

UBER'S EFFICIENCIES: A MODEST PROPOSAL FOR LIMITING USE OF ANTITRUST'S PER SE RULE

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In antitrust law, the per se rule against horizontal price-fixing seems set in stone. Over time, however, antitrust enforcers and courts have declined to use this rule and instead have used the rule of reason. This change stems directly from the recognition that the per se rule's blunt application may end up harming consumers in some contexts.

Using Uber as an example of a consumer-friendly, efficiency-enhancing business model, this Comment argues that using the per se rule to analyze horizontal arrangements like Uber's sacrifices consumer welfare. Instead, courts should use the rule of reason and engage in cost-benefit analysis where horizontal arrangements create unique efficiencies. This proposition necessarily demands that courts and enforcers identify "arrangement-specific" efficiencies and measure those efficiencies in a concrete way. This Comment offers only suggestions to those points.

Courts lose nothing by engaging with the rule of reason's detailed framework, but society might easily lose innovative business structures that benefit consumers if courts continue to defer to the per se rule.

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INTRODUCTION	314
I. UNDERSTANDING <i>MEYER</i> : AN OVERVIEW	317
A. <i>The Dispute</i>	317
B. <i>Basic Antitrust Principles for Horizontal and Vertical Conspiracies</i>	319
1. The Per Se Rule Against Horizontal Price-Fixing.....	319
2. The Rule of Reason.....	321
3. Hub-and-Spoke Arrangements	322
C. <i>Applying Basic Antitrust Principles to Meyer: An Opportunity to Evaluate the Per Se Rule</i>	323
II. HISTORY OF THE CONSUMER WELFARE MODEL: THE NEED TO EMBRACE EFFICIENCY	323
A. <i>The Early Days and Robert Bork's Impact</i>	324
B. <i>The Consumer Welfare Model and Efficiency</i>	327
C. <i>Misguided Consumer Welfare Conceptions and the Per Se Rule</i>	331
III. EVOLUTION OF ANTITRUST LAW AND PER SE RULES.....	333
IV. MEASURING EFFICIENCIES WITHIN THE RULE OF REASON.....	337
A. <i>Uber's Efficiencies</i>	337
B. <i>Implementing the Rule of Reason: Procedure and Measuring Efficiencies</i>	341
CONCLUSION	343

INTRODUCTION

After breaking into the market in 2010, Uber, a ride-sharing app, quickly became a preferred alternative to hailing a taxi.¹ The setup is simple: Uber connects people who need a ride with drivers in the area.² Passengers open the app, select a pickup location, and signal through the app that they are looking for a driver.³ The first driver to see the signal and ac-

1. Avery Hartmans & Paige Leskin, *The History of How Uber Went from the Most Feared Startup in the World to Its Massive IPO*, BUS. INSIDER (May 18, 2019, 2:42 PM), <https://www.businessinsider.com/ubers-history> [<https://perma.cc/8A5N-BC8U>]; Raul Hernandez, *New York City Yellow Cabs Have Taken a Back Seat to Uber*, BUS. INSIDER (Oct. 17, 2017, 7:05 AM), <https://www.businessinsider.com/nyc-uber-more-popular-than-yellow-cabs-2017-10> [<https://perma.cc/3TYA-SXX9>].

2. *How Does Uber Work?*, UBER HELP, <https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last visited Nov. 15, 2018) [<https://perma.cc/YU4Z-UV8E>].

3. *Id.*

cept the ride then drives to the designated location, picks up the passenger, and brings the passenger to his or her end location.⁴ The price is usually reasonable.⁵ “Surge pricing”—higher ride costs—occurs when the supply of drivers does not meet the high demand.⁶ Uber contends that surge pricing’s purpose is two-fold: (1) the higher cost will drive down passenger demand, and (2) drivers will flock to the area to capture the higher price point, thereby increasing supply. Thus, surge pricing should return the market to equilibrium.⁷

While some consumers grumble about surge pricing, Uber has also faced more serious scrutiny, ranging from corporate scandals to safety concerns.⁸ Recent revelations of a toxic corporate culture, including allegations of sexual harassment, have led some to boycott the ride-sharing app in favor of its competitors.⁹ Uber has also needed to deal with serious safety

4. *How to Request a Ride*, UBER HELP, <https://help.uber.com/riders/article/how-to-request-a-ride?nodeId=67f41961-e0aa-4670-af32-58be02c7c492> (last visited Nov. 15, 2018) [<https://perma.cc/F7AK-CSTA>].

5. Jacob Davidson, *Here’s How Much the Average Ride Costs on Uber and Lyft*, MONEY (July 15, 2015), <http://money.com/money/3959091/uber-lyft-price-per-trip/> [<https://perma.cc/F6ML-L6HV>].

6. *Will Surge Pricing Be Included in the Upfront Fare?*, UBER HELP, <https://help.uber.com/riders/article/will-surge-pricing-be-included-in-the-upfront-fare?nodeId=c8cb4b9e-484d-4997-ad06-3133232f15aa> (last visited Nov. 15, 2018) [<https://perma.cc/6W5K-CZGG>] (indicating that surge pricing will be “higher than usual”).

7. *What Is Dynamic Pricing?*, UBER HELP, <https://help.uber.com/riders/article/what-is-dynamic-pricing?nodeId=ba2b4925-9aed-48de-9398-8889607ee0e4> (last visited Nov. 15, 2018) [<https://perma.cc/P7LY-V2L4>].

8. See Robert Burnson, *Uber’s ‘Don’t Blame Us’ for Driver Assaults Is Again Under Fire*, BLOOMBERG (May 14, 2018, 6:02 PM MDT), <https://www.bloomberg.com/news/articles/2018-05-15/uber-may-have-to-face-high-schooler-s-lawsuit-over-lewd-driver> [<https://perma.cc/Z8WW-TTZA>] (explaining consumer frustration with Uber’s hands-off approach to dealing with driver misconduct); Felix Salmon, *When Will It Be Safe to Undelete Uber?*, SLATE (July 20, 2018, 5:50 PM), <https://slate.com/business/2018/07/can-uber-ceo-dara-khosrowshahi-fix-a-toxic-culture.html> [<https://perma.cc/8LSU-DRYR>] (explaining the #deleteUber campaign, a consumer response to allegations of aggressive and sexist behavior at Uber’s corporate level); J.B. Wogan, *Employee or Independent Contractor?*, GOVTECH: POLICY (June 3, 2016), <http://www.govtech.com/policy/Employee-or-Independent-Contractor-Its-the-Uber-Important-Question-of-Todays-Economy.html> (follow “Continue to Site”) [<https://perma.cc/8HKA-GGK3>] (tracking driver frustration with the ongoing debate over their classification as independent contractors).

9. Alana Semuels, *Why #DeleteUber and Other Boycotts Matter*, THE ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/business/archive/2017/02/why-deleteuber-and-other-boycotts-matter/517416/> [<https://perma.cc/GCB2-37EH>] (outlining, briefly, the allegations of Uber’s unwelcoming workplace environment).

issues, including drivers assaulting and abducting passengers.¹⁰

On the legal front, Uber has faced challenges to its characterization of drivers as independent contractors, rather than employees.¹¹ Characterizing its drivers as independent contractors has important agency law implications affecting Uber's potential liability for the conduct of its drivers. Additionally, it means that Uber need not pay its drivers minimum wage nor provide them legally-required benefits like health care. Uber has won that legal battle, for now.¹²

That victory, however, is a catch-22. So long as drivers are classified as independent contractors, it would seem that Uber's pricing model is illegal. According to traditional anti-trust analysis, it is per se illegal—that is, illegal as a matter of law—to engage in horizontal price-fixing (where competitors agree to set one price). Because Uber's drivers are independent contractors, and therefore technically “competitors,” Uber and each of its drivers horizontally fix prices by adhering to Uber's pricing scheme.¹³

In 2015, a class of Uber users initiated a lawsuit against Uber and its founder and former CEO, Travis Kalanick.¹⁴ The plaintiff class alleged that Uber had unlawfully engaged in horizontal price-fixing in violation of Section 1 of the Sherman Act.¹⁵ Although *Meyer* was removed to arbitration proceedings, the case still presents antitrust enforcers with a unique problem: Uber's horizontal price-fixing creates consumer-friendly efficiencies. This situation provides antitrust enforcers an opportunity to reexamine the rule that horizontal price-fixing is

10. See *Uber Driver Accused of Kidnapping, Assaulting Passenger Who Fell Asleep*, 6ABC ACTION NEWS (Oct. 17, 2018), <https://6abc.com/uber-driver-accused-of-kidnapping-assaulting-passenger/4501710/> [https://perma.cc/E95M-CMXV]; Deena Bouknight, *Ride-Sharing Saves, but Is It Safe?*, BUTLER COUNTY TIMES-GAZETTE (May 15, 2019, 12:01 AM), <https://www.butlercountytimesgazette.com/zz/timeandmoney/20190515/ride-sharing-saves-but-is-it-safe> [https://perma.cc/23FD-VBBH].

