on criminal application is purely a matter of prosecutorial discretion, it does not, strictly speaking, preclude arbitrary and discriminatory enforcement as a matter of law. Failure of the law itself to cabin the discretion of authorities is its own vagueness concern, regardless of whether authorities choose to fence themselves in voluntarily.<sup>110</sup>

It is worth emphasizing this last point in particular. Beyond concerns of notice alone, the malleability of Sherman Act doctrine leaves the door open for arbitrary—if not discriminatory—enforcement. Among the extra-legal influences on antitrust decisionmaking, scholars have emphasized the role of politics,<sup>111</sup> connections and access to decisionmakers,<sup>112</sup> and even capture by particular industry segments.<sup>113</sup> Though quantitative data along these lines is naturally limited, it suggests at least some degree of disparity between particular industries<sup>114</sup> and categories<sup>115</sup> in terms of antitrust enforcement. This is an increasingly pressing concern, moreover, as United States antitrust law contends with economic globalization. The mere *potential* for vague antitrust laws to be used as a discriminatory weapon

110. If this were not the case, the practice of facial vagueness challenges—attacking the law in *all* possible applications—would not be logically consistent. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 60-64 (1999); *see supra* notes 12-13 and accompanying text.

111. *See, e.g.*, EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION* (2007).

112. *See, e.g.*, Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1444 (1998) (“Knowledge of the decision-makers, familiarity with current enforcement policy, even if unpublished, and access to the agencies play a critical role . . .” (footnotes omitted)).

113. *See, e.g.*, Joshua D. Wright, Commissioner, Fed. Trade Comm’n, Remarks at the Big Ideas Information Lecture on Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC 13-14 (Apr. 2, 2015) [https://www.ftc.gov/system/files/documents/public\\_statements/634631/150402clemons.pdf](https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemons.pdf) [<https://perma.cc/83BM-PC7L>] (observing that “[s]ome sets of producers are simply better organized and more politically connected than others,” and that “regulatory bodies are far more likely to be populated by industry insiders with favorable inclinations towards older and outdated modes of doing business”).

114. *See, e.g.*, MACLOLM B. COATE & SHAWN W. ULRICK, *ECONOMIC ISSUES: TRANSPARENCY AT THE FEDERAL TRADE COMMISSION: THE HORIZONTAL MERGER REVIEW PROCESS 1996-2003*, at 16 (2005), <https://www.ftc.gov/sites/default/files/documents/reports/request-mailed-copy-transparency-federal-trade-commission-horizontal-merger-review-process-1996-2003/0502economicissues-1.pdf> [<https://perma.cc/3QPA-R74M>] (examining merger review data from 1996 to 2003, and concluding that it “suggest[ed] differences in the enforcement regimes faced by the . . . selected industries”).

115. *See, e.g.*, LAWRENCE A. SULLIVAN ET AL., *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 792 (3d ed. 2016) (“A policy bias may also result in abandoning entire categories of antitrust violations . . . . During President Reagan’s two terms, the Antitrust Division devoted almost all of its enforcement resources to two categories: merger enforcement and horizontal violations of Section 1 . . .”).

against foreign exporters may stymie economic accords and treaties<sup>116</sup> and has already generated some degree of tension with respect to China<sup>117</sup> and the European Union.<sup>118</sup>

In brief, the Sherman Act's text, historical pattern of implementation, and judicially-created framework all raise severe concerns as to notice and consistency. Those concerns, on their face alone, may be enough to find the Sherman Act void for vagueness, given modern doctrine. But additional considerations and guiding principles tend to motivate vagueness analysis. Among others, the severity of the statute's penalties, the overlap and tension with constitutionally protected activity, and the presence or absence of a limiting mens rea requirement. As the following three Parts examine, along each of these additional dimensions the Sherman Act's constitutionality is only more suspect.

### III. PENALTIES AND THE SHERMAN ACT

The more severe the penalty, the less vagueness in the law will be constitutionally tolerated. Where a small civil fine is at stake, the courts tend to permit relatively broad and textually open-ended prohibitions. But where more severe sanctions—such as imprisonment—may be applied, the courts tend to demand a high degree of clarity and specificity. Over the years, as the Sherman Act's penalties have been amended and enhanced, the Act has drifted further and further towards the more demanding end of this spectrum. In short, the relatively stiff penalties associated with modern criminal antitrust law—accompanied by the trends that, if anything, have decreased clarity

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116. See, e.g., COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 137 (Richard A. Epstein & Michael S. Greve eds., 2004) ("As [World Trade Organization] agreements progressively reduce tariff barriers, nations are likely to use discriminatory competition laws as a nontariff barrier."); Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 356 (2004) ("Agencies will be tempted to be lenient toward locals and tough on foreigners . . . even if no such double standard is called for in the relevant legislation. . . . Ample evidence suggests that states are, indeed, biased in their application of competition policy.").

117. See, e.g., RICHARD A. EPSTEIN, CTR. FOR THE PROT. OF INTELLECTUAL PROP., CURBING THE ABUSES OF CHINA'S ANTI-MONOPOLY LAW: AN INDICTMENT AND REFORM AGENDA (2014), <https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2014/04/Curbing-the-Abuses-of-Chinas-Anti-Monopoly-Law.pdf> [<https://perma.cc/QHU4-T5PU>]; *Unequal Before the Law?*, ECONOMIST (Aug. 23, 2014), <http://www.economist.com/news/business/21613348-chinas-antitrust-crackdown-turns-ugly-foreign-carmakers-forefront-unequal> [<https://perma.cc/G2JM-5MG3>].

118. See, e.g., D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247, 1257 (2015) (noting a perceived "anti-American bias" in European antitrust enforcement, including empirical findings of "protectionism"); George L. Priest & Franco Romani, *The GE/Honeywell Precedent*, WALL ST. J. (June 20, 2001), <http://www.wsj.com/articles/SB992994589433979465> ("When the European Commission states that politics will be irrelevant to its decision, it means the political efforts of the U.S. and other countries wanting economic progress, not the politics of Rolls-Royces and Thales, which hope for regulatory action to save them from the effects of aggressive competition.").

and definiteness—render it particularly vulnerable to a vagueness challenge.

### A. *Penalties and Vagueness*

As a rule, more process is due when the potential deprivation—life, liberty, or property—is greater.<sup>119</sup> On one end of this continuum, minor civil deprivations—such as a public school suspension—require only a simple, informal hearing.<sup>120</sup> On the other end, in capital criminal cases, defendants must be afforded the highest standard of formal trial procedures.<sup>121</sup> Vagueness challenges, flowering out of due process rights, have taken on the same characteristic:

The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. . . . The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.<sup>122</sup>

In other words, because criminal sanctions may include not only financial penalties, but also “opprobrium,” “stigma,” and “years in prison,” statutes with criminal application are held to a far higher standard of clarity.<sup>123</sup> Purely civil laws, on the other hand, are only rarely held to be void for vagueness.<sup>124</sup>

Even within the criminal and civil categories, vagueness concerns correlate with the severity of potential punishment. A law that “nominally imposes only civil penalties. . . . [M]ay warrant a relatively strict test” if it, for example, additionally relies on and enforces the

119. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (holding that due process guarantees “can vary, depending upon the importance of the interests involved”). See generally Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 16 (2006) (“[D]ue process rights fall on a continuum of greater and lesser deprivations . . .”).

120. See *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

121. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding, more than thirty years before such a right was recognized for all criminal defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that “in a capital case . . . it is the duty of the court . . . to assign counsel”).

122. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

123. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

124. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991); *Arnett v. Kennedy*, 416 U.S. 134, 163-64 (1974); *Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 548-49 (1973); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 590-91 (1967). See generally David W. Gartenstein & Joseph F. Warganz, *RICO’s “Pattern” Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 509-10 (“[V]ery few civil statutes have been struck on vagueness grounds . . .”).

stigma associated with criminal drug activity.<sup>125</sup> And, among criminal statutes, those triggering capital and felony punishment are scrutinized more heavily than ones involving only misdemeanors.<sup>126</sup> In short, as the consequences of inadvertent violations increase for citizens, so does the Court's skepticism of ill-defined legal boundaries.

With that factor in mind, the remainder of this Part looks to the first major vagueness challenge to the Sherman Act and examines how much the statutory penalties have since changed. Although this challenge failed, its precedential value in terms of the Sherman Act's vagueness is severely undermined by the contrast in penalties at issue.

### B. *Nash v. United States*

In *Nash v. United States*,<sup>127</sup> the Court upheld the criminal provisions of the Sherman Act against its first charges of unconstitutional vagueness. *Nash* came on the heels of *Standard Oil Co. of N.J. v. United States*<sup>128</sup> and *United States v. American Tobacco Co.*,<sup>129</sup> two cases credited with narrowing the literal terms of the Sherman Act—prohibiting “every” contract, combination, or conspiracy in restraint of trade—to a prohibition against only “unreasonable” restraints of trade.<sup>130</sup> The defendant, accused of using complex vertical arrangements to fix prices and rig contract bids, argued that this holistic

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125. *Hoffman Estates*, 455 U.S. at 499-500 & n.16 (treating an Illinois ordinance requiring public registration to sell items “designed or marketed for use with illegal . . . drugs” as “quasi-criminal” for purposes of vagueness analysis).

