When *Hemi* is understood in this light, Justice Ginsburg's concurrence emerges as the most laudable of the three opinions issued by the Court. Refusing to engage in the exercise of defining proximate causation, Justice Ginsburg expressly stated her reasons for dismissing the City's claim: she was reluctant to allow the City — an entity that, as a first matter, could not constitutionally impose a tax on out-of-state sellers like Hemi — to recover damages for a violation of an Act in which Congress declined to include a private right of action.[75] In so doing, she provided a measure of transparency. One might argue, of course, that allowing the judiciary to make policy judgments in lieu of strict legal analysis undermines the rule of law and has antidemocratic implications.[76] But while the Court might attempt to define proximate causation and the state-city relationship in a way that provides less interpretive flexibility, such definitions have proven elusive for generations of jurists. Some legal questions may always be indeterminate. In such cases, courts can and should rely on policy considerations. When they do so, however, they need not mask their thought process, but should, as Justice Ginsburg did in *Hemi*, lay bare their reasons for holding as they do.[77] Such transparency increases the legitimacy of judicial decisions made in areas "not amenable to bright-line rules."[78]

G. Sherman Act

Quick Look Rule of Reason. — Section 1 of the Sherman Antitrust Act famously makes illegal any "contract, combination . . . or conspiracy, in restraint of trade,"[1] a prohibition whose scope has been debated for well over a century.[2] Because a flat prohibition of contracts that restrain trade would outlaw nearly every business agreement, the Supreme Court has created a narrow category of conduct that is per se illegal and has held that all other contracts and conspiracies in restraint of trade are subject to the "rule of reason."[3] This more permis-

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[75] *See id.* at 995 (Ginsburg, J., concurring in part and concurring in the judgment).

[76] *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[77] *Cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (advocating an approach in which "the judge's cards are laid on the table for all to see, and to critique"). *But cf. id.* at 3058 (Scalia, J., concurring) ("In a vibrant democracy, usurpation should have to be accomplished in the dark.").

[78] Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008).

[1] 15 U.S.C. § 1 (2006).

[2] *See, e.g.*, Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672–82 (1991) (describing the conflict between the broad scope of the procompetitive Sherman Act section 1 and the anticompetitive effects of state and local regulations).

[3] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) ("[T]he construction which we have deduced from the history of the act and the analysis of its text is . . . that in every case where it is claimed that an act or acts are in violation of the [antitrust] statute the rule of reason,

sive test requires courts to conduct a detailed analysis of plaintiffs' allegations and has functioned to allow myriad justifications by defendants so that nearly all conduct survives section 1 review.[4] More recently, the Court has developed a "quick look" rule of reason that foregoes the original rule's extensive inquiry by shifting the burden of proof onto the defendant to provide evidence that certain presumptively anticompetitive acts did not create economic harm in violation of section 1. The addition of this third test provided little respite from the original dichotomy, however, as the defendant's burden to defeat the presumption of economic harm was rarely met in practice.

Last Term, in *American Needle, Inc. v. National Football League*,[5] the Court held that licensing activities conducted by the National Football League (NFL) constituted concerted action within the reach of section 1.[6] The Court, however, not only suggested that the lower court should apply the quick look rule of reason analysis on remand, but also indicated that certain features of the NFL could overcome the presumption of economic harm in some contexts.[7] This nonfatal quick look test represents a novel development in antitrust law — one that may allow the doctrine to better reflect the legal shades of gray in business arrangements.

The NFL is an unincorporated trade association currently made up of thirty-two separately owned and operated franchises that compete during an annual season lasting from September through February.[8] When the league was organized in 1920,[9] the teams made separate arrangements for licensing their intellectual property and marketing their merchandise.[10] In 1963, however, the teams formed National Football League Properties (NFLP) to develop and market their intellectual property, the revenues from which would be shared equally among the teams or given to charity.[11] NFLP granted vendors, including American Needle, Inc., nonexclusive licenses to make and sell ap-

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in the light of the principles of law and the public policy which the act embodies, must be applied.").