11. Andrew J. Hawkins, *Uber Drivers Are Freelancers, Not Employees, Judge Rules*, THE VERGE (Apr. 12, 2018, 3:40 PM EDT), <https://www.theverge.com/2018/4/12/17231060/uber-drivers-freelancers-employees-judge-ruling> [https://perma.cc/KZ6F-5FR7].

12. *Id.*

13. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 401 (1927) (articulating a per se rule against horizontal price-fixing).

14. *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

15. *Id.* at 819–20. The Sherman Act is the “grandfather” of antitrust legislation, outlawing monopolies and other ways of restricting competition.

per se illegal and decide whether the rule should apply in this consumer-friendly setting.

Arguing that the per se rule should be limited, this Comment will proceed as follows. Part I offers an overview of *Meyer* and introduces the legal standards currently in place. Part II outlines the historical aims of antitrust law and the emergence of the consumer welfare model. That Part focuses on the original conception of the consumer welfare model as encompassing *efficiency*, which supports this Comment's contention that the per se rule should be limited in situations like Uber's, where price-fixing creates efficiencies. Part III then explicates this Comment's main thesis: the per se rule should be limited. Specifically, the per se rule should not be used when, by fixing a price, so-called competitors create beneficial efficiencies. Instead, courts should apply the rule of reason standard,¹⁶ wherein judges consider the pros and cons of a given action before deciding whether that action violates the Sherman Act. Part III also explains why limiting the per se rule in this way is the logical next step in antitrust law's careful cabining of per se rules. Part IV details Uber's efficiencies and explains how they would be limited or erased absent the company's current pricing model. Finally, Part V establishes the procedure for implementing this idea and humbly proposes economic tools courts can use to measure efficiencies and weigh consumer benefits under the rule of reason.

I. UNDERSTANDING *MEYER*: AN OVERVIEW

The antitrust issues posed by Uber's pricing model were first detailed in *Meyer v. Kalanick*. Since that case was brought in 2015, antitrust enforcers have had to confront whether Uber is truly in violation of antitrust laws.¹⁷ This Part summarizes the plaintiff's claims in *Meyer* and explains the basic antitrust principles at play and their application to those claims.

A. *The Dispute*

In *Meyer*, the named plaintiff, a disgruntled Uber passen-

16. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

17. *Meyer*, 174 F. Supp. 3d at 819.

ger, alleged two antitrust violations against Uber, both stemming from the app's pricing model. First, the plaintiff alleged a horizontal conspiracy: each Uber driver was conspiring with the other drivers to abide by Uber's pricing model and thereby set one price.¹⁸ Second, the plaintiff alleged a vertical conspiracy: Uber was conspiring with its drivers to set one price.¹⁹ Ruling on a motion to dismiss, the court relied on cases recognizing "hub-and-spoke" conspiracies to determine that the plaintiff had sufficiently alleged both claims.²⁰ The court further stated that, pursuant to antitrust precedent, horizontal price-fixing is *per se* illegal.²¹ Conversely, courts analyze vertical price-fixing using the rule of reason, which requires that a plaintiff show actual harm in the relevant product market.²² The following sections outline several well-developed antitrust principles that apply to horizontal price-fixing, vertical price-fixing, and hub-and-spoke conspiracies, and inform their application to *Meyer*.²³

18. *Id.* at 822–23.

19. *Id.* at 826–27.

20. *Id.* at 824 (“[C]ourts have long recognized the existence of ‘hub-and-spoke’ conspiracies in which an entity at one level of the market structure, the ‘hub,’ coordinates an agreement among competitors at a different level, the ‘spokes.’ These arrangements consist of *both* vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub’s] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.”(quoting *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015))).

21. *Id.* at 822 (“Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices,’ while, at least in the context of resale price maintenance, [v]ertical price restraints are to be judged according to the rule of reason.”(quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 907 (2007))).

22. *Id.* at 827 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)).

23. Recent scholarship indicates that the proper legal analysis for *Meyer* is that outlined in *Broadcasting Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). See Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859, 911 (2017); Herbert Hovenkamp, *Antitrust and the Design of Production*, 103 CORNELL L. REV. 1155, 1207 n.225 (2018); Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 39 (2019). *BMI* involved an allegation of horizontal price-fixing against two licensing “clearinghouses” who offered blanket licenses to musical works from various artists. 441 U.S. at 4. In *BMI*, the Court decided not to apply the *per se* rule because the “agreements” between musicians and the clearinghouses offered a *new product* that could not exist without said agreements. *Id.* at 21–23. The Court thus concluded that “to the extent the

B. Basic Antitrust Principles for Horizontal and Vertical Conspiracies

Section 1 of the Sherman Act mandates that “[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, is declared to be illegal.”²⁴ A plaintiff alleging a violation of the Sherman Act must make two initial showings. First, the plaintiff must establish that there was an agreement. Second, the plaintiff must demonstrate that the agreement resulted in an illegal restraint on trade.²⁵ Depending on the kind of agreement at play, courts analyze trade restraints either under the per se rule or the rule of reason.²⁶

First, this Section addresses how the per se rule against horizontal price-fixing became a binding framework for antitrust enforcers. Next, it explains the rule of reason and its use in analyzing vertical price-fixing schemes. Finally, it recounts how antitrust has confronted “hub-and-spoke” price-fixing schemes—conspiracies that look vertical on their face but may be masking a more nefarious horizontal conspiracy—to explain why the per se rule is appropriate in such situations.

1. The Per Se Rule Against Horizontal Price-Fixing

It is a bedrock principle of antitrust law that horizontal price-fixing is per se illegal.²⁷ The Competitor Collaboration

blanket license is a different product, [the clearinghouse] is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual composers are raw material,” meaning that there was no horizontal price-fixing afoot. *Id.* at 22. *BMI* would certainly offer Uber’s best defense in *Meyer*. That is, Uber could be likened to the clearinghouses and the drivers to the composers. However, outlining the best defense for Uber is not the aim of this Comment. As such, this Comment will proceed as if the per se rule would apply—as it very well might—because there is a crucial, if slight, distinction from *BMI*. Namely, Uber is not creating a new product that could not exist without the agreements at issue; it is creating efficiencies that could not exist. Part III of this Comment will further explain this distinction and why *BMI*’s limitation on the per se rule should be expanded.

24. 15 U.S.C. § 1 (2018).

25. *Capital Imaging Assocs., P.C.*, 996 F.2d at 542.

26. *Id.*

27. A per se rule of illegality, in any area of law, is one where if certain criteria are met, the practice or conduct at issue is automatically condemned without analysis into the circumstances of the case. *See Per Se*, BLACK’S LAW

Guidelines, jointly issued by the Department of Justice and the Federal Trade Commission, state that agreements challenged as per se illegal are those “that always or almost always tend[] to raise price or to reduce output”²⁸ Understanding the reasoning behind the per se rule is vitally important to understanding the critiques against it.