126. See, e.g., Gartenstein & Warganz, *supra* note 124, at 509 (“The degree of scrutiny to which statutes are subjected gradually diminishes as the potential penalty is reduced.”); Jeffrey I. Tilden, Big Mama Rag: *An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1556 & n.68 (1981) (arguing that, in the Court’s vagueness analysis, “due process justifies attention to fairness commensurate with the penalty involved,” and noting in particular the high standard applied in “death penalty cases”); Robert H. Wright, *Today’s Scandal Can Be Tomorrow’s Vogue: Why Section 2(a) of the Lanham Act Is Unconstitutionally Void for Vagueness*, 48 HOW. L.J. 659, 665 (2005) (noting that “the more severe the penalty” among criminal statutes, “the more likely the Court is to invalidate it on void for vagueness”); Stan Thomas Todd, Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 888 (1974) (“Actual application of vagueness doctrine in the context of . . . criminal law has always been a flexible process. The extent of permissible vagueness in each case is a function of . . . the severity of the sanction imposed . . .”).

127. 229 U.S. 373 (1913).

128. 221 U.S. 1 (1911).

129. 221 U.S. 106 (1911).

130. *Id.* at 178-79 (“[I]n the *Standard Oil Case* . . . it was held . . . that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason.”); *Nash*, 229 U.S. at 376 (“Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.”).



reasonableness approach rendered the statute unconstitutionally vague. As the Court stated:

And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. . . . “[T]he criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty” . . . .<sup>131</sup>

The Court rejected the vagueness argument, however, comparing the Sherman Act to other valid matters of degree in criminal law:

But . . . the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. “An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it” by common experience in the circumstances known to the actor. “The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.” . . . If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. If he did no more than drive negligently through a street he might get off with manslaughter or less. And in the last case he might be held although he himself thought that he was acting as a prudent man should.<sup>132</sup>

The Court offered little further elaboration, and its analysis is somewhat puzzling, at least in light of how vagueness doctrine is cast today. As explored broadly in Part II, vagueness is predicated on notice—notice that the conduct in question is prohibited.<sup>133</sup> This kind of notice is independent of “intending” or “foreseeing” physical cause and effect. That is, a person may or may not intend to kill when they drive wildly, but it is almost certain that they know, as a matter of background information, that killing another person is illegal. The Court’s analysis thus conflates tolerating prosecution of an imprudent person who misappraises the riskiness of their actions with tolerating prosecution of a prudent person who misappraises the illegality of their conduct.

This odd side-step recurs multiple times in the Court’s historical treatment of vagueness cases. That trend, and its interaction with antitrust law specifically, is addressed in detail in Part V’s discussion

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131. *Nash*, 229 U.S. at 376-77 (citing *Tozer v. United States*, 52 F. 917, 919 (E.D. Mo. 1892)).

132. *Id.* at 377 (citations omitted).

133. *See supra* notes 7-13 and accompanying text.

of mens rea. The remainder of this Part is instead dedicated to briefly highlighting how sharply the Sherman Act's penalties have increased since *Nash*. Even assuming no other changes in doctrine, the sheer magnitude of difference between the Sherman Act then and the Sherman Act now clearly precludes reliance on *Nash* as precedential authority with which to defeat a vagueness challenge.

### C. *The Sherman Act Today*

"Although most enforcement actions are civil, the Sherman Act is also a criminal law," enforced with severe penalties.<sup>134</sup> Originally, violations of the Act were "misdemeanor[s]," punishable "by fine not exceeding five thousand dollars," by "imprisonment not exceeding one year," or both.<sup>135</sup> *Nash*, decided in 1913, involved these relatively small stakes. However, after multiple enhancing amendments in 1955,<sup>136</sup> 1974,<sup>137</sup> and 1990,<sup>138</sup> criminal violations of the Sherman Act now constitute felonies exclusively, punishable by up to ten years imprisonment and one million dollars in fines.<sup>139</sup>

These criminal penalties, moreover, are far from dead letter. Even without further legislative enhancement or expansion, criminal antitrust prosecution by the DOJ has increased steadily since the 1990s: the average number of individuals sentenced to prison per year has doubled, and the average prison sentence received has tripled.<sup>140</sup> A majority of those sentenced under the Sherman Act receive prison time.<sup>141</sup> And the reliance of the DOJ on incarceration for antitrust offenses does not appear to be changing anytime soon.<sup>142</sup> In short, the potential deprivation of liberty and property at

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134. *The Antitrust Laws*, *supra* note 104.

135. 26 Stat. 209 (1890).

136. 69 Stat. 282 (1955).

137. 88 Stat. 1708 (1974).

138. 104 Stat. 2880 (1990).

139. 15 U.S.C. §§ 1, 2. Using CPI data to adjust for inflation, this constitutes up to a ten-fold increase in monetary penalties in real-dollar terms.

140. *Criminal Program Update 2015*, DEPT OF JUSTICE, ANTITRUST DIV., <https://www.justice.gov/atr/division-update/2015/criminal-program-update> [<https://perma.cc/EC2B-CQJ6>].

141. U.S. SENTENCING COMM'N, 2013 ANNUAL REPORT, at tbl.12, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table12.pdf> [<https://perma.cc/44VB-QGQL>].

142. Brent Snyder, Deputy Assistant Att'y Gen., Dep't of Justice, Antitrust Div., Remarks on Individual Accountability for Antitrust Crimes 3 (Feb. 19, 2016), <https://www.justice.gov/opa/file/826721/download> [<https://perma.cc/X4HV-BP2T>] ("This emphasis on individual accountability is fundamental to Antitrust Division prosecutors. The Division has long touted prison time for individuals as the single most effective deterrent to the 'temptation to cheat the system and profit from collusion.'").

stake is significant—and vagueness concerns are therefore particularly pressing.<sup>143</sup>

To be clear, the severity of punishment at issue is only one factor among many in vagueness analysis. But coupled with the already significant shortcomings of the Sherman Act's text and application in terms of notice and consistency, the repeated penalty increases have made the Act's constitutionality more precarious. Broadening the analysis further, the next Part addresses a separate, though related vagueness concern: the Sherman Act's increasing tension with constitutionally protected activity.

#### IV. CONSTITUTIONALLY PROTECTED ACTIVITY AND THE SHERMAN ACT

Distinct from the severity of penalties imposed, vagueness concerns are also magnified when the proscribed conduct borders—or overlaps—with constitutionally protected activity. Laws implicating First Amendment rights, in particular, are frequently subject to an exacting vagueness analysis. As applied and interpreted today, the Sherman Act exhibits much greater tension with constitutionally protected freedoms, including First Amendment speech, than it once did. This tension has manifested itself both directly—ranging from boycotts and information exchanges to lobbying and lawsuits—as well as indirectly, via second-order effects on growing information and communication markets. Accordingly, any modern vagueness analysis of the Sherman Act would be subject to these particularly strict standards.

##### A. *Constitutionally Protected Activity and Vagueness*

Where the conduct at issue itself implicates constitutional concerns, vagueness can be particularly detrimental—and courts apply a more demanding analysis as a result.<sup>144</sup> In *Colautti v. Franklin*, for

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143. Although a full international analysis is beyond the scope of this Article, it is worth drawing a brief comparison to the United Kingdom's competition laws. Cartelization, for example, was long a civil-only offense. When the relevant laws were enhanced in 2002 to include criminal penalties, a heightened mens rea requirement was added as well. See Enterprise Act 2002 §§ 188-202. That mens rea requirement was later slightly weakened but supplemented by textually explicit safe harbor and defense provisions, such as disclosing the joint arrangement to customers. See COMPETITION & MARKETS AUTHORITY, CARTEL OFFENCE PROSECUTION GUIDANCE 3-4 (2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288648/CMA9\\_Cartel\\_Offence\\_Prosecution\\_Guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9_Cartel_Offence_Prosecution_Guidance.pdf) [<https://perma.cc/TM85-B4UT>]. The Sherman Act's multiple penalty enhancements, in contrast, were not accompanied by any such offsets.