[4] *See, e.g.*, Chicago Bd. of Trade v. United States, 246 U.S. 231, 239–41 (1918) (applying the rule of reason in determining that appellant's internal trading rule did not violate the Sherman Act); *see also* Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 337 (2000) ("The traditional rule of reason was uniformly viewed as 'a euphemism for an endless economic inquiry resulting in a defense verdict.'" (quoting Maxwell M. Blecher, Schwinn — *An Example of a Genuine Commitment to Antitrust Law*, 44 ANTITRUST L.J. 550, 553 (1975))).

[5] 130 S. Ct. 2201 (2010).

[6] *Id.* at 2206–07.

[7] *Id.* at 2216–17.

[8] Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 737 (7th Cir. 2008).

[9] *American Needle*, 130 S. Ct. at 2207.

[10] *Id.*

[11] *Id.*

parel with team logos.[12] In December 2000, the teams voted to allow NFLP to grant exclusive licenses to use their intellectual property.[13] As a result, NFLP granted Reebok an exclusive ten-year license of all thirty-two teams' trademarks for the purposes of making and selling headwear.[14] NFLP also declined to renew American Needle's previous nonexclusive license, along with the nonexclusive licenses of other headwear vendors.[15] American Needle filed suit in the Northern District of Illinois against the NFL, NFLP, the individual teams of the NFL, and Reebok.[16] American Needle claimed, inter alia, that because each of the teams separately owned its intellectual property, the collective decision to authorize NFLP to award an exclusive license constituted restraint of trade in violation of section 1 of the Sherman Act.[17]

The district court granted summary judgment for the defendants on American Needle's section 1 claim, finding that the agreement between NFL teams regarding their intellectual property could not violate the Sherman Act.[18] The court cited *Copperweld Corp. v. Independence Tube Corp.*,[19] in which the Supreme Court held that a corporation and its wholly owned subsidiary are a single entity, incapable of conspiring with one another for the purposes of section 1.[20] The court found that the NFL teams' decision to license their trademarks served their collective interest "to promote NFL football."[21] As with the intra-enterprise conduct in *Copperweld*, delegation of the decisions for this common goal did not contravene section 1's purpose to prevent agreements that "deprive the marketplace of independent centers of decision-making."[22] Furthermore, the court found that in this aspect of their business, the teams had "so integrated their operations" that they were more like a single entity than a joint venture.[23] American Needle appealed.

The Seventh Circuit affirmed.[24] Judge Kanne wrote for the panel,[25] concluding that the district court did not err in its grant of sum-

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12 *Id.*
13 *Id.*
14 *Id.*
15 Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 738 (7th Cir. 2008).
16 *Id.*
17 *Id.*
18 Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942–43 (N.D. Ill. 2007).
19 467 U.S. 752 (1984).
20 *Id.* at 769–70.
21 *American Needle*, 496 F. Supp. 2d at 944.
22 *Id.* at 943 (quoting *Copperweld*, 467 U.S. at 769) (internal quotation mark omitted).
23 *Id.*
24 Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008).
25 Judges Sykes and Tinder joined the opinion.

mary judgment to the NFL.[26] Also citing *Copperweld*, the court underscored the federal judiciary's rejection of the "intra-enterprise doctrine"[27] and its expansion of single-entity immunity from section 1.[28] The court stated that the characterization of a league need not be the same for all purposes, observing that in some contexts, the teams may be properly described as a single entity, unable to violate section 1; in others, the teams act more as separate units combined in a joint venture, whose agreements are subject to section 1 scrutiny.[29] Although the court agreed with American Needle's assertion that single-entity status must be determined by whether the conduct "deprives the marketplace of . . . independent sources of economic control,"[30] it declined to hold that the teams' ability to compete when licensing their intellectual property was dispositive for the single-entity question.[31] "[C]omplete unity of interest"[32] is not necessary; the court instead found that the teams shared a sufficient "interest in collectively promoting NFL football."[33] The court stated that the relevant competition was not between the teams within the NFL, but rather between the NFL and "other entertainment providers."[34] Therefore, because there existed a unified interest in the promotion of their jointly created product, the league's teams functioned as a single entity when managing their intellectual property for that purpose.[35]

The Supreme Court reversed. Writing for a unanimous Court, Justice Stevens held that the teams did not act as a single entity in licensing and marketing their intellectual property and therefore were not immune from section 1 scrutiny.[36] The Court used a functional, rather than formal, analysis.[37] Under a functional examination, the Court looks to the "competitive reality" of the parties, focusing on the cen-

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[26] *American Needle*, 538 F.3d at 740, 744.