United States v. Trenton Potteries Co. first declared the rule that horizontal price-fixing is per se illegal.²⁹ *Trenton Potteries* involved price-fixing among manufacturers and distributors of sanitary pottery.³⁰ The defendants argued that a per se rule was inappropriate because the prices, although fixed, were reasonable.³¹ The Supreme Court disagreed. It held that agreements to fix or maintain prices are not reasonable restraints “merely because the prices themselves are reasonable.”³² Moreover, it held that the per se rule was appropriate: agreements to fix prices are *always* unreasonable because the *power* such agreements confer—the power “to control the market and to fix arbitrary and unreasonable prices”³³—is itself an unreasonable restraint of trade.³⁴

After *Trenton Potteries*, the Supreme Court again upheld the per se rule against horizontal price-fixing in *United States v. Socony-Vacuum Oil Co.*, a case involving a buying program among competitors which had the effect of regulating and increasing prices.³⁵ The Supreme Court has since continued to apply the per se rule in horizontal price-fixing cases due to the Court’s belief that horizontal price-fixing schemes always harm competition and thereby consumers.

DICTIONARY (11th ed. 2019).

28. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 1.2 (2000).

29. *See* 273 U.S. 392, 398 (1927).

30. *Id.* at 394.

31. *Id.* at 396.

32. *Id.*

33. *Id.* at 397.

34. *Id.* at 400–02; *see also* *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940) (“Agreements for price maintenance . . . are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition . . . [and] create potential power for such price maintenance.”).

35. 310 U.S. 150, 218 (1940).

2. The Rule of Reason

Vertical price restrictions are analyzed under the rule of reason.³⁶ Unlike the per se rule, the rule of reason “entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.”³⁷ This Comment argues that some horizontal price-fixing arrangements, like vertical price restrictions, should be analyzed under the rule of reason rather than the per se rule.

Although the Supreme Court originally applied a per se rule to vertical agreements,³⁸ it broke from precedent and adopted a rule of reason approach in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, in which a manufacturer had entered into minimum resale price maintenance agreements with retailers.³⁹ Notably, the Supreme Court in *Leegin* overruled its past precedents after recognizing the procompetitive justifications for vertical price restraints. The Court detailed several procompetitive justifications for a vertical price restriction; namely, such restrictions (1) stimulate inter-brand competition, (2) may give consumers more options between low-priced and high-priced goods and services, and (3) curb free-riding problems, which occur when some retailers expend resources promoting a product’s brand name and other retailers selling the same product entice customers with discounts on the brand name that they did not help create.⁴⁰ The switch from applying the per se rule to vertical agreements to the rule of reason approach in *Leegin* is but one example of the erosion of per se rules in antitrust law.⁴¹ Because courts must balance the “good” that vertical price restraints offer against the “bad,” it is now settled that the rule of reason is the appropriate analysis.⁴²

36. Vertical price restrictions are those that occur between actors on different levels in the same chain of distribution. *Price-Fixing*, BLACK’S LAW DICTIONARY (11th ed. 2019). For example, a manufacturer of a good may wish to impose price restrictions on wholesalers and retailers downstream. Such a restriction would be a vertical price restriction.

37. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 28, at § 1.2.

38. *See* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

39. 551 U.S. 877, 881 (2007).

40. *Id.* at 889–90.

41. *See infra* Part III.

42. *Leegin*, 551 U.S. at 882 (“We now hold that . . . vertical price restraints are to be judged by the rule of reason.”); *see also* David I. Gelfand and Linden Bernhardt, *Vertical Restraints: Evolution from Per Se to Rule of Reason Analysis*,

3. Hub-and-Spoke Arrangements

When business models are relatively simple, it is usually clear whether an agreement is horizontal or vertical. That is not the case, however, with hub-and-spoke agreements. This Section explains how antitrust enforcers determined that such arrangements are subject to the per se rule of illegality.

Hub-and-spoke conspiracies are those price-fixing arrangements “in which an entity at one level of the market structure, the ‘hub,’ coordinates an agreement among competitors at a different level, the ‘spokes,’” in order to fix prices amongst the spokes and mimic a monopoly.⁴³ Although these agreements are structurally vertical (that is, between the hub and each of the spokes), they are analyzed under the per se rule because they function as horizontal agreements.⁴⁴ This idea was first successfully applied in *Interstate Circuit v. Unites States*.⁴⁵ That case created powerful precedent that “[a]cceptance by competitors, without previous agreement, of an invitation [by the hub] to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”⁴⁶

Uber’s business relationship with its drivers is arguably a hub-and-spoke arrangement, with Uber, the hub, setting the price and the drivers, the spokes, agreeing to charge that price. To analyze whether the per se rule is appropriately applied to cases where horizontal price-fixing results in efficiencies, this Comment works off of the assumption that courts would treat Uber’s pricing model as a horizontal arrangement.

ABA ANTITRUST SECTION FALL FORUM 1 (Nov. 16, 2017), http://awa2018.concurrences.com/IMG/pdf/4_d_gelfand_and_l_bernhardt_-_vertical_restraints_evolution_from_per_se_to_rule_of_reason_analysis.pdf [<https://perma.cc/C2Z5-ZC7D>] (“Vertical restraints in particular have been almost entirely removed from the realm of per se treatment, yet they are often investigated and challenged in court.”).

43. *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015).

44. *See Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 486–87 (S.D.N.Y. 2012) (“[W]here parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade.”).

45. 306 U.S. 208 (1939).

46. *Id.* at 226–27.

C. Applying Basic Antitrust Principles to Meyer: An Opportunity to Evaluate the Per Se Rule

The plaintiff in *Meyer* alleged that Uber engaged in both a horizontal price-fixing agreement (that the drivers agreed amongst themselves to adhere to Uber's price) and a vertical price restraint (that the drivers agreed with Uber to set prices).⁴⁷ The *Meyer* court determined that Uber's pricing model was a hub-and-spoke arrangement and held that the plaintiff adequately pled the per se rule's applicability.⁴⁸

In light of that holding, this Comment argues that the per se rule should not be used for models that create efficiencies. Even if drivers agreed between themselves to follow the price set by Uber, the efficiencies offered to consumers (which enhance consumer welfare), might outweigh any potential anti-competitive effect. Therefore, the arrangement should not be subject to the blunt tool of a per se analysis.⁴⁹ In order to fit this suggestion into the current antitrust framework, this Comment revisits the consumer welfare model's true purpose and grapples with the per se rule from that perspective.

II. HISTORY OF THE CONSUMER WELFARE MODEL: THE NEED TO EMBRACE EFFICIENCY

The consumer welfare model controls contemporary anti-trust analysis. Part II provides a historical overview of anti-trust law's road to the consumer welfare model and outlines the model's focus on efficiency. This analysis supports the Comment's argument that applying the rule of reason to efficiency-creating behavior fits within the consumer welfare model.

Specifically, this Part outlines the shift from early anti-

47. *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 820 (S.D.N.Y. 2016).

48. *Id.* at 824.

49. This conception differs importantly from the reasoning in *Leegin*, which overruled the use of the per se rule in vertical agreements by pointing to the procompetitive justifications of vertical price restraints. *See supra* notes 39–40 and accompanying text. This Comment does not necessarily advocate that there are potentially pro-competitive effects of Uber's hub-and-spoke model in terms of competition between drivers. Rather, the arrangement is pro-consumer in many ways that should not be discounted. The historical erosion of per se rules in antitrust law, and this Comment's place as a natural progression in that erosion, is discussed in Part III.

trust enforcement doctrine to the now controlling Chicago School framework and its attendant consumer welfare model. First, it reviews the early days of antitrust law. Second, Section II.B recounts the debut of the Chicago School and reviews the impact of Robert Bork's consumer welfare model on antitrust law. Finally, it explains the consumer welfare model in terms of its original aim: efficiency.

A. The Early Days and Robert Bork's Impact

In the early twentieth century, the goals of antitrust law were far different from those of today. Most shocking to today's enforcers are judicial opinions that expressed concern that some larger retailers were essentially *too* efficient and were harming small firms (the previous beneficiaries of antitrust law).⁵⁰ Enter Robert Bork and his fellow Chicago School thinkers. Bork's criticisms of early antitrust cases stemmed directly from his concern that efficiency should be protected for the sake of the consumer.⁵¹ This call for an economic approach that advances efficiency supports the rest of this Comment's criticisms of the *per se* rule and the *Meyer* case. This Section examines the development of antitrust law and culminates in a discussion of Bork's criticisms and concerns.