144. See, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.”); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961) (“The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates

example, the Supreme Court found a Pennsylvania statute requiring “every person who performs or induces an abortion to make a determination, ‘based on his experience, judgment or professional competence,’ that the fetus is not viable” impermissibly vague.<sup>145</sup> In so doing, the Court noted that the adverse effects of vagueness are especially strong “where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights,”<sup>146</sup> nodding to the protections set forth in *Roe v. Wade*.<sup>147</sup> Likewise, in *Kolender v. Lawson*, the Court invalidated a California statute requiring “persons who loiter or wander on the streets to provide a ‘credible and reliable’ identification and to account for their presence when requested by a peace officer.”<sup>148</sup> Again, the Court highlighted the fact that the statute in question “implicate[d] consideration of the constitutional right to freedom of movement.”<sup>149</sup>

First Amendment concerns are a particularly frequent trigger for this type of enhanced scrutiny. The Court has found a number of statutes implicating freedoms of speech and press,<sup>150</sup> as well as assembly and association,<sup>151</sup> void for vagueness—always highlighting the added danger of chilling constitutionally protected activity:

If the line drawn by the decree between the permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. . . . These freedoms are deli-

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to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.”). See generally Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revised*, 30 AM. J. CRIM. L. 279, 284 (2003) (noting that vagueness concerns are “especially significant when the behavior is constitutionally protected, such as performing abortions or engaging in protected speech”); Karen A. Goldman & Montgomery K. Fisher, *The Constitutionality of the “Other Serious Deviation from Accepted Practices” Clause*, 37 JURIMETRICS J. 149, 156 (1997) (“[L]aws that might inhibit the exercise of constitutionally protected rights are generally subject to the most stringent examination for vagueness . . .”).

145. *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (internal quotation marks omitted).

146. *Id.* at 386-91; see also *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 451 (1983) (invalidating as vague part of an Ohio statute requiring that physicians “insure that the remains of the unborn child are disposed of in a humane . . . manner”). Unlike other parts of the *Akron* decision, the vagueness analysis was not disturbed by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

147. 410 U.S. 113 (1973).

148. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

149. *Id.* at 358 (citing *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

150. See, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-73 (1997); *Smith v. Goguen*, 415 U.S. 566, 578 (1974); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Winters v. New York*, 333 U.S. 507 (1948).

151. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

cate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.<sup>152</sup>

That is, the Court has held that the mere existence of a vague statute curtails expression—even expression that might not ultimately be found to violate the statute—because “only . . . those hardy enough to risk criminal prosecution to determine the proper scope of regulation” will fully exercise their rights.<sup>153</sup>

It is worth noting that vagueness doctrine operates separate and distinct from “overbreadth doctrine”—a line of analysis unique to First Amendment jurisprudence:

The city correctly points out that imprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when “judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).<sup>154</sup>

As outlined in the following Sections, the Sherman Act exhibits substantial overlap and tension with First Amendment protections, making an overbreadth challenge at least hypothetically possible. A full, separate overbreadth analysis is, however, beyond the scope of this Article. The implications for vagueness analysis are clear: the Sherman Act is particularly suspect.

### B. National Dairy Products Corporation v. United States

Fifty years after *Nash*, *United States v. National Dairy Products Corp.*<sup>155</sup> brought a new vagueness challenge to the antitrust laws. Somewhat inadvertently, it also provides the Supreme Court’s only explicit foray, however brief, into the intersection of antitrust, vagueness, and constitutionally protected activity. In *National Dairy*, the defendants were accused of engaging in predatory pricing—defined as selling at “unreasonably low prices for the purpose of de-

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152. *NAACP v. Button*, 371 U.S. 415, 432, 433 (1963). See generally Gartenstein & Warganz, *supra* note 124, at 513 n.177 (collecting subsequent cases); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969) (analyzing the first vagueness cases to explicitly contemplate a “chilling effect”).

153. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

154. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (footnotes omitted).

155. 372 U.S. 29 (1963).

stroying competition or eliminating a competitor”—in violation of the Robinson-Patman Act.<sup>156</sup> In district court, they successfully moved for dismissal of the indictment on the ground that the law’s prohibition on “unreasonably low prices” was unconstitutionally vague.<sup>157</sup>

On direct appeal, the Supreme Court disagreed, and reversed the district court’s decision. In particular, the Court noted that prior cases applying the Robinson-Patman Act—and even the Sherman Act—had long established the illegal nature of defendant’s particular conduct.<sup>158</sup> Moreover, due to the defendants’ citations to multiple First Amendment vagueness cases in its brief,<sup>159</sup> the Court also went on to distinguish the conduct at issue in this case from those higher-scrutiny types of cases:

In this connection we also note that the approach to “vagueness” governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute “on its face” because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. . . . The reliance . . . on First Amendment cases is therefore misplaced.<sup>160</sup>

This brief paragraph offers the only explicit commentary from the Court on antitrust vagueness vis-à-vis the First Amendment, but it may be tied to a broader historical trend. That is, when the Court labels a statute as “purely economic”—as opposed to encompassing constitutionally protected conduct—it comfortably applies a less searching vagueness inquiry.<sup>161</sup> Although the Court has never explicitly labeled the Sherman Act as “purely economic,” the suggestion that it and the other antitrust laws are “directed only at conduct designed to destroy competition” is quite close and might reasonably lead one to believe that a lax vagueness analysis applies to the

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156. Pub. L. No. 74-692, 49 Stat. 1528 (codified at 15 U.S.C. § 13(a)). The Robinson-Patman Act was an amendment and addition to the Clayton Act. *See generally supra* note 2 (explaining and comparing the scope of each of the antitrust statutes).

157. *Nat’l Dairy Prods. Corp.*, 372 U.S. at 31. The motion was granted orally, and no opinion below was rendered. *See* Brief for the United States, *Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 1961 WL 102236, at \*1.

158. *Nat’l Dairy Prods. Corp.*, 372 U.S. at 33-35.

159. *See* Brief for Appellees, *Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 1962 WL 115429 (citing, for example, *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

160. *Nat’l Dairy Prods. Corp.*, 372 U.S. at 36 (citations omitted).

161. *Smith v. Goguen*, 415 U.S. 566, 573 n.10 (1974); *see also* Jennifer Lee Koh, *Criminalization and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1138 (observing that the Court “appl[ies] a less rigorous vagueness analysis” to purely economic regulations); Sohoni, *supra* note 6, at 1189 (“In the decades following the New Deal, it became uncontroversial to announce that ‘purely economic regulation’ was subject to a less stringent vagueness standard.”).



Sherman Act.<sup>162</sup> As the next Section explores, however, “constitutionally protected” and “socially desirable” activities frequently lie in the Sherman Act’s path as well; the “purely economic” label simply could not stick today.

### C. *The Sherman Act Today*

The underlying view in *National Dairy* that the antitrust laws do not implicate constitutionally protected activity is antiquated at best, particularly with respect to the Sherman Act. Even prior to *National Dairy*, jurists recognized the clear interplay between the Sherman Act and speech. In *American Column & Lumber Co.*, for example, a dissenting Justice Holmes commented on the ramifications of the majority’s holding that section 1 prevents sellers from sharing price information:

I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable. It prohibits the distribution of stock, production, or sales reports, the discussion of prices at association meetings, and the exchange of predictions of high prices. . . . I cannot believe that the fact, if it be assumed, that the acts have been done with a sinister purpose, justifies excluding mills in the backwoods from information . . . .<sup>163</sup>

The Court’s opinion shortly thereafter in *Maple Flooring Manufacturers Ass’n v. United States*, seemingly minimizing *American Column*, echoed this theme:

Persons who unite in gathering and disseminating information in trade journals and statistical reports . . . are not engaged in unlawful conspiracies in restraint of trade . . . for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information.<sup>164</sup>

This back-and-forth would prove to be prescient of future Sherman Act decisions crafting a fine line between permissible and impermissible information exchange, a recurring theme in the jurisprudence.<sup>165</sup> Meanwhile, the Court has increasingly recognized that the “sale, disclosure, and use of” commercial information is, in fact, speech protected by the First Amendment—rejecting the notion that

162. *Nat’l Dairy Prods. Corp.*, 372 U.S. at 36.

163. *Am. Column & Lumber Co.*, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting).

164. *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 584 (1925).

165. *Compare* *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) (treating information exchange as price fixing, and therefore a Sherman Act violation per se), *with* *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) (treating information exchange as conduct within the rule of reason). For a more recent example of information exchange as potentially triggering criminal liability, see *United States v. Airline Tariff Publishing Co.*, No. 92-2854 (SSH), 1994 WL 502091 (D.D.C. Aug. 10, 1994).

such information is “a mere ‘commodity’ with no greater entitlement to First Amendment protection than ‘beef jerky.’ ”<sup>166</sup> These two trends, taken together, render *National Dairy*’s suggestion that no constitutionally protected or socially desirable conduct would be at issue under the Sherman Act particularly suspect.

The case law governing boycotts provides another direct link between the Sherman Act and the First Amendment. As noted earlier,<sup>167</sup> although *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*<sup>168</sup> and *Federal Trade Commission v. Superior Court Trial Lawyers Ass’n*<sup>169</sup> are in some tension, the holding that the Sherman Act prohibits at least some boycotts remains clear. At the same time, the Court has recognized that the First Amendment generally protects boycotts:

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, “though not identical, are inseparable.” Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.

. . . .

[T]he petitioners clearly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign.<sup>170</sup>

Hence, as with the rules governing information exchange, a fine line now separates constitutionally protected and illegally anti-competitive boycott activity.<sup>171</sup> As the Court itself has recognized, “[e]xactly what types of activity fall within the forbidden category is, however, far from certain.”<sup>172</sup> As a result, there is a clear risk of “chilling effect[s]” due to the “imprecise contours” of antitrust boycott doctrine.<sup>173</sup>

In at least one instance, the tension between the First Amendment and the Sherman Act has been so direct as to necessitate a judicially-created bright-line carveout. Specifically, the Supreme Court has established that the First Amendment’s protection of the right to petition grants presumptive immunity from liability under the antitrust laws for “attempts to influence the passage or enforcement of

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166. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 570 (2011).