[27] The now-defunct intra-enterprise doctrine treated cooperation between affiliated but legally separate entities as within the scope of section 1. *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) ("The fact that . . . restraints occur in a setting described . . . as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act.").

[28] *American Needle*, 538 F.3d at 738–39 (citing Jack Russell Terrier Network v. Am. Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005); Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, 213 F.3d 198, 205 (5th Cir. 2000); Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 597–600 (7th Cir. 1996); City of Mt. Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 271, 276–77 (8th Cir. 1988)).

[29] *Id.* at 741–42.

[30] *Id.* at 742.

[31] *Id.* at 743.

[32] *Id.* (quoting *Chi. Prof'l Sports Ltd.*, 95 F.3d at 598) (internal quotation mark omitted).

[33] *Id.*

[34] *Id.* at 744.

[35] *Id.*

[36] *American Needle*, 130 S. Ct. at 2201, 2206–07, 2212–15.

[37] *See id.* at 2209–10. The functional analysis developed as the Court reexamined its approach under the intra-enterprise doctrine. *Id.*

ter(s) of decisionmaking, rather than the superficial arrangement of the entities.[38] Therefore, the legal organization of the NFL teams as a single company in marketing their intellectual property did not foreclose the possibility that the teams acted as independent decisionmakers, capable of violating section 1.[39]

Under the functional approach, the relevant question was whether the alleged conduct joined together separate decisionmakers, and thus deprived the marketplace of "actual or potential" competitors.[40] Justice Stevens concluded that the NFL teams lacked both "the unitary decisionmaking quality [and] the single aggregation of economic power" that distinguish single entities.[41] He pointed to the fact that the teams are separately owned and operated franchises guided by corporate objectives that are not necessarily aligned.[42] In contrast to the Seventh Circuit opinion, Justice Stevens's opinion described the relevant competition not as between the NFL and other forms of entertainment for the attention of the public, but as between the teams as sellers in the market for intellectual property.[43] He found that when licensing its trademarks, a team is interested not in promoting NFL football generally, but rather in pursuing its specific corporate objectives.[44]

The Court also held that the formation of a separate entity, NFLP, to unite the common interests of the teams did not save their conduct from section 1 scrutiny.[45] First, Justice Stevens declined to give weight to the NFL's argument that NFLP serves to unify the teams' common interests because illegal restraints are often in the interests of separate organizations.[46] Second, he noted that the teams retain significant power during NFLP decisionmaking, as more than a majority of votes is required for licensing decisions.[47] Third, Justice Stevens stated that the fact that the potential competitors share in profits and losses was not a legitimate defense because if the Court allowed this justification for treating the NFLP as a single entity, "then any cartel 'could evade the antitrust law simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'"[48] In addition, because

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[38] *Id.* at 2212.

[39] *Id.* at 2209–10, 2212 (citing United States v. Sealy, Inc., 388 U.S. 350 (1967)).

[40] *Id.* at 2212.

[41] *Id.* at 2212–13.

[42] *Id.* at 2213.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 2215.

[48] *Id.* (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment)).