Antitrust cases in the 1890s struggled to articulate the goals of antitrust law. Originally, the Court determined that manufacturers were not engaged in interstate commerce, thus making a large portion of the manufacturing sector essentially immune from federal antitrust regulation under the Commerce Clause.⁵² Two years after that decision, the Supreme Court again considered the Sherman Act and concluded that "it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions."⁵³ In the 1911 *Standard Oil* case, the Court

50. See Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 308 (1975) (explaining that the Court's reasoning in the 1960s was centered on the concern for small businesses and was not grounded in economic theory).

51. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50 (1978).

52. *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895).

53. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327 (1897) (emphasis omitted).

finally established the modern antitrust standard: the rule of reason is used when evaluating restraints of trade.⁵⁴ The Court concluded that the Sherman Act does not prohibit all restraints; it simply prohibits “undue” restraints of trade.⁵⁵ The Court also discussed the harmful effects of monopolization: reduced output, increased prices, and reduced quality of goods or services.⁵⁶ Specifically, the Court explained that “the dread of enhancement of prices” necessitated treating unreasonable restraints of trade as illegal.⁵⁷

During the middle of the twentieth century, antitrust law was characterized by concern for small firms in the wake of competition from larger, cost-effective, retailer chain stores. Cases like *Brown Shoe Co. v. United States*⁵⁸ and *United States v. Von's Grocery Co.*⁵⁹ are illustrative of this era. In *Brown Shoe*, two large shoe corporations engaged in manufacturing, distribution, and retail attempted to merge.⁶⁰ The Supreme Court blocked that merger out of concern for small businesses.⁶¹ In *Von's Grocery*, two large grocers similarly proposed a merger.⁶² The Supreme Court again intervened, noting that “[t]he facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt” because “[t]he number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards.”⁶³ This fear of big business and absence of economic analysis colored antitrust law until the rise of the Chicago School.

The Chicago School thinkers gained prominence in the late 1960s and 1970s. At the heart of the Chicago School's theory is the consumer welfare model.⁶⁴ Commentators have largely

54. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911).

55. *Id.*

56. *Id.* at 58.

57. *Id.*

58. 370 U.S. 294 (1962).

59. 384 U.S. 270 (1966).

60. *Brown Shoe Co.*, 370 U.S. at 296.

61. *Id.* at 346.

62. *Von's Grocery Co.*, 384 U.S. at 271.

63. *Id.* at 277.

64. Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 218 (2010) (“Phillip Areeda at Harvard Law School, Robert Bork and Ward Bowman at Yale Law School, and Richard Posner and others at The University of Chicago Law School advanced the initially

agreed that the introduction of that model offered much-needed guidance to antitrust enforcement.⁶⁵ The model focuses the concern of antitrust enforcers and the judiciary toward those maneuvers by businesses that “threaten[] to artificially restrict output and harm consumers” and essentially limits antitrust laws’ applicability to only those situations.⁶⁶ Implicit in the consumer welfare model is a heavy emphasis on economic inquiry into whether anticompetitive behavior has reduced or might reduce output.⁶⁷ This stands in stark contrast to the amorphous social values upon which courts had previously fixated.⁶⁸

The Chicago School’s consumer welfare model was at least in part a response to what legal scholars of the day saw as judicial overreach in antitrust cases; Chicago School thinkers hoped that the model would better comport with the original intent of the legislators of the Sherman Act.⁶⁹ In his seminal work, *The Antitrust Paradox: A Policy at War with Itself*, Chicago School thinker Robert Bork criticized judges who used antitrust law to further “a cornucopia of social values, all of them rather vague and undefined but infinitely attractive.”⁷⁰

United States v. Aluminum Co. of America (Alcoa) particularly demonstrates the pre-Chicago School era’s vague enforcement.⁷¹ In that case, Judge Learned Hand held that Aluminum Company of America’s monopoly of virgin ingot was in violation of Section 2 of the Sherman Act.⁷² In his opinion,

controversial view that the antitrust laws should promote economic efficiency and consumer welfare . . .”).

65. See *id.* at 217 (“Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases.”); see also Adam J. Di Vincenzo, *Editor’s Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821, 829 (2014) (“[C]onsumer welfare appeals to judges and enforcers because it presents a clear and (at least in theory) politically neutral legal standard, which was sorely lacking in many of the antitrust decisions of [Robert Bork’s] day.”).

66. Vincenzo, *supra* note 65, at 825.

67. Today, even entry-level antitrust textbooks are replete with economic theory. See A. DOUGLAS MELAMED, RANDAL C. PICKER, PHILIP J. WEISER & DIANE P. WOOD, ANTITRUST LAW AND TRADE REGULATION 62–72 (7th ed. 2018).

68. See Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014); William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1419 (1990).

69. See generally Crane, *supra* note 68.

70. BORK, *supra* note 51, at 50.

71. 148 F.2d 416 (2d Cir. 1945).

72. *Id.* at 429.

Judge Hand failed to take into account any consumer-related economic benefits. Instead, he claimed that “great industrial consolidations are inherently undesirable,” no matter the efficiencies they create.⁷³ The Chicago School, starting with Bork, found such reasoning unsound and unwise and criticized Judge Hand’s value cherry-picking and failure to articulate a clear rule.⁷⁴ Moreover, and perhaps more importantly, the Chicago School believed that cases like *Alcoa* “ignored the original intent of the Sherman Act by applying values that conflicted with consumer welfare.”⁷⁵ Bork argued that antitrust law should focus on preventing restraints on trade that would decrease output and thereby harm consumers.⁷⁶ Because Bork pioneered the consumer welfare model, Bork’s perspectives on that model should guide antitrust enforcers. Antitrust enforcers should especially heed Bork’s emphasis on the desirability of efficiencies that benefit consumers.

B. *The Consumer Welfare Model and Efficiency*

Although the consumer welfare model has been widely accepted as the proper frame for antitrust analysis,⁷⁷ antitrust enforcers and courts are not without lingering questions about the model’s objectives.⁷⁸ This Section outlines the argument that consumer welfare *does* and *should* encompass consumer-friendly efficiencies. First, it lays out the misguided argument that Bork’s model is a total welfare model.⁷⁹ Second, it uses

73. *Id.* at 428.

74. Vincenzo, *supra* note 65, at 827 (quoting BORK, *supra* note 51, at 53). Justice Stewart highlighted the worrisome state of antitrust doctrine when he noted in his dissent that the “Government always wins.” *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

75. Vincenzo, *supra* note 65, at 827.

76. *Id.* at 825.

77. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’” (quoting BORK, *supra* note 51, at 66)).

78. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 136 (2010).

79. A total welfare model balances the costs and benefits of a given choice across the entire society and accepts a choice if it results in a net-gain to society. *See* Herbert J. Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 44 J. CORP. L. (forthcoming 2019) (manuscript at 1), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2987&context=faculty_scholarship [<https://perma.cc/2FZR-DF5T>] (explaining that total welfare “includes the surplus, or wealth net of costs, enjoyed by everyone affected, including producers . . .”). That

economic models to demonstrate that efficiency is in the consumer's best interest and that Bork's original consumer welfare model encompasses consumer-friendly efficiencies.

Commentators have suggested that Bork's term "consumer welfare," as he used it, actually constitutes "social" or "total welfare."⁸⁰ The suggestion of a "total welfare" model, however, is a misinterpretation of Bork. Rather, Bork argued that the consumer welfare model should be understood in terms of efficiency because efficiency is in the consumer's interest, and he used economics to support this argument.⁸¹ Below is a brief explanation of those economics.

Bork's analysis focused on allocative and productive efficiencies.⁸² Productive efficiency is achieved when a firm creates wealth by using the minimum resources to produce any given output. Productively efficient firms, therefore, use the best available technology and other efficiency-enhancing tools. Such wealth-creating behavior is best shown on the Production Possibilities Frontier (PPF).⁸³ The PPF—depicted in Figure 1—is a useful economic model because it describes the productively efficient behavior of a single firm or of society as a whole. When a firm or society produces goods or services in a productively efficient manner, any increase in production for one good or service results in a decrease in production for another good or service.⁸⁴ Any point along the blue line in Figure 1, therefore, is productively efficient. However, if a firm produced within the blue line—say, two units of Good 2 and five units of Good 1—then that firm would be considered productively inefficient.

is, if conduct creates 100 units of wealth for a producer but costs 50 units of wealth to the consumer, then that conduct will be accepted even though consumers are worse off.