167. See *supra* notes 85-87 and accompanying text.

168. 472 U.S. 284 (1985).

169. 493 U.S. 411 (1990).

170. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 914 (1982) (citations omitted).

171. See generally *Lemley & Leslie*, *supra* note 81, at 1229-31.

172. *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 294.

173. *Beschle*, *supra* note 84, at 421.

laws.”<sup>174</sup> This immunity applies even when a suit is brought with overtly anticompetitive intent,<sup>175</sup> so long as it is not an “objectively baseless” sham.<sup>176</sup> But this narrow exception does little to relieve the tension overall. In all other cases, it would not alter the typical Sherman Act analysis at all—a detailed, fact-intensive inquiry in- to economic motivation and effects.<sup>177</sup>

Moving beyond direct implication of speech, it is worth taking into account the Sherman Act’s second-order effects on information and communication markets *as* markets. Whether directed at old media (such as the Associated Press’s news<sup>178</sup>) or new (such as Google’s search results<sup>179</sup>), antitrust law necessarily implicates and affects speech insofar as it imposes regulation. To be clear, this is not precisely the same as a chilling effect—here, the user or original author is one step removed from antitrust scrutiny, and hence not incorporating the threat of antitrust penalties into their decision to exercise speech. But the First Amendment concerns are analogous: if the threat of antitrust prosecution “chills” the ownership or creation of *platforms* for speech, downstream users are no less marginalized or curtailed in their speech. This is perhaps most directly embodied by the proposals<sup>180</sup> (and attempts<sup>181</sup>) to

174. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

175. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.”).

176. *Profl Real Estate Inv’rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993).

177. *Compare Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (finding no boycott-based Sherman Act violation), *with* *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (finding a boycott-based Sherman Act violation). *See generally* Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 50 (2015) (arguing that “the First Amendment has never been successfully invoked to modify antitrust assessment” outright, with *Noerr-Pennington* as the “one exception”).

178. *Associated Press v. United States*, 326 U.S. 1 (1945).

179. *Compare* Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 884 (2012) (arguing that Google’s search results would be exempt from Sherman Act scrutiny), *with* Kurt Wimmer, *The Proper Standard for Constitutional Protection of Internet Search Practices* (Jan. 17, 2014), <http://www.mediainstitute.org/mediacompolicy/wp-content/uploads/2012/06/First-Amendment-Issues-in-Search-and-Antitrust-6-2.pdf> [<https://perma.cc/BEQ8-U54W>] (reaching the opposite conclusion).

180. *See, e.g.*, Aleksandra Gebicka & Andreas Heinemann, *Social Media & Competition Law*, 37 WORLD COMPETITION 149 (2014); Lisa P. Goldstein et al., *Antitrust in High-Tech Industries*, 19 GEO. MASON L. REV. 1071, 1079-87 (2012); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015); Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771 (2012).

181. *See, e.g.*, *Facebook, Inc. v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025 (N.D. Cal. 2012).

bring antitrust law to bear on concentrations of social networking media. But it encompasses even prosaic platforms as well. In *Craftsmen Limousine, Inc. v. Ford Motor Co.*, for example, the court needed to determine whether the decision of several trade publications to not publish certain advertisements was truly anticompetitive, or merely motivated by a desire to project a certain “image” of the “industry as a whole.”<sup>182</sup>

These examples all highlight not only the interplay between constitutionally protected activity and the Sherman Act, but also the extent to which that interplay is fraught with ambiguity. Bright-line carveouts are minimal and narrow; the answers to questions of liability are complex, shifting, and case-specific. The second-order effects on information and communication markets are less concretely defined, but at a minimum further undermine the dated notion that the Sherman Act does not impact constitutionally protected activity. Accordingly, the Sherman Act today would be subject to a particularly high standard of clarity and consistency—one that it cannot meet for all the reasons given thus far. With those shortcomings in mind, the following Part turns to one last factor in vagueness analysis: scienter.

## V. MENS REA AND THE SHERMAN ACT

In addition to the penalties at stake and the conduct at issue, whether or not the law incorporates a requirement of mens rea strongly influences vagueness analysis. The courts tend to view these scienter constraints—the need for a guilty mind—as not only narrowing the statute’s scope, but also undermining any claim that the law has simply trapped the unwary or uninformed. Conversely, statutes without mens rea requirements are held to a much greater standard of clarity. In the most recent vagueness challenge to the Sherman Act, the Supreme Court created a mens rea requirement as a matter of constitutional necessity. As this Part examines, however, that requirement has been hollowed out in practice to the point of being moot—where it has not been eliminated explicitly.

### A. *Mens Rea and Vagueness*

The Supreme Court “has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.”<sup>183</sup> In *Screws v. United States*, Justice Douglas provided perhaps the most explicit rationale for this close relation:

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182. *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 393 (8th Cir. 2007), cert. denied, 552 U.S. 1040 (2007).

183. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (emphasis omitted).

The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.<sup>184</sup>

Put differently, the Court has reasoned that the inclusion of a mens rea requirement reduces the likelihood of an individual being subject to penalty without notice, thereby mitigating the due process concerns associated with vagueness.<sup>185</sup>

Conversely, when no such mens rea requirement can be found in the statute at issue, the Court's examination becomes quite strict. The opinion in *Colautti v. Franklin* is once again illustrative; there, "[b]ecause of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable," the Court found the statute in question to be "little more than 'a trap for those who act in good faith.'" <sup>186</sup> A requirement of mens rea, in the Court's eye, would have helped to counterbalance "the uncertainty of the viability determination itself":

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184. *Screws v. United States*, 325 U.S. 91, 101-02 (1945) (citations omitted).

185. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) ("And the knowledge requirement of the statute further reduces any potential for vagueness . . ."); *Killing v. United States*, 561 U.S. 358, 412 (2010) (noting that mens rea "blunts any notice concern[s]"); *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns."); *Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("[T]he [vagueness] concern is ameliorated by the fact that § 18-9-122(3) contains a scienter requirement. The statute only applies to a person who 'knowingly' approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling."); see also Bradley E. Abruuzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 364 (2012) ("[I]f the same law overlays a mens rea or scienter requirement, said liability only attaches when the defendant can be faulted for the transgression, perhaps for acting negligently, recklessly, willfully, or with full knowledge that he or she was within the forbidden zone."); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 80 (2014) ("[A] criminal statute that includes a[n] . . . intent (or mens rea) requirement is less likely to encompass morally innocent conduct, and so more likely to accord with people's intuitions about what conduct is illegal.").

186. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (quoting *United States v. Ragen*, 314 U.S. 513, 524 (1942)).

As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all.<sup>187</sup>

Numerous commentators have noted the logical flaws in using mens rea as a replacement for actual notice through clarity. In brief, having the intent to perform a certain action or achieve a certain result is not coterminous with having the intent to violate the law itself.<sup>188</sup> For example, if a road has no speed limit signs posted, one may fully intend to drive sixty miles per hour—but that says little about whether there was adequate notice that the speed limit was actually fifty miles per hour.<sup>189</sup>

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187. *Id.* at 395-96 (footnote omitted).

188. See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting) ("[T]he knowledge requisite to [a] knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense."); GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY 187 (Laura Pineschi ed. 2015) (arguing that "knowledge of the criminality of the conduct . . . should be the correct focus" for mens rea to actually ameliorate vagueness concerns); Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 7 (1997) ("[T]his rule makes sense only if the requirement is that the defendant knew or should have known he was behaving unlawfully. Any other mens rea requirement, even that the defendant specifically intended to do the conduct . . . would give no guarantee that the defendant had fair warning that the conduct was a crime." (footnote omitted)); Gartenstein & Warganz, *supra* note 124, at 514 n.194 ("A finding of scienter should not cure a notice problem, because it does not show that the defendant knew . . . what conduct was prohibited by the statute."); Lockwood, *supra* note 13, at 413 ("[W]hen a court uses a mens rea requirement as a substitute for notice, the court dilutes the fair notice requirement because a scienter requirement in the law does not guarantee that the law is clearly written."); Sohoni, *supra* note 6, at 1194 ("Logically speaking, mens rea and clarity are apples and oranges . . . . The presence of a mens rea requirement in a criminal statute cannot make otherwise unclear statutory language clear as to what it prohibits."); Mario Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 440 (2012) ("Given the divided state of case law, it is not clear if intent to record police would constitute intent to exercise a constitutional right. This mens rea probably does not provide fair warning to a reasonable citizen-recorder acting in good faith."); Maureen L. Rurka, Comment, *The Vagueness of Partial-Birth Abortion Bans: Deconstruction or Destruction?*, 89 J. CRIM. L. & CRIMINOLOGY 1233, 1253-54 (1999).