NFLP decisions affect not only NFLP profits, but also the profits of the individual teams, each team's vote reflects not only an interest in the promotion of the NFL, but also an interest in the team's individual revenue objectives.[49]

Finally, the Court stated that its decision would not subject every aspect of the NFL to section 1 scrutiny, and therefore some cooperation among the teams in the production of football games would remain beyond the scope of antitrust law. In the instant case, the Court instructed the Seventh Circuit to evaluate the legality of the concerted conduct using the rule of reason.[50] The classic rule of reason invites the court to perform a thorough analysis of the restraint in question, including a consideration of its effects, "actual or probable."[51] Justice Stevens further noted that the application of the rule of reason does not always necessitate a detailed analysis — sometimes an activity can be evaluated "in the twinkling of an eye."[52] He concluded by noting that certain factors could be legitimate reasons for the NFL's agreement and permit it to survive scrutiny under the rule of reason, including the need to "maintain[] a competitive balance."[53] The determination of whether such characteristics were relevant to this conduct was, however, a question for the lower court to decide on remand.[54]

Although much of the opinion in *American Needle* presents a narrow holding supported by a detailed recounting of precedent, Justice Stevens's concluding instruction to the court on remand represents a novel development in antitrust law. Since its inception in *Standard Oil Co. v. United States*,[55] the rule of reason has generally been used to permit activity that appears to be in violation of the Sherman Antitrust Act.[56] Conduct evaluated using the detailed, fact-based analysis

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[49] *Id.* (citing Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L.J. 63, 69–71 (1987)).

[50] *See id.* at 2216.

[51] *Id.* at 2216 n.10 ("[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 is 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." (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918))).

[52] *Id.* at 2217 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984)) (internal quotation mark omitted).

[53] *Id.* (quoting *NCAA*, 468 U.S. at 117) (internal quotation mark omitted).

[54] *Id.*

[55] 221 U.S. 1 (1911).

[56] Although courts have found anticompetitive effects in some cases — for example, finding in *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001), that an exchange of salary information among industry employers that led to reduced compensation would be sufficient to show a restraint of trade — the detailed factual inquiry has led courts to find many competitive benefits that justify such practices. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–23 (1979) (increased output as a justification); Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1570–71 (11th Cir. 1991) (generating operating efficiencies as a justification).

of the rule of reason has often been deemed legal;[57] in contrast, defendants found to have engaged in the second, more narrow category of per se illegal activity have been given no chance to justify their actions.[58] A third choice, the quick look rule of reason, developed in the 1980s to place the initial burden of proof on defendants to prove that their presumptively illegal acts had a procompetitive justification.[59] However, rather than blurring the dichotomy between the presumptively legal rule of reason analysis on one hand and the category of per se illegal conduct on the other, the quick look has allowed courts to find section 1 violations in nearly every case in which it has been used without having to expand the short list of per se illegal acts.[60] In *American Needle*, Justice Stevens suggested that the court should use a quick look rule of reason.[61] In his next sentence, however, Justice Stevens provided the lower court with a reason not to find the NFL's conduct illegal, but instead to find justification for the teams' cooperation. The deliberate determination that the quick look analysis should be used in order to find conduct legal is novel to antitrust doctrine and represents the fulfillment of the idea that antitrust doctrine should be "less a dichotomy than a continuum."[62]

When the Sherman Antitrust Act was passed in 1890, the expansive language of section 1 — which forbids every "contract, combination . . . or conspiracy, in restraint of trade"[63] — seemed as if it could

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[57] *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268–69 (1999) (calculating that eighty-four percent of plaintiffs cannot make the prima facie showing of anticompetitive effects, and that defendants are able to show a procompetitive justification in ninety-seven percent of the remaining cases).

[58] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."); *see also* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) (explaining that per se treatment is appropriate "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it"); Carrier, *supra* note 57, at 1283 (noting that horizontal arrangements like price fixing, agreements to limit output, and agreements to allocate markets are per se illegal).

[59] *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461 (1986).

[60] *See, e.g.*, *id.*; Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692–96 (1978); Cal. Dental Ass'n v. FTC, 128 F.3d 720, 727 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

[61] *American Needle*, 130 S. Ct. at 2217 ("[T]he Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 n.39 (1984))). Courts often use this quotation from *NCAA* to support decisions to apply the quick look rule of reason. *See, e.g.*, Expert Masonry, Inc. v. Boone Cnty., 440 F.3d 336, 343 (6th Cir. 2006); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004); *California Dental*, 128 F.3d at 727.