80. See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012) (stating that when Bork "use[d] the term 'consumer welfare,'" he really "meant total welfare").

81. Crane, *supra* note 68, at 837 ("From the beginning . . . [Bork] asserted that consumer welfare and efficiency went hand in hand—that the consumer interest was efficiency.").

82. BORK, *supra* note 51, at 90–106.

83. See *infra* Figure 1.

84. This problem—how many units of each good to produce—is answered by allocative efficiency, discussed below. See *infra* notes 94–96 and accompanying text. For now, the point is to be producing along with PPF.

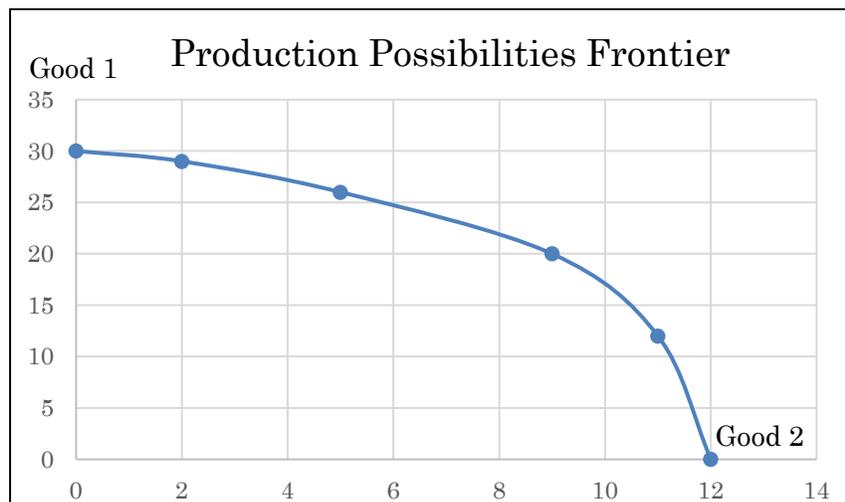


FIGURE 1. Production possibilities frontier. The blue curve is the PPF, which explains productive efficiency for a firm producing two goods. It is the production possibilities of a given firm. Along the x-axis is the output of Good 2; along the y-axis is the output of Good 1. Any point along the PPF is a point where the firm is operating with productive efficiency. If, however, a firm were to produce twenty units of Good 1 and four units of Good 2, then that firm would be productively inefficient because it would not be producing the most output while keeping costs of production the same.

The above PPF and its caption demonstrate “microeconomics”—referencing just one firm and a small set of consumers’ choices.⁸⁵ However, the PPF can also demonstrate productive efficiency in “macroeconomics”—referencing an entire economic system, or simply “society.”⁸⁶ In a free market system, consumers choose for themselves what “welfare” means. So, a productively efficient society is one where firms offer whatever

85. Andrew Bloomenthal, *Production Possibility Frontier (PPF)*, INVESTOPEDIA (Jun. 8, 2019), <https://www.investopedia.com/terms/p/production-possibility-frontier.asp> [<https://perma.cc/VB2X-M52X>] (“In business analysis, the production possibility frontier (PPF) is a curve illustrating the different possible amounts that two separate goods may be produced when there is a fixed availability of a certain resource that both items require for their manufacture.”).

86. *Id.* (“In macroeconomics, the PPF represents the point at which a country’s economy is most efficiently producing its goods and services and, therefore, allocating its resources in the best way possible.”).

consumers are willing to buy using the minimum resources to do so (thus keeping costs and prices lower).⁸⁷

Allocative efficiency—shown in Figure 2—is achieved when the efficient output for the efficient price is offered to the market.⁸⁸ Another way to conceptualize allocative efficiency (especially across the entire economy) is that producers offer the products and services that consumers desire. Therefore, allocative efficiency occurs when the supply curve and the demand curve meet.⁸⁹ This equilibrium reflects a well-functioning competitive market.⁹⁰

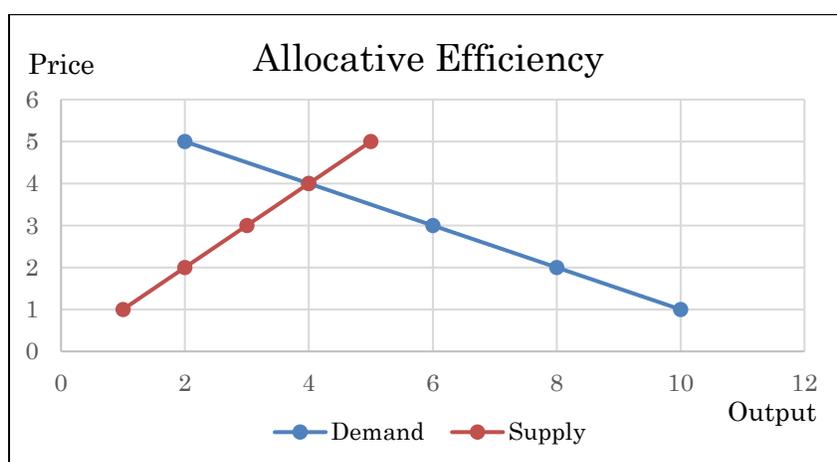


FIGURE 2. Allocative efficiency. The x-axis is output; the y-axis is price. When the supply and demand curves meet, that point is called equilibrium or allocative efficiency. When allocative efficiency is achieved, the price and the output (or supply) perfectly meet consumers' demands. In a functioning free market, equilibrium happens automatically because producers will react to consumers' preferences.

Although Figure 2 is a simple example, it demonstrates that allocative efficiency is achieved at the point where the blue and red lines cross. In Figure 2, the x-axis is output, and the y-

87. BORK, *supra* note 51, at 105.

88. *Id.* at 91–104.

89. *See infra* Figure 2.

90. James Chen, *Equilibrium*, INVESTOPEDIA (May 24, 2019), <https://www.investopedia.com/terms/e/equilibrium.asp> [<https://perma.cc/AN5A-5M2E>].

axis is price; therefore, equilibrium occurs when price and output are both four. Allocative efficiency explains antitrust law's reliance on price as the metric for showing potentially illegal firm behavior; when price is higher than the equilibrium price, consumers are dissatisfied.

Allocative efficiency also denotes the specific point along the PPF that society (macroeconomics) or specific players (microeconomics) will choose. Consumer welfare, therefore, consists of *both* productive and allocative efficiency; when a firm or society functions with both, consumers receive the goods and services that they desire, *and* those goods and services are produced in the most efficient way (usually translating to lower prices for consumers). Although critics point to Bork's efficiency arguments as evidence that he promoted a "total welfare" framework,⁹¹ Bork instead promoted a pure consumer welfare model. So long as the analysis begins and ends with the consumer in mind, antitrust enforcers need not sacrifice efficiency gains along the way.

C. *Misguided Consumer Welfare Conceptions and the Per Se Rule*

Despite Bork's emphasis on productive and allocative efficiency as promoting (or even defining) consumer welfare, caselaw has interpreted the consumer welfare model in narrower terms and has ultimately ignored efficiency when considering consumer welfare. In *Brown Shoe Co.*, the pre-Chicago School case involving merging shoe companies, the Court held that the merger was illegal *because* it resulted in a firm that was too efficient.⁹² The Court reasoned that the resulting "large national chain . . . integrated with a manufacturing operation" would go against "Congress'[s] desire to promote

91. See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 437–38 (2009) (claiming that Bork first espoused the true "consumer welfare" model but converted it into a total welfare standard "offer[ing] no evidence that Congress ever shared his rather specialized understanding of what a 'consumer' meant"); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2203 n.11 (2013) (claiming that Bork "equat[ed] 'consumer welfare' with the welfare of all individuals in society," meaning that Bork himself fell into the camp of people interpreting "consumer welfare" to mean "total welfare").