189. If anything, one might reasonably infer a lack of knowledge of that fact, if one assumes that most people endeavor to comply with the law.



The only situation in which this logical gap is closed is where the mens rea requirement is the intent to break the law itself. The laws governing federal tax fraud provide such an example. Under 26 U.S.C. §§ 7201 and 7203, governing failure to file an income tax return and attempting to evade income taxes, respectively, the defendant must have actually known that his or her conduct was illegal:

In this case, if [the defendant] asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

. . . .

It was therefore error to instruct the jury to disregard evidence of [the defendant's] understanding that, within the meaning of the tax laws, he was not a person required to file a return or to pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.<sup>190</sup>

Tax fraud is not alone in this regard.<sup>191</sup> The defendant's knowledge of the law itself is a prerequisite to criminally prosecute, for example, bank deposit structuring,<sup>192</sup> food stamp misuse,<sup>193</sup> copyright violations,<sup>194</sup> and even obstruction of justice.<sup>195</sup>

Nevertheless, an unbroken thread of Supreme Court precedent stretching back almost one hundred years confirms that mens rea still provides a strong defense against vagueness challenges—even mens rea short of knowledge that the conduct is illegal.<sup>196</sup> This Arti-

190. *Cheek v. United States*, 498 U.S. 192, 202, 203 (1991).

191. See generally Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 131 & n.21 (2009) (collecting cases).

192. 31 U.S.C. § 5324 (2012); see *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994) (“In light of these examples, we are unpersuaded by the argument that structuring is so obviously ‘evil’ or inherently ‘bad’ that the ‘willfulness’ requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring.”).

193. 7 U.S.C. § 2024 (2012); see *Liparota v. United States*, 471 U.S. 419, 426 (1985) (holding that a “knowledge-of-illegality requirement” applies to 7 U.S.C. § 2024).

194. 17 U.S.C. § 506(a)(1) (2012). Although the Supreme Court has not weighed in on the issue, “[a] majority of the courts have interpreted [§ 506(a)(1)] to mean that the government must show that the defendant specifically intended to violate copyright law.” Lisa Andrukonis et al., *Intellectual Property Crimes*, 53 AM. CRIM. L. REV. 1459, 1489 & nn.263-64 (2016); see, e.g., *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 143 (2d Cir. 2010); *Danjaq, LLC v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir. 2001); *United States v. Manzer*, 69 F.3d 222, 227 (8th Cir. 1995); *United States v. Heilman*, 614 F.2d 1133, 1137 (7th Cir. 1980).

195. 18 U.S.C. § 1512 (2012); see *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005) (requiring “consciousness of wrongdoing” to convict under 18 U.S.C. § 1512).

196. See, e.g., *Harris v. McRae*, 448 U.S. 297, 311 n.17 (1980) (“[T]he Hyde Amendment is not void for vagueness because . . . [it] contains a clear scienter requirement under which good-faith errors are not penalized . . . .”); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952) (“The statute punishes only those who knowingly violate the Regula-

cle, accordingly, assumes that the doctrinal thread remains good law. Though keeping the aforementioned logical flaws in mind, the following Sections instead examine the Sherman Act's mens rea requirement as created by the Court and analyze whether that requirement remains legally operative and practically salient.

### B. United States v. U.S. Gypsum Company

Only fifteen years after *National Dairy*, *United States v. U.S. Gypsum Co.*<sup>197</sup> would provide the next key vagueness challenge to the Sherman Act and the Supreme Court's most recent holding on that issue. Once again, the Court did not find the challengers' arguments persuasive, but this time, on more curious grounds, the Sherman Act's mens rea requirement. To be clear, the text of the Sherman Act does not include a mens rea requirement; on its face, there is no language addressing or referring to intent, knowledge, recklessness, or negligence. Nevertheless, the *Gypsum* Court read a mens rea requirement into the Sherman Act, finding it necessary in order to save the Act against the claim of vagueness.

The *Gypsum* defendants were accused of using "interseller price verification"—that is, "the practice of telephoning a competing manufacturer to determine the price being currently offered . . . to a specific customer"—in order to ensure matching cartel prices at a fixed level.<sup>198</sup> The Court took issue with the jury instructions given by the trial court, which charged: "[I]f the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, *as a matter of law*, to have intended that result."<sup>199</sup> The Court rejected this essentially "strict-liability" approach, due explicitly to the considerable ambiguity in the Act:

The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the "rule of reason" have been applied to broad classes of conduct

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tion. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502-03 (1925) ("[S]ince the statutes require a specific intent to defraud . . . the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement."); *Omaechevarria v. Idaho*, 246 U.S. 343, 348 (1918) ("Furthermore, any danger . . . which might otherwise arise from indefiniteness, is removed by § 6314 . . . which provides that . . . 'there must exist a union, or joint operation, of act and intent, or criminal negligence.'").

197. 438 U.S. 422 (1978).

198. *Id.* at 422.

199. *Id.* at 434 (internal quotation marks omitted).

falling within the purview of the Act's general provisions. Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a "generality and adaptability comparable to that found to be desirable in constitutional provisions."<sup>200</sup>

Due to the Sherman Act's ambiguity, the Court explained, there was a significant risk of punishing "good-faith error[s] of judgment," in turn leading to "overdeterrence" of "socially acceptable and economically justifiable business conduct."<sup>201</sup> The solution the Court found was to read into the Act an otherwise absent mens rea requirement: "[W]e conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the anti-trust laws."<sup>202</sup>

The *Gypsum* Court's decision to create a mens rea requirement in the Sherman Act was not, it should be emphasized, based on the text of the Act itself. To reiterate, the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."<sup>203</sup> And "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony," without mention or reference to state of mind.<sup>204</sup> The Court's decision, moreover, contravened the Act's legislative history as well. After the addition of a mens rea requirement to Senator Sherman's original bill by the Finance Committee, the change was heavily criticized in debate for allegedly making it "impossible . . . to produce a conviction."<sup>205</sup> The mens rea requirement was, accordingly, later specifically removed.<sup>206</sup> The *Gypsum* Court does not discuss this or any aspect of the Sherman Act's legislative history. Absent either a textual or legislative hook, the Court's decision appears to rely wholly, yet implicitly, on the interpretive

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200. *Id.* at 438-39 (citations omitted) (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933)).

201. *Id.* at 441. In its analysis, the Court found its prior decisions—ones more dismissive of vagueness concerns—unpersuasive to the contrary. *Id.* at 439 (discussing *Nash v. United States*, 229 U.S. 373 (1913)).

202. *Gypsum*, 438 U.S. at 444.

203. 15 U.S.C. § 1 (2012).

204. *Id.* (emphasis added).

205. 21 CONG. REC. 1767 (1890); see S. 1, 51st Cong. § 1 (as reported by Sen. Sherman, Jan. 14, 1890) (criminalizing arrangements made "with the intention to prevent full and free competition" (emphasis omitted)).

206. See S. 1, 51st Cong. § 1 (as proposed by Sen. Sherman, Mar. 18, 1890) (criminalizing arrangements made "which tend to prevent full and free competition").

canon of avoiding unconstitutionality.<sup>207</sup> Put differently, the lengths to which the Court was willing to go to create a mens rea requirement indicates just how vulnerable the Sherman Act otherwise was to a vagueness challenge at the time. It thus appears fair to say that the Sherman Act—at least in its 1978 iteration and implementation—could not have survived a vagueness challenge without that mens rea requirement.<sup>208</sup>

*Gypsum*, of course, involved a less severe iteration of the Sherman Act than its contemporary form—to wit, like in *Nash*, the *Gypsum* defendants were risking only misdemeanor convictions.<sup>209</sup> The Court has not addressed whether the mens rea requirement should accordingly be higher for the felony convictions now possible under the Act. Indeed, it remains questionable whether *any* mens rea level would be sufficient to save the criminal application of the Sherman Act given its increased penalties and increased contact with constitutionally protected activity over the past four decades.<sup>210</sup> The following Section tackles a somewhat narrower, and in many ways simpler, inquiry instead: to what extent is the mens rea requirement that *was* created to save the Sherman Act still functional or operative?

### C. *The Sherman Act Today*

Whereas the mens rea requirement set forth by *Gypsum* may have ameliorated vagueness concerns at the time, its effect has since been significantly limited in two key respects. First, the mens rea requirement does not apply to per se violations—a category which, as discussed in Part II, has become significantly blurred. Second, actually implementing the mens rea requirement for offenses governed by the rule of reason has proved impracticable, circular, and vacuous.

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207. See generally Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (explaining the history and practical use of the canon of avoiding unconstitutionality).

208. Indeed, the Court's approach in *Gypsum* may be contrasted directly with the Court's discussion of scienter as a *textual* requirement in the Robinson-Patman Act in *National Dairy*:

Finally, we think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. . . . The Act here . . . listed as elements of the illegal conduct not only the intent to achieve a *result*—destruction of competition—but also the *act*—selling at unreasonably low prices—done in furtherance of that design or purpose. It seems clear that the necessary specificity of warning is afforded when, as here, separate, though related, statutory elements of prohibited activity come to focus on one course of conduct.