[62] 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1508c, at 408 (1986).

[63] 15 U.S.C. § 1 (2006).

encapsulate nearly every type of business contract.[64] In *Standard Oil*, however, the Supreme Court clarified the law, explaining that Congress could not have intended this result and instead meant to prohibit only "unreasonable" restraints of trade.[65] This standard, which came to be known as the "rule of reason," stood in contrast to the rule of per se illegality, under which participants in the conduct in question would be allowed no defense or justification.[66] Due to its invitation of defenses and explanations, as well as its relatively low standard for legality,[67] the rule of reason functioned to allow most conduct that was not per se illegal to continue unimpeded.[68] From the start, detractors criticized the rule as applying the broad language of section 1 too narrowly and allowing too much anticompetitive activity to slip past the preventative measure that Congress had intended.[69]

As a result, the quick look rule of reason developed in order to allow courts to stop some kinds of anticompetitive conduct without pronouncing the activity illegal in all cases. Application of the quick look allows a court to presume economic harm from the questionable nature of the conduct and shifts the burden of proof onto the defendant to prove that the conduct created plausible efficiencies.[70] Furthermore, this burden must be satisfied even before the plaintiff is required

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[64] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 687–88 ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. . . . [A]s Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, section 1 would outlaw the entire body of private contract law." (internal citations omitted)).

[65] Standard Oil Co. v. United States, 221 U.S. 1, 88–89 (1911).

[66] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899). Examples of conduct that the Court has held to be per se illegal are horizontal price fixing, *see* United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927), and market division, *see* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 43 (1977).

[67] *See Continental T.V.*, 433 U.S. at 49 & n.15 (stating that, under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition" (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918))); AREEDA, *supra* note 62, ¶ 1503, at 377 ("[T]he plaintiff alleging an unreasonable restraint must show a significant restraint on competition and . . . this ordinarily requires definition of a product and geographic market, an assessment of the parties' roles in that market, and proof of such other market circumstances as bear on competitive effects.").

[68] *See* Carrier, *supra* note 57, at 1273.

[69] *See, e.g.*, *Standard Oil*, 221 U.S. at 93–96 (Harlan, J., dissenting) (arguing that precedent directed the Court to hold illegal any contract that restrained trade "directly," and therefore that the Court erred in its adoption of the permissive rule of reason).

[70] *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986); *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (explaining that quick look applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); *The Truncated or "Quick Look" Rule of Reason*, FEDERAL TRADE COMMISSION (June 25, 2007), http://www.ftc.gov/opp/jointvent/3Persepap.shtm.

to show market power or actual anticompetitive effect.[71] When applied to already questionable conduct, the presumption of economic harm is difficult for defendants to overcome. Because the quick look test allowed courts to stop highly questionable conduct without setting bright-line rules, the test was looked upon favorably[72] and commended.[73]

In practice, however, the "continuum" description has proven less than accurate. The application of the quick look test, rather than the full rule of reason analysis, has generally been a death sentence for the activity in question, as defendants have been limited to only facially plausible competitive justifications in attempting to surmount the court's presumption of economic harm.[74] Unlike under the traditional rule of reason, defendants have been unable to use the in-depth factual inquiry to provide myriad business justifications for their decisions to engage in questionable activity. As a result, instead of creating an antitrust doctrine to reflect the legal shades of gray that exist in the business world, the quick look has functioned as another tool that allowed courts to strike down any difficult agreement without expanding the harsh per se category.[75]

The Court's decision in *American Needle*, with its indication that the quick look rule of reason could be applied on remand,[76] followed by a reminder that certain aspects of the NFL could save the licensing agreement, suggests that the quick look rule of reason may cease to be simply the slow per se standard it has embodied in the past. The Court spent the majority of the opinion rejecting the NFL's proffered interests that could have saved the arrangement from section 1 scruti-

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[71] *See* Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 624–25 (1996).