92. *Brown Shoe Co. v. United States*, 370 U.S. 294, 332 (1962).

competition through the protection of viable, small, locally owned businesses.”⁹³ Today, that view is seen as extreme and has been abandoned in favor of the Chicago School’s emphasis on economics and consumer welfare (which certainly does *not* promote the interests of small businesses).⁹⁴ Although efficiencies are no longer seen as anticompetitive, the Supreme Court still fails to consider efficiencies when determining consumer welfare.⁹⁵ Moreover, “no party has successfully asserted an efficiency defense in court,”⁹⁶ despite the fact that the 2010 Merger Guidelines from the Department of Justice and the Federal Trade Commission contemplate that efficiencies could justify a merger if they are “merger-specific,” “substantial,” and “verifiable.”⁹⁷

Efficiencies, unfortunately, have not had a forceful impact on areas of antitrust law beyond mergers. Prices continue to dominate the analysis in most antitrust cases. This focus on price is not unreasonable because price is a reliable metric to determine market structure, consumer preferences, and so on. Bork himself stated that “[t]here is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare.”⁹⁸ That being said, courts have overwhelmingly looked only to the resulting price of a new arrangement and have not examined the added efficiencies of a new arrangement that is allegedly anticompetitive.⁹⁹ As explored in Section 2.B, however, antitrust analysis must include efficiencies to capture all of the benefits to consumers. For example, in *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, the Sixth Circuit noted that an antitrust violation does not occur “unless low prices today [become] high prices tomorrow.”¹⁰⁰ Price is often a compelling measure of efficiencies; however, it is time for antitrust to

93. *Id.* at 344.

94. *See* Crane, *supra* note 68, at 835, 847.

95. *Id.* at 692.

96. MELAMED, ET AL., *supra* note 67, at 692.

97. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 10 (2010).

98. BORK, *supra* note 51, at 117.

99. “Ever since Congress . . . passed . . . the Sherman Act in 1890, ‘protecting consumers from monopoly prices’ has been ‘the central concern of antitrust.’” *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (quoting 2A P. AREEDA, H. HOVENKAMP, R. BLAIR, & C. DURRANCE, *ANTITRUST LAW* ¶ 345, at 179 (4th ed. 2014)).

100. 833 F.3d 680, 685 (6th Cir. 2016).

(re)frame the analysis with efficiencies, not simply price, at the forefront of the discussion.

Antitrust law has evolved over time, but it is largely settled that the consumer welfare model is the framework to follow.¹⁰¹ Robert Bork's original vision was for that model to promote the best economy for consumers by protecting and enhancing efficiency through antitrust law, which is best achieved when antitrust enforcers embrace economic theory and analysis. Unfortunately, the consumer welfare model has, in practice, deemphasized firm efficiency.¹⁰² Efficiency should be embraced by antitrust law. This Comment next proposes that a limitation on the per se rule for situations where behavior otherwise deemed undesirable creates efficiencies is proper.

III. EVOLUTION OF ANTITRUST LAW AND PER SE RULES

Antitrust law should return to Bork's original conception of consumer welfare, which stresses efficiency. Once antitrust enforcers accept an efficiency-focused consumer welfare model, it is clear that a per se rule—even for horizontal price-fixing—is not appropriate when that very price-fixing might be responsible for creating the efficiencies that consumers enjoy. Simply put, a per se rule is often too blunt a tool. In cases like Uber's, the rule of reason should apply, and economic analysis should be conducted to accurately weigh the pro-consumer effects. The rule of reason's inherent nuance protects consumers from truly anticompetitive behavior while also allowing them to benefit from the efficiencies that innovative companies create. The consequences of ignoring the economically-beneficial effects of certain agreements are especially salient in *Meyer*, where, although drivers are accused of horizontally fixing prices, the consequence of the per se rule—that is, shutting down or significantly changing Uber's pricing model—would hurt consumers.¹⁰³ Before the Comment analyzes those efficiencies and how antitrust enforcers might measure them in the future, this Part

101. See Meese, *supra* note 91, at 2201 n.2 (listing numerous scholarly articles whose authors have concurred that the consumer-welfare model has been wholly embraced).

102. Or, it has been embraced in name, but used only to analyze prices faced by consumers. See Hovenkamp, *supra* note 79, (manuscript at 31) (explaining the New Brandeis School's interpretation that "low prices are the dog and efficiency is but the tail").

103. See *infra* Part IV.

discusses the robust history of cabining per se rules. This history shows that this suggestion is consistent with antitrust trends and sacrifices none of the consumer welfare antitrust law aims to guard.

A per se rule is useful in many contexts; however, antitrust law has carefully identified those situations where it should be applied and has rejected the rule when its costs outweigh its benefits. Some leading scholars note that the biggest benefit of using the per se rule is merely to cut administrative costs.¹⁰⁴ Because the per se rule does not require analysis, its use is justified only when agreements are certain to decrease consumer welfare.¹⁰⁵ It was once thought that horizontal price-fixing *always* had this effect.¹⁰⁶ With unique platform businesses such as Uber becoming more and more common, however, horizontal price-fixing is not always as nefarious as it was once believed. Instead, pricing models like Uber's, which technically fix prices horizontally, create numerous efficiencies that consumers enjoy.

Antitrust analysis has already abandoned a per se rule in favor of the rule of reason in other contexts. Both vertical price-fixing¹⁰⁷ and non-price vertical restraints are now analyzed using the rule of reason. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court abandoned the per se rule against non-price vertical restraints set forth in *United States v. Arnold, Schwinn & Co.*¹⁰⁸ *Schwinn* and *Sylvania* both involved alleged non-price vertical restraints—conspiracies to allocate exclusive territories to distributors—that harmed competition among distributors.¹⁰⁹

Schwinn articulated a bright-line rule: when title of goods passes to distributors, the per se rule applies and the non-price vertical restraint is illegal.¹¹⁰ *Sylvania* overruled *Schwinn*'s per

104. MELAMED, ET AL., *supra* note 67, at 121.

105. Cf. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 28, at § 3.2 (justifying the per se illegality rule for “[a]greements of a type that always or almost always tend[] to raise price or to reduce output”).

106. See generally *United States v. Trenton Potteries Co.*, 273 U.S. 392, 401 (1927) (articulating a per se rule against horizontal price-fixing).

107. See *infra* notes 40–43 and accompanying text.

108. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

109. *Sylvania*, 433 U.S. at 37; *Schwinn*, 388 U.S. at 367–68.

110. *Schwinn*, 388 U.S. at 379 (“Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with

se analysis.¹¹¹ In doing so, the Court looked to *Northern Pacific Railway Co. v. United States*, which described when a per se rule is justified: “there 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.”¹¹² The Court found that *Schwinn’s* per se rule could not meet those rigid standards and supplanted the per se rule with the rule of reason to evaluate vertical non-price restraints, even where the title of the good had passed.¹¹³

Since *Sylvania*, “the Court has systematically [gone] about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.”¹¹⁴ Indeed, “[w]e have witnessed the Court’s reconsideration of several unfortunate precedents and the consequential demise of per se rules involving boycotts, vertical price restraints, and vertical non-price restraints.”¹¹⁵ Retreating from per se rules is a documented trend in antitrust, and the retreat has sacrificed none of the consumer welfare that antitrust law aims to guard. Although the per se rule results in administrative efficiency, antitrust law benefits from limitations on the per se rule because these limitations reduce the chance of punishing efficiency-creating conduct.¹¹⁶

Just as antitrust law evolved away from a per se rule in the non-price vertical restraint context, it should now similarly evolve to limit the per se rule against horizontal price-fixing.¹¹⁷

dominion over it.”).

111. *Sylvania*, 433 U.S. at 59 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

112. *N. Pac. Ry.*, 356 U.S. at 5.

113. *Sylvania*, 433 U.S. at 57.

114. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002).

115. *Id.* at 472 (citations omitted).