United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 35 (1963).

209. See *supra* notes 136-38 and accompanying text.

210. See *supra* Parts III & IV.

On the first point, every circuit to address the question has explicitly narrowed *Gypsum*'s mens rea requirement to rule-of-reason cases.<sup>211</sup> While the Supreme Court has never endorsed this approach outright, it has rejected certiorari on all such cases. As the Second Circuit explained:

Since the *per se* rule makes certain conspiracies illegal without regard to their actual effects on trade, it would be illogical to refuse to allow a jury to consider whether the defendant's acts had resulted in an unreasonable restraint, on the one hand, and then require it to find the specific intent to produce those effects, on the other. *Where per se conduct is found . . . a requirement that intent . . . envision actual anti-competitive results would reopen the very questions of reasonableness which the per se rule is designed to avoid.*<sup>212</sup>

But given the aforementioned blurring between *per se* and rule-of-reason offenses, this limitation placed on *Gypsum*'s holding is no longer justifiable. That is, to the extent courts engage in rule-of-reason analysis as a step-zero inquiry on *per se* cases,<sup>213</sup> the "questions of reasonableness" are already open; it is inconsistent at best to not extend that inquiry to the matter of intent as well. Moreover, given the DOJ's policy of pursuing criminal charges only for *per se* offenses,<sup>214</sup> cabining application of the mens rea requirement to rule-of-reason cases generates a truly counterintuitive result: intent needs to be proved in *civil* cases only. Because vagueness concerns scale with the severity of punishment at issue—particularly between criminal and civil penalties<sup>215</sup>—this narrowing of *Gypsum*'s mens rea requirement largely undermines whatever vagueness-mitigating effect it might have had.

Even if the mens rea requirement were extended to *per se* offenses, however, that would do little to resolve vagueness concerns in practice. The "knowledge" requirement implemented by *Gypsum* is inherently fraught given the nature of competitive markets. As the *Gypsum* Court stated:

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211. *United States v. Koppers Co.*, 652 F.2d 290, 295 n.6 (2d Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979), *cert. denied*, 444 U.S. 866 (1979); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1162 (4th Cir. 1986); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979); *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 449-50 (10th Cir. 1984); *United States v. Giordano*, 261 F.3d 1134, 1143 (11th Cir. 2001).

212. *Koppers*, 652 F.2d at 296 n.6 (emphasis added).

213. *See supra* Section II.B.2.

214. *See supra* Section II.B.3.

215. *See supra* Section III.A.

Our question . . . is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the “conscious object” of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow.<sup>216</sup>

The Court decided on the latter, creating the mens rea requirement of knowledge of probable “anticompetitive effects.” “[A]nticompetitive effects,” in turn, typically refers to “increased prices and decreased output”<sup>217</sup>—the classic economic markers of a more monopolistic equilibrium.

But focusing on effects is myopic; participants in a competitive market always seek these effects, directly or otherwise. That is, an economically rational company always wants to generate the greatest possible profit,<sup>218</sup> and the profits associated with being a monopolist are, all else being equal, greater than competitive-market profits due precisely to reduced output and increased price.<sup>219</sup> The end goal of a greater market share and fewer competitors are, therefore, universally desirable—only the means taken to that end may be feasibly distinguished. Judge Learned Hand recognized this tension early on, in *United States v. Aluminum Co. of America*:

A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, *the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.<sup>220</sup>

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216. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978).

217. *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992); see, e.g., *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011) (“Injury to competition ‘is usually measured by a reduction in output and an increase in prices in the relevant market.’” (emphasis omitted)); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) (“Anticompetitive effects include increased prices [and] reduced output . . .”).

218. See, e.g., R. PRESTON MCAFEE & TRACY R. LEWIS, *INTRODUCTION TO ECONOMIC ANALYSIS* 107 (2009) (“The basic theory of the firm regards the firm as a mechanism . . . for transforming materials into valuable goods and to maximize profits.”).

219. See, e.g., WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 224 (10th ed. 2008); N. GREGORY MANKIW & MARK P. TAYLOR, *ECONOMICS* 301 (2006); SAMPAT MUKHERJEE, *MODERN ECONOMIC THEORY* 426 (4th ed. 2002); TIBOR SCITOVSKY, *WELFARE & COMPETITION: THE ECONOMICS OF A FULLY EMPLOYED ECONOMY* 381-85 (2013).

220. 148 F.2d 416, 430 (2d Cir. 1945) (emphasis added). *Finis opus coronat* means “[t]he end crowns the work.” *Finis Coronat Opus*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/finis%20coronat%20opus> [<https://perma.cc/7VFT-8XDK>].



Put more directly, if the culpable state of mind is defined as knowing that one's conduct will shut down or exclude a competitor, paving the way to restricting output and increasing price, that does nothing to limit the practical application of the Sherman Act:

Almost all evidence bearing on "intent" tends to show both greed-driven desire to succeed and glee at a rival's predicament. . . . [D]rive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often *is* the motive behind, competition.<sup>221</sup>

This problem is somewhat exceptional to antitrust. Not everyone who gets into a physical fight intends to kill; not everyone who tells an untruth intends to deceive. But "the market economy relies on the self-interest of the businessman, in seeking to maximize profits,"<sup>222</sup> increase market share, and extract greater surplus. Antitrust law, therefore, can proscribe only certain methods of achieving those goals. And if those proscriptions are vague, *Gypsum's* ends-based mens rea requirement does not actually add specificity or limitation. These logical shortcomings are reflected in the practical difficulties created by *Gypsum's* framework: for at least the reasons given above, intent to destroy competition through anticompetitive means is largely indistinguishable from the legitimate intent to do so competitively.<sup>223</sup>

Contrast *Gypsum* with the aforementioned mens rea requirement for criminal tax violations—"voluntary, intentional violation of a known legal duty."<sup>224</sup> Much as a rational firm generally intends to maximize profits, a rational taxpayer generally intends to minimize tax liability.<sup>225</sup> Hence, defining a mens rea requirement for criminal tax violations as knowledge of the probable effect of paying less money to the government would not actually cabin culpability. Instead,

221. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (emphasis added); *see also* *Morgan v. Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989) ("Evidence of predatory intent alone can be ambiguous or misleading.").

222. Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 385 (1965).

223. *See* William S. Comanor & H.E. Frech III, *Predatory Pricing and the Meaning of Intent*, 38 ANTITRUST BULL. 293, 302 n.30 (1993) ("As a casual look at the business trade press will show, businessmen often use sports or military language. Thus, aggressive memos are expected. Finding such documents, without more, is not necessarily evidence of predatory intent."); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 646 (2005) ("[F]iery language used by a company's employees sheds no light on the legality or competitive effects of its conduct.").

224. *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *see supra* notes 190-95 and accompanying text.

225. *See, e.g.*, Kathleen DeLaney Thomas, *The Psychic Cost of Tax Evasion*, 56 B.C. L. REV. 617, 623 (2015); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1556-57 (1998).

by centering the mens rea requirement on a known legal duty, criminal tax law not only avoids *Gypsum*'s misstep, but also addresses the notice and clarity concerns associated with vagueness directly—notice to the defendant is effectively a prerequisite to prosecution.<sup>226</sup> Justice Stevens advocated for precisely such an approach towards the Sherman Act in *Gypsum*:

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law. I adhere to that view today. . . .

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had an adverse effect on the market.<sup>227</sup>

That approach was nevertheless rejected by the majority.

Even setting aside the flaws intrinsic to *Gypsum*'s "knowledge" standard, sheer complexity in Sherman Act doctrine may necessitate a stricter mens rea requirement. Consider, as a final example, the mens rea distinction between civil and criminal copyright enforcement—again, the presence of an intent to violate the law.<sup>228</sup> Determining whether a given work will infringe a purportedly copyrighted work is—unless word-for-word plagiarism has taken place—an extraordinarily complex task, such that it would be almost unthinkable to criminalize copyright infringement without it. To start, copyright law protects only "expressions," not "ideas,"<sup>229</sup> and distinguishing between the two can at times seem an exercise in deeply ambiguous philosophy. As Judge Learned Hand stated:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

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226. See sources cited *supra* note 196.

227. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 474-75 (1978) (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

228. 17 U.S.C. § 506(a)(1) (2012); see *supra* notes 190-95 and accompanying text.

229. 17 U.S.C. § 102(a)-(b) (2012); see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 304 (1996) ("[C]opyright doctrine posits a dichotomy between protectable expression and unprotected ideas. While a work's aesthetic form falls within the province of the copyright owner's exclusive rights, the ideas that the work evokes or seeks to convey are free for all to use."); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989).