[72] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 262–65 (2d ed. 1999) (explaining that the quick look approach can provide a needed middle ground in tough-call cases because "[t]he truncated inquiry is usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the per se class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications"); Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391, 392 (2000) (endorsing the quick look approach for certain horizontal restraints).

[73] AREEDA, *supra* note 62, ¶ 1508c, at 408.

[74] *See Indiana Federation*, 476 U.S. at 458–59 (using the quick look to condemn the conduct without "elaborate industry analysis").

[75] *See* Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007) ("[The per se rule and the 'quick-look' rule of reason] are exceptional . . . and their application is reserved for the most patently anticompetitive restraints."); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 488 (2000) (noting the number of "false positives," or acts wrongly deemed a violation of the Sherman Act, resulting from the quick look rule of reason).

[76] *American Needle*, 130 S. Ct. at 2216–17.

ny,[77] seeming to remove any opportunity for the NFL to argue that it had a facially plausible competitive justification. Nevertheless, the tone in the final lines of the opinion changed drastically, as Justice Stevens provided the lower court with a ready-made justification for allowing the licensing agreement to remain: the teams' shared interest in maintaining a competitive balance within the league.[78] According to Justice Stevens, such an interest did not shield the teams from section 1 scrutiny, but was "unquestionably" an interest that could be used to justify a range of decisions among them.[79] Indeed, the Court not only suggested that the Seventh Circuit not examine the agreement too closely, but also provided an explanation that may overcome the NFL's burden of proof.

American Needle's suggestion that the quick look rule of reason not be fatal truly completes the spectrum that Professor Phillip Areeda had envisioned. It extends, however, farther than simply between *Addyston Pipe*'s per se illegal conduct and *Standard Oil*'s rule of reason. Instead of ending with the rule of reason, the spectrum of possible tests under section 1 continues to that which is per se legal under section 1, such as agreements and contracts within a single entity.[80] Between the rule of reason and per se legal conduct on this new branch of Professor Areeda's continuum is the *American Needle* nonfatal quick look rule of reason. The *American Needle* version of the quick look continues to exclude from its analysis the defendant's lengthy explanation and various justifications, but Justice Stevens's rather general proposed "competitive balance" justification suggests that the defendant's burden of proof may not be as difficult to overcome as its "slow per se" analogue.

The difficulty of creating a doctrine that balances the need to be easily understood by the wide spectrum of federal judges, on one hand, and the need to capture accurately the business reality it regulates, on the other, is not to be underestimated. Antitrust law, however, has proceeded in its development particularly slowly, with this final addition to the spectrum of section 1 tests coming over a century after the Sherman Act's passage. The Court's suggestion that the NFL's decisionmaking arrangement for its intellectual property could be upheld despite the application of the quick look completes a doctrinal conti-

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[77] For example, the Court stated that the NFL teams are independently owned teams in competition with each other in nearly every setting, including on the playing field, for ticket revenue, and for personnel and fans. *Id.* at 2212–13.

[78] *Id.* at 2217 ("We have recognized . . . 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

[79] *Id.*

[80] See, for example, the development of the intra-enterprise doctrine, described *supra*, note 27.

nuum that better reflects the complexities of business reality.[81] As a result, the current inconsistencies in antitrust precedent that resulted from the sharp division between per se illegal conduct and rule of reason evaluations[82] may evolve to fit into the spectrum as the standards for unreasonable restraints of trade are clarified for judges and executives alike.

[81] Some scholars have previously noted that courts' use of the traditional quick look rule of reason was based on an unsophisticated understanding of commerce. *See* Meese, *supra* note 75, at 464–65 (arguing that the quick look test was the government's attempt to protect the freedom of market participants from coercive restraints of trade, and that "[d]evelopments in economic theory have cast new light on the purpose and function of many restraints, demonstrating that various contracts once deemed 'coercive' or 'monopolistic' are in fact examples of voluntary integration that improve social welfare").

[82] See, for example, the Court's struggle to apply the general definition of the antitrust term "naked" to the holdings of *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), and *NCAA*, 468 U.S. 85.