116. See, e.g., Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 75 (2012) (noting that the Supreme Court “has repeatedly framed its rulings in a manner that shows sensitivity to the unavailability of error” and that the Court has adopted a preference for Type I errors—where the law fails to see an antitrust violation and punishes nothing—over Type II errors—where the law mistakenly finds an antitrust violation and punishes beneficial behavior).

117. See *supra* Section I.B.1.

In contexts like Uber's, the per se rule against horizontal price-fixing no longer meets the demands of *Northern Pacific Railway Co.* because horizontal price-fixing does not always decrease consumer welfare. While horizontal price-fixing may sometimes represent a harm to consumer welfare, it is not true that such price-fixing has a "lack of any redeeming virtue" in *all* cases.¹¹⁸

The Court has already deemed one unique situation as immune from the per se rule in the context of horizontal price-fixing: agreements creating a new product that could not exist absent the agreement. In *Broadcasting Music, Inc. v. Columbia Broadcasting System, Inc. (BMI v. CBS)*, CBS sued two musical composition copyright license clearinghouses—American Society of Composers, Authors and Publishers (ASCAP) and BMI—for violating the Sherman Act.¹¹⁹ CBS claimed that ASCAP's and BMI's blanket licenses—bundled licenses to all the works in their respective repertoires—were actually schemes to horizontally fix prices.¹²⁰ The Ninth Circuit agreed and held that the per se rule applied.¹²¹ The Supreme Court disagreed and held that the behavior of ASCAP and BMI did not warrant per se analysis. By bringing together composers of innumerable musical works and offering a blanket license to those works to television stations like CBS, the defendants had actually created a *new product* that could not exist without price-fixing.¹²² The Court understood that a consumer like CBS greatly benefitted from the blanket licenses because, alternatively, the market for licenses to copyrighted musical compositions would be plagued by nearly insurmountable transaction costs. In that scenario, CBS would have to reach out to each composer and negotiate a mutually agreeable price. The time and effort that consumers saved by simply buying the blanket license was an efficiency gain that could not be denied.

Many argue that *Meyer* should be analyzed under *BMI*'s "new product" theory.¹²³ This argument has merit, and Uber's defense lawyers will surely make use of it. However, there is one wrinkle in this comparison: Uber has not necessarily cre-

118. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

119. 441 U.S. 1, 6 (1979).

120. *Id.*

121. *Id.*

122. *Id.* at 21–23.

123. See sources cited *supra* note 23.

ated a new *product* that could not be offered without fixing the price among their drivers. Therefore, *BMT's* exception to the per se rule should expand to horizontal price-fixing situations where a firm creates *efficiencies* that benefit consumers.

This proposal begs several questions. First, where should the burden of proof lie and at what stage must a defendant show consumer-friendly efficiencies? Second, are efficiencies ever dependent on price-fixing and what efficiencies might be so consumer-friendly that courts are willing to digress from the per se rule against horizontal price-fixing? Finally, how might antitrust law measure those efficiencies so that courts can continue to follow sound economic analysis? Below, Part IV uses the case against Uber as a framework to answer these questions.

IV. MEASURING EFFICIENCIES WITHIN THE RULE OF REASON

Having proposed that antitrust law limit the per se rule against horizontal price-fixing in scenarios where the price-fixing creates efficiencies, the remainder of this Comment outlines modest suggestions for implementing limitations on the per se rule. By way of illustration, it first lists Uber's various efficiencies and notes those that are likely dependent on price-fixing. The largest efficiency that depends on the pricing-model is the reduced transaction costs. Then, it proposes how antitrust law might go about assigning value to such transaction costs—an endeavor ripe for the attention of economic research.

A. *Uber's Efficiencies*

Uber is an extremely efficient ride-sharing service. First, its efficiencies are mostly productive efficiencies, which are seen clearly when Uber's business model is compared to those of traditional taxi services. Second, Uber's allocative efficiency has also skyrocketed, due in large part to the app's algorithm that aims to match supply and demand. Third, Uber also offers "social" efficiencies such as a reduction in the frequency of drunk driving. Finally, Uber has transaction cost efficiencies that consumers highly value. This Section discusses these efficiencies in detail, arguing that the rule of reason—not the per se rule—should be used to evaluate efficiency-creating horizontal price-fixing. It is evident that using the per se rule to evalu-

ate Uber's pricing model would sacrifice many of Uber's efficiencies, ultimately compromising consumer welfare.

Uber is productively efficient, meaning that it uses the best available technology to offer ride-sharing services. Again, productive efficiency is achieved when a firm (or the entire economy, for a macroeconomic interpretation) produces on the PPF.¹²⁴ Recent studies show that compared to traditional taxi services, Uber's business model has greatly increased productive efficiency. One study reveals that, of the total miles driven by taxi drivers in Los Angeles and Seattle, only about 40 percent are driven while carrying a passenger to an end destination. For UberX, the numbers are 64 percent and 55 percent for the two cities, respectively.¹²⁵ Similarly, taxi drivers in San Francisco spend 38 percent of their time with a passenger onboard, while Uber drivers spend around 55 percent of their time with a passenger.¹²⁶ Another study by UC Berkeley's Transportation Sustainability Research Center showed that "93 [percent] of San Francisco riders using Uber, Lyft, or Sidecar spent less than 10 minutes waiting for their ride and no one spent more than 20 minutes."¹²⁷ By contrast, of "people trying to get a taxi [to] come to their home, only 35 [percent] got a ride within 10 minutes, and 23 [percent] were still waiting after 20 minutes."¹²⁸

An economics degree is not necessary to recognize that Uber is more efficient than traditional taxi services. In economic terms, by delegating the majority of the transaction costs (the cost of the time spent by consumers finding and bargaining with service-providers) to its app, Uber uses the minimum resources to produce any given output. Using the minimum resources to achieve the same result means that consumers are better off in multiple ways. Not only are users waiting less for rides, but the cost savings of drivers are also potentially passed on to consumers. That is, consumers no longer "pay" for the excessive time taxi drivers drive with no passenger. Consequently, prices for Uber rides are lower than prices for taxis in

124. See *supra* Figure 1.

125. Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177, 180 (2016).

126. *Id.* at 179.

127. James Hamilton, *Uber Efficiency*, ECONBROWSER (Mar. 27, 2017), <http://econbrowser.com/archives/2016/03/uber-efficiency> [<https://perma.cc/65AM-C4ZT>].

128. *Id.*

the majority of American cities.¹²⁹

Uber is also allocatively efficient, especially because its algorithm aims to set the price and quantity at equilibrium. Again, allocative efficiency exists when the economy offers the right amount and type of products for the right price.¹³⁰

New York City provides an excellent example of Uber's advantage in allocative efficiency. New York's taxi regulations require that a driver or taxi company acquire a medallion for each taxi.¹³¹ Because there are only so many medallions, this system restricts the number of taxis. Before Uber and other ride-sharing apps offered alternatives to taxis, that system "meant that people who wanted a ride could not get one."¹³² That supply restriction directly harmed consumers. Since supply failed to meet demand, prices for taxis were higher and, theoretically, some would-be consumers could not receive rides. In New York, Uber offers much needed competition and supply to passengers. Moreover, Uber's surge pricing ensures ongoing allocative efficiency: when supply is too high, drivers simply opt out of driving, and the market returns to equilibrium. Ultimately, after the introduction of Uber, the number of rides rose by 40 percent,¹³³ meaning that "Uber has made New Yorkers richer by whatever value they put on a 40 [percent] rise in the number of rides."¹³⁴

One need not look just to New York for evidence. These same advantages multiply as one looks at the country more broadly. One study reports that, in 2015, UberX¹³⁵ cumulatively generated approximately \$2.9 billion in consumer surplus in Chicago, Los Angeles, New York, and San Francisco.¹³⁶

129. Sara Silverstein, *These Animated Charts Tell You Everything About Uber Prices in 21 Cities*, BUS. INSIDER (Oct. 16, 2014, 12:47 PM), <https://www.businessinsider.com/uber-vs-taxi-pricing-by-city-2014-10> [<https://perma.cc/HD7A-8HWJ>].