Nobody has ever been able to fix that boundary, and nobody ever can.<sup>230</sup>

Since copyright protection—unlike, say, patents—involves no pre-approval application or grant process, content creators seeking to avoid infringing are the first to examine the validity of purported copyrights.<sup>231</sup> In other words, before publishing a creative work, creators are effectively asked to untangle the platonic knot expressed above to discern whether adjacent creations pose a copyrightable threat. Next, even where a copyright is valid, the other work must be “substantially similar” to constitute infringement—a requirement so standardless and free-form in practice that “it may seem like courts are going by an ‘I know it when I see it’ means to determine similarity.”<sup>232</sup>

Moreover, fair use<sup>233</sup>—the key defense to copyright infringement—is “extremely uncertain” in application, and “calls for [a] flexible, case-by-case analysis.”<sup>234</sup> As the Court itself has stated: “The task is

230. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (citing *Holmes v. Hurst*, 174 U.S. 82, 86 (1899)). Modern cases still rely on Judge Hand’s levels-of-abstraction analysis. *See, e.g.*, *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir. 1986); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 615-16 (7th Cir. 1982).

231. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013 (1997) (“Copyright law does not require examination by the government or the ‘issuance’ of a copyright; instead, original works of authorship are protected immediately upon their creation.”).

232. Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL’Y 1375, 1376-77 (2007) (observing that “courts have created a variety of conflicting and often times confusing tests,” that are “complicated and vague,” as well as “appl[ie]d . . . inconsistently and incorrectly”); *see also* Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 735 (1987) (describing the “substantial similarity” analysis as “leav[ing] the courts with an ad hoc, subjective approach that is not workable or fair”); Katherine Lippman, *The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in the U.S. Circuit Courts*, 2013 MICH. ST. L. REV. 513, 515 (“[C]onfusion arises from an absence of uniform judicial language, difficulty results from the lack of a single substantial similarity test . . . , and complexity surfaces when subject matter poles apart . . . are adjudicated by the same standard.”); Jarrod M. Mohler, *Toward A Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 972 (2000) (“The indeterminacy and misapplication of tests for copyright infringement has led to great confusion as to what substantial similarity means among courts and commentators alike.”); B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 491-92 (2001) (“[T]here appears to be an ever-present potential for confusion regarding the proper application of one or more of the various similarity tests . . .”).

233. *See* 17 U.S.C. § 107 (2012) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”).

234. Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1718 (1999); *see also* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007) (“[A]scertaining the scope of fair use ex ante is sufficiently uncertain that the doctrine is not effectively fulfilling its important function.”); Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 612 (1997)

not to be simplified with bright-line rules . . . .”<sup>235</sup> To wit, not unlike the rule of reason, courts (and hence creators) are expected to correctly weigh and balance:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>236</sup>

On the fourth factor in particular, the Court wades into territory quite familiar to antitrust: “It requires courts to consider not only the extent of market harm caused by the [defendant], but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the . . . market.’”<sup>237</sup>

Given the sum of uncertainties faced by content creators working in the shadow of copyright law, the mens rea for criminal infringement is understandably high. Indeed, scholars have rightly questioned whether copyright law’s criminal provisions could survive a challenge for vagueness without it.<sup>238</sup> Considering the Sherman Act’s comparable complexity and much more severe penalties,<sup>239</sup> its lower

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(“The invitation for particularized examination gives fair use its flexibility, and permits it to seem to be all things to all people.”); Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1786 (2010) (“But exactly what ‘fair’ means is uncertain. . . . [F]air use has no definitional boundaries . . .”).

235. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

236. 17 U.S.C. § 107 (2012).

237. *Campbell*, 510 U.S. at 590 (second alteration in original) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS* § 13.05[A][4] (1993)).

238. See, e.g., Abruzzi, *supra* note 185, at 383 (“With the added overlay of the willfulness requirement to protect a defendant from blundering into liability, copyright’s expressly criminal provisions ultimately present a less consequential vagueness problem than the civil infringement remedies do.”); Margot Kaminski, *Copyright Crime and Punishment: The First Amendment’s Proportionality Problem*, 73 MD. L. REV. 587, 616-17 (2014); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 892 (1999) (“The highly technical nature of the Copyright Act coupled with the subtle nature of this evanescent law . . . borders on not giving adequate notice to individuals of the conduct proscribed.”); cf. Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2467 (1998) (noting that the absence of this mens rea requirement for *civil* infringement may render it “wholly or partly unconstitutional” under vagueness doctrine).

239. Criminal copyright offenses, depending on the nature of the act, are punishable by up to five years imprisonment and “not more than \$150,000” in statutory damages for first-time violations. 18 U.S.C. § 2319(a)-(d) (2012); 17 U.S.C. § 504(c) (2012). Under the Sher-

mens rea requirement—applicable only to a fraction of cases to begin with—would simply not be sufficient to save the Sherman Act from a modern vagueness challenge. Incorporating all of the vagueness concerns raised in this Article thus far, the Sherman Act’s position looks considerably bleak.

## VI. DIVERGENT SOLUTIONS

The previous four Parts have outlined in detail the vulnerabilities of the Sherman Act with respect to vagueness doctrine. To avoid the true import of a statutory text written without limits, the courts manufactured a system of rules without specificity or clarity. To wit, despite almost no legislative intervention, antitrust law has floated freely with economic theory and cycle, and any judicially-created bright-line rules have been either eliminated or blurred. Simultaneously, there has been a fairly drastic increase in penalties associated with antitrust violations—particularly criminal violations—alongside an increase in tension with areas of concern to the First Amendment. Exacerbating matters even further, the Sherman Act’s *deus ex machina*—the creation of a saving mens rea requirement out of the ether—has proven impractical and incomplete, where it has not been abrogated entirely.

After examining these shortcomings laid out in detail side by side, one might conclude that the Sherman Act is flawed fundamentally with respect to vagueness, and thus rightfully ought to be invalidated on those grounds—or at least that the author so believes. Nevertheless, to any keen observer—and even the author—it should be easily recognized that a robust form of antitrust enforcement is needed now perhaps more than ever, with complete overhaul an unlikely solution. Industry sectors across the board are becoming increasingly concentrated,<sup>240</sup> with an associated “clear tendency toward anticompetitive outcome” in terms of increased prices<sup>241</sup> and decreased innovation.<sup>242</sup>

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man Act, even first-time violators are liable for up to ten years imprisonment and \$1,000,000 in fines. *See supra* note 139 and accompanying text.

240. *See, e.g.*, COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 1 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf) [<https://perma.cc/8D7U-3RUV>] (analyzing data from 1997 to 2012 across thirteen broad sectors and concluding that “[s]everal indicators suggest that competition may be decreasing in many economic sectors, including the decades-long decline in new business formation and increases in industry-specific measures of concentration,” including data showing “that returns may have risen for the most profitable firms”); *Too Much of a Good Thing*, ECONOMIST (Mar. 26, 2016), <http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing> [<https://perma.cc/W2WL-CCYL>].

241. JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 94 (2015).

242. *See, e.g.*, Carmine Ornaghi, *Mergers and Innovation in Big Pharma*, 27 INT’L J. INDUS. ORG. 70 (2009) (showing statistically significant declines in research and develop-

This is in addition to more novel concerns such as regional inequality<sup>243</sup> or monopolization of Internet platforms and services.<sup>244</sup> Abrogation of major swaths of antitrust law would, at this point in time, potentially work far more harm than good.

But it is precisely because of these economic challenges ahead that the vagueness of antitrust law's central statute must be confronted head-on. In the worst case, a challenge successfully articulating the vagueness arguments herein could shut down entire areas of enforcement until legislative intervention. Even in the best case, latent fears of vulnerability in the law may ironically lead to *under-enforcement* at times.<sup>245</sup> The remaining question is, therefore, how best to address the shortcomings of the Sherman Act with respect to vagueness, assuming a more drastic overhaul to be both implausible and impractical.<sup>246</sup>

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ment expenditures and productivity among merged pharmaceutical companies as compared to non-merged firms).

243. See, e.g., Richard M. Brunell, *The Social Costs of Mergers: Restoring "Local Control" as a Factor in Merger Policy*, 85 N.C. L. REV. 149 (2006) (reviewing empirical literature associating negative socioeconomic effects with loss of regional firm control through mergers, and proposing a reorientation of antitrust merger policy around those region-specific costs); Phillip Longman, *Why the Economic Fates of America's Cities Diverged*, ATLANTIC (Nov. 28, 2015), <https://www.theatlantic.com/business/archive/2015/11/cities-economic-fates-diverge/417372/> [<https://perma.cc/Z739-JZLM>] (citing a decrease in airline, railroad, and trucking competition as one major driver of regional inequality, with refocused antitrust law as one potential solution).

244. See, e.g., Newman, *supra* note 180, at 151, 176 (arguing that "antitrust law has failed to develop an adequate response to zero-price markets," such as online social media, communication, and search platforms, leading to concentration and monopolization); John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016) (expanding on the same concept, and setting forth specific antitrust solutions and applications).