130. See *supra* Section II.B.

131. Tim Worstall, *Uber's 2 Billionth Ride – And Where Uber Actually Adds Economic Value*, FORBES (Jul 20, 2016, 8:54 AM), <https://www.forbes.com/sites/timworstall/2016/07/20/ubers-2-billionth-ride-and-where-uber-actually-adds-economic-value/#47fb0aa35b04> [<https://perma.cc/9T6W-8F8H>].

132. *Id.*

133. *Id.*

134. *Id.*

135. UberX is one of many services that Uber offers. Specifically, UberX offers "affordable, everyday rides" that may be completed in non-luxury vehicles. By contrast, Uber Black offers "[l]uxury rides with professional drivers" for more upscale customer experiences. See *UberX*, UBER, <https://www.uber.com/us/en/ride/uberx/> (last visited Aug. 13, 2019) [<https://perma.cc/PXR3-AT75>].

136. Peter Cohen et al., *Using Big Data to Estimate Consumer Surplus: The*

The authors of that study estimated consumer surplus by using the aggregate data Uber records and calculated that one day's worth of UberX-generated consumer surplus is about \$18 million.¹³⁷ So, if UberX were to “unexpectedly disappear for a day,” consumers would lose \$18 million in surplus.¹³⁸ The economists involved with this study also estimated the total consumer surplus generated by UberX in the United States was approximately \$6.8 billion.¹³⁹

Uber also presents other efficiencies that do not fit neatly into either productive or allocative efficiencies. These are called positive externalities.¹⁴⁰ For one, the convenience and availability of Uber has likely led to a decrease in drunk driving in many cities; these studies, however, are largely observational, and the effect is not evident in all cities.¹⁴¹ Still, it is notable that drunk driving crashes decreased by sixty percent in Portland, Oregon in 2017, corresponding with a massive increase in the number of Uber users/rides in the city.¹⁴² Mothers Against Drunk Driving (MADD) National President Colleen Sheehey-Church noted that Uber makes it easier than ever to make a safe choice.¹⁴³

Finally, there are transaction cost efficiencies introduced thanks to Uber's pricing model. Transaction costs are the costs of using the price mechanism—that is, of carrying out a transaction by means of an exchange on the open market.¹⁴⁴

Case of Uber 1 (Nat'l Bureau of Econ. Research, Working Paper No. 22627, 2016), <https://www.nber.org/papers/w22627.pdf> [<https://perma.cc/N4VU-DGJ4>].

137. *Id.* at 2, 21.

138. *Id.* The authors also acknowledge that if Uber were to disappear permanently, the analysis would need to be different. This is because their estimates were based off of short-run estimates for the demand curve. If Uber permanently disappeared, the loss to consumers would need to take into account the fact that consumers would find substitutes and firms would likely enter the market to fill the gap that Uber had left.

139. *Id.* at 1.

140. Will Kenton, *Externality*, INVESTOPEDIA (May 26, 2019), <https://www.investopedia.com/terms/e/externality.asp> [<https://perma.cc/Z73E-4F9E>].

141. Andrew J. Hawkins, *Does Uber Lead to Less Drunk Driving? It's Complicated*, THE VERGE (Oct. 4, 2017, 5:00 PM), <https://www.theverge.com/2017/10/4/16418782/uber-drunk-driving-crashes-study-cities> [<https://perma.cc/6QEC-KRG4>].

142. *Id.*

143. Kate Parker, *Uber & MADD Announce Campaign to Eliminate Any Excuse for Drinking and Driving*, UBER NEWSROOM (Nov. 15, 2018), <https://www.uber.com/newsroom/reasons-to-ride/> [<https://perma.cc/H5AW-2LET>].

144. See Ronald Coase, *The Nature of the Firm*, *ECONOMICA* 386, 390–95 (1937), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-0335.1937.tb00002>

Although there are few reports on this, there is an argument that having the price quoted to the passenger up front reduces the transaction cost of negotiating with the driver to reach a mutually agreeable price. The Court accepted a similar argument in *BMI*.¹⁴⁵ Drivers benefit when the price is given to them directly by Uber because they do not have to go through the trial-and-error of finding the best price. Passengers benefit because it quickens the overall process. If every Uber driver set their own price, the resulting transaction costs could be huge. Again, some of the most important gains from Uber are the speed and convenience of getting a ride. Without setting the price, these gains would likely be significantly undermined. Therefore, once it is suggested that horizontally fixed prices are causing transaction cost efficiencies, the rule of reason should apply. The next question then becomes how one might measure transaction costs. The following section tackles that important question only briefly, as it is best suited for economic research and scholarship.

B. Implementing the Rule of Reason: Procedure and Measuring Efficiencies

Despite Uber's efficiencies, the price-fixing allegations against it might still have some merit. Decision-makers must confront the price-fixing allegations head on by using the rule of reason and the economic tools available. To be clear, this Comment stands for the proposition that the per se rule should not be used in efficiency-creating contexts. It does not attempt to perfectly outline the practical implementation of that idea, given the level of sophisticated economics needed to identify and measure certain efficiencies. This section is intended to demonstrate that the practical implementation of this idea is possible and to offer some suggestions for that implementation.

Procedurally, before the per se rule is discarded, the defendants in a given case should have to prove by a preponderance of the evidence that there are efficiencies created by their pricing system that benefit consumers. The burden should be low because the rigorous economic analysis will be conducted

.x [<https://perma.cc/675Y-CNUT>] (introducing the concept that there is a "cost" of transactions while theorizing why firms exist).

145. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979).

under the rule of reason.

It is then important that efficiencies are measured correctly. Measuring transaction costs is particularly challenging, but there are ways to measure these societal benefits. Several theories have evolved regarding how economists should measure these costs. First, the traditional economic theory of transaction costs—Williamsonian transaction cost economics—uses proxies to measure transaction costs.¹⁴⁶ Second, John Wallis and Douglass North measure the “transaction sector” of the economy and propose that the total value of resources used in the transaction sector equals the transaction costs in the economy.¹⁴⁷ It is possible to use this theory on a microeconomic scale. For example, a court could look to the value of resources used by Uber to create transactions, and that number would be the transaction costs that would otherwise exist for passengers and drivers without Uber. Third, Hernando de Soto’s method of measuring transaction costs complements Wallis and North’s proposal. Wallis and North’s transaction sector admittedly only captures the transaction costs that flow through the market.¹⁴⁸ De Soto, however, focused on non-market transaction costs like resources spent on waiting, getting permits to do business, and cutting through red tape.¹⁴⁹ These non-market transaction costs would be especially high for Uber drivers who, without Uber’s price model, would need to negotiate with each passenger.

The rule of reason should therefore apply after defendants sufficiently allege that their pricing system has consumer-benefitting efficiencies. Implementing the rule of reason will depend, then, on a court’s ability to measure transaction costs. Though this seems like a daunting task, there are many viable methods for measuring these costs. This approach is preferable to the *per se* rule because the rule of reason allows courts to take account of the efficiencies created by businesses. Additionally, adopting this idea would continue the trend in anti-trust law of eroding *per se* rules in favor of economic analysis.

146. Ning Wang, *Measuring Transaction Costs: An Incomplete Survey* 3–4, (Ronald Coase Institute, Working Paper No. 2, 2003), <http://www.coase.org/workingpapers/wp-2.pdf> [<https://perma.cc/KX2L-REKC>].

147. *Id.* at 4–5.

148. *Id.* at 5.

149. *Id.* at 6–7.

CONCLUSION

Antitrust enforcers should limit the use of the per se rule when a price-fixing scheme creates beneficial efficiencies. This is consistent with antitrust law's goal of protecting consumer welfare, which encompasses pro-consumer efficiencies. *Meyer* offers a compelling case study of possible consumer-friendly efficiencies, such as reduced transaction costs. Moreover, the proposition is consistent with the historical trend in antitrust law to shy away from per se rules. Building on *BMI*, enforcers should evaluate whether models like Uber's are always bad for the consumer, or whether they present such large efficiencies that they should not be punished. Finally, although measuring transaction costs is difficult in antitrust litigation, viable means to do so are circulating in economic theory. Moving forward, courts should apply the rule of reason to horizontal price-fixing cases involving efficiencies in order to better protect consumers and innovative competition.