245. The ur-example of this is perhaps the Apple eBook case. See *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). In that case, Apple was accused of orchestrating a collusive price-fixing conspiracy among publishers. *Id.* at 297. Despite such conduct falling well within per se analysis (being labeled by the court as no less than "the supreme evil of antitrust") and the existence of "ample . . . evidence" demonstrating "express collusion," and approval of the conclusion that "Apple was more than an innocent bystander," only civil penalties were applied. *Apple*, 791 F.3d at 316; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

246. For more comprehensive proposals to redesign antitrust law that would, at least incidentally, also reduce vagueness concerns, see Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1194-97 (2008) (arguing in favor of more "informal solutions and negotiated agreements," like the DOJ and FTC's approach to merger review, rather than explicit criminal or civil adjudication); 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, 1940 (2015) (suggesting that the FTC follow a practice of "notice-and-comment rulemaking" to steer antitrust policy through *Chevron* deference); Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247, 1249 (2011) (advocating for "an antitrust agency with authority to make Sherman Act rules," instead of "forcing the Court to approximate agency decision making"); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 670-82 (2009) (propos-



Reducing the severity of the Sherman Act's criminal penalties—or elimination of its criminal application entirely—would go far in lessening vagueness concerns and is perhaps the cleanest approach. This solution, however, has at least three key drawbacks. First, it would require direct legislative intervention,<sup>247</sup> which appears unlikely given the long-term decline in the political salience of antitrust law.<sup>248</sup> And, absent a statutory rewrite, even if the DOJ were to abstain from criminal antitrust prosecution entirely, the potential for severe criminal penalties would still be written into the antitrust laws—thereby informing any vagueness analysis. Second, criminal antitrust law serves unique purposes that may be impossible to fulfill with civil-only application. To the leadership of major corporations, fines alone may “seem trivial”<sup>249</sup> or be shifted entirely to stockholders,<sup>250</sup> offering far less of a deterrent effect than imprisonment and a criminal record.<sup>251</sup> Third, the civil-only solution may not even be sufficient to eliminate vagueness vulnerability. Given the severity of the Sherman Act's civil penalties in addition to its textual and doctrinal ambiguity, its tension with the First Amendment, and its current lack of a meaningful mens rea requirement, it may not survive even under the more lax standards associated with purely civil vagueness analysis.

Another potential approach might be to curtail the ambiguity in Sherman Act doctrine directly, by establishing more bright-line rules. Fairly clear per se rules unraveled (either implicitly or explicitly) into the rule of reason through case law alone,<sup>252</sup> so the Court is free to remake those rules without waiting for congressional action. But

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ing a more focused role for the FTC as research and data aggregator, thereby enabling other agencies or Congress to develop explicit antitrust rules).

247. See *supra* notes 135-39 and accompanying text (outlining the statutory provisions governing criminal antitrust penalties).

248. See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 1-10 (2005); Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006); Crane, *supra* note 246, at 1159; Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013).

249. Drew Feeley, *Personality, Environment, and the Causes of White-Collar Crime*, 30 L. & PSYCHOL. REV. 201, 209-13 (2006); see, e.g., Philip F.S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers and Directors of Publicly Traded Companies after the Sarbanes-Oxley Act*, 56 VAND. L. REV. 1871, 1896-98 (2003).

250. See, e.g., Berg, *supra* note 249, at 1896 (“However, indemnification contracts, corporate by-laws, and insurance contracts can shift the responsibility for . . . fines from executives to shareholders.”).

251. See, e.g., NEAL SHOVER & ANDY HOCHSTETLER, *CHOOSING WHITE-COLLAR CRIME* 172-73 (2006) (“There is reason to suppose . . . that white-collar offenders may be positioned ideally for learning the lessons of imprisonment. Prison is painful for them in ways that differ from the pains of the typical street offender. . . . If nothing else, it shocks and forces them to confront the fact that many people take their crime seriously.”); Jennifer S. Recine, Note, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1563 (2002).

252. See *supra* Section II.B.2.

again, this approach exhibits fairly strong disadvantages. First and foremost, using only bright-line rules and per se analysis sacrifices doctrinal flexibility completely—flexibility that is arguably needed for antitrust law to keep pace and maintain relevance in the face of accelerating changes in the marketplace, business structure, and technology.<sup>253</sup> Given those needs, even if the Court were to nominally label more activities as falling under the rule of reason, lower courts in practice would likely just shift even more flexibility and adaptability to step-zero analyses.<sup>254</sup> On net, this would do little to address vagueness concerns; to the extent it forces courts to be less transparent with their decisionmaking calculus, it may actually make matters worse.<sup>255</sup> Finally, even if this approach were desirable, the Court itself seems highly unlikely to take it. The Court's tendency in more recent decades, across doctrines, has been to avoid bright-line rules wherever possible in favor of more flexibly-applied standards.<sup>256</sup>

The need for both criminal application and flexibility in antitrust law seems unavoidable, and yet those two factors alone contribute to vagueness concerns considerably. This leads to a third possible solution: perhaps the time for a revised mens rea requirement has finally

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253. See, e.g., Markham, Jr., *supra* note 80, at 597-98 ("It is of course desirable, indeed unavoidable, that the rule of reason invites some degree of flexibility. Commerce, in a sense, is like a flowing river. . . . No two restraints are identical, and no two restraints are imposed within identical marketplace contexts."); Lemley & Leslie, *supra* note 81, at 1264 ("When categorical reasoning does not help the decision-maker identify and condemn unreasonable trade restraints, such an approach is at best unnecessary and at worst counterproductive . . ."); Stucke, *supra* note 5, at 1475 ("In other words, a rule-of-reason standard must apply at the margins of any rule of law to respond flexibly with various alternatives and resolve novel problems that continually emerge over time. A novel case readjusts the relations, proportions, and values of each legal precedent toward the whole, and thus becomes part of the whole." (footnote omitted)); Barbara Ann White, *Countervailing Power—Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045, 1066 (1992) (arguing that overreliance on per se analysis "leads to inflexible rules that do not consider other competitive and efficiency factors, and can unnecessarily impede economic growth") (footnote omitted).

254. See *supra* Section II.B.2.

255. See *supra* notes 102-03 and accompanying text.

256. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) (arguing that the contemporary Court has displayed a tendency to "settle[] the case before it" while "avoid[ing] clear rules and final resolutions" with broader application); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 475 (2012) (articulating "the Court's widespread use of standards (as opposed to bright-line rules)"); see also Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States' Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 620 (2014) (arguing that the Court has not "provide[d] bright-line rules with respect to civil liberties," leading to potential issues in wartime); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1429 (2014) (observing the tendency of the Court to deny "criminal prosecutors . . . the defendant-grabbing, bright-line rules they prefer"); Sipe, *supra* note 61, at 435-36 (noting the Court's firm pattern of "pushback" against bright-line rules in the patent context).

come. Setting aside the potential benefits of a more fundamental or institutional overhaul of the antitrust regime, which are beyond the scope of this Article, properly refocusing the mens rea requirement on an intent to violate the law itself would appear to be the most straightforward yet comprehensive solution. Such an approach has the benefits of being both judicially-implementable—since the Sherman Act’s mens rea requirement was wholly judicially-created in the first place<sup>257</sup>—as well as familiar. As detailed in Part V, this type of mens rea requirement is already used to mark the divide between criminal and civil copyright violations, among several other technical and flexible areas of law.

The chief drawback to this approach would be the heavy burden of proof it would place on prosecutors; the result could potentially be well-below-optimal conviction rates.<sup>258</sup> That being said, ameliorating latent concerns over constitutionality (as well as freestanding considerations such as the rule of lenity) paves the way for a more robust enforcement regime—at least partially offsetting that drawback.<sup>259</sup> And again, it should be emphasized that the status quo is untenable vis-à-vis vagueness, risking abrogation outright. Surely, some anti-trust enforcement is better than none.

## VI. CONCLUSION

If subjected to a modern void-for-vagueness challenge, the Sherman Act likely would not pass muster. Although previous high-profile attempts to invalidate the core Act of antitrust law as unconstitutionally vague were unsuccessful, the landscape has changed considerably since then. The deficiencies of the statutory text in terms of notice and consistency have only been enhanced by a long-term pattern of judicially-created rules that tolerate and maintain ambiguity, whether categorical or substantive. The penalties for Sherman Act violations have been repeatedly increased, along with robust enforcement—making good-faith mistakes particularly costly. Tension with the First Amendment has likewise been amplified, both directly and through second-order effects on communication and information markets. The erstwhile attempt to create a saving mens rea require-

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257. See *supra* Section V.B.

258. See, e.g., Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. L. REV. 21, 52-53 (2001) (describing “knowledge . . . that such action is against the law” as the second-most “difficult to prove” mental state of twelve, behind only the “premeditation” state associated with “first-degree murder”); Andrew Schouten, *Unlicensed Money Transmitting Business and Mens Rea Under the USA PATRIOT Act*, 39 MCGEORGE L. REV. 1097, 1122 (2008) (arguing that “[i]gnorance of the law is no excuse” precisely “because it would be too difficult to prove that a person knew the law when he claimed otherwise”).

259. See *supra* note 244 and accompanying text.

ment for the Sherman Act has proved unworkable and illogical at best—where it has not been abrogated entirely. Without alteration, the Sherman Act's future is constitutionally suspect. Eliminating criminal application or resurrecting long-dead bright-line rules may offer partial solutions, but reworking the Sherman Act's mens rea requirement is a more pragmatic and satisfactory way forward.