

Juries Can *Quick Look* Too

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I. Introduction	272
II. Quick Look: A Brief History	274
A. The Road and Stops to Quick Look.....	275
B. <i>BMI, NCAA, and California Dental</i> : Moving Slowly But Surely	278
C. Since <i>California Dental</i> , Precedents Remain Far and Few With No Consensus: Quick Look A Modified Per Se or A Truncated Rule of Reason?.....	282
III. A Spectrum of Analyses: Quick Look In Two Step	287
A. Per Se Rule Goes to the Jury and Quick Look Must Follow	289
B. Rule of Reason and Quick Look Demand the Trier of Facts to Balance the Evidence.....	290
C. Parties’ Jury Preferences Should Not Dictate the Mode of Analysis	292
D. Quick Look Creates Presumptions and Shifts the Burden of Proof.....	293
E. Scholastic Interpretation of Quick Look	295
IV. Implication of the “Observer Standard”	298
A. Establishment Clause and the Reasonable Observer	

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Standard	299
B. Patent Litigation and the Ordinary Observer	301
C. The Role of Expert Witnesses.....	303
V. Conclusion	305

I. INTRODUCTION

The Supreme Court has established three methods of analysis (or rules) for antitrust cases: the *Per Se* analysis,¹ the Quick Look analysis,² and the Rule of Reason analysis.³ Each analysis comes with different inquiries. The *Per Se* analysis focuses on the actions of the defendant. The quick look analysis focuses on the positive and the negative effects of the defendant's actions and then balances these effects. The Rule of Reason analysis investigates an array of elements, which includes the plaintiff's economic injuries, the market power, and the actions of the defendant, amongst others.

The Supreme Court made clear in *Arizona v. Maricopa County Medical Society*⁴ that trial courts must select the appropriate mode of analysis at the beginning of the trial. The Supreme Court also affirmed the rule of reason as the default of the three modes of analysis.⁵ Beyond offering these two clarifications, the Court provided little guidance on how to choose the appropriate rule, yet this choice may make or break a case.

Counter-intuitively, courts must choose the rule at the *beginning* of a trial, rather than during the course of the trial or prior to presenting the

¹ "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

² *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) [hereinafter *BMI*] and its progeny created the quick look analysis, affirmed in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). See Section II *infra*.

³ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁴ 457 U.S. 332, 337 n.3 (1982).

⁵ "The rule of reason "presumptively applies . . . under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

case to the jury.⁶ This means that courts decide how to analyze antitrust cases based only upon the facts of the case as pled in the complaint and answer. Selecting the rule affects the presumptions; these presumptions affect which party carries the burden of proof. The rule also affects whether the case can be sent to a jury. While juries can decide *per se* and rule of reason cases, they cannot determine quick look cases.⁷

The question of whether cases decided under quick look can go to the jury came before the Third Circuit in *Deutscher Tennis Bund v. ATP Tour Inc.*⁸ The Third Circuit wrote that quick look cannot not be sent to the jury, basing its decision upon the American Bar Association model jury instructions.⁹ The Third Circuit relied upon a misguided source and failed to follow the subtle guidance the Supreme Court provided in *California Dental Ass'n v. FTC.*¹⁰

This paper disagrees with the decision of the Third Circuit and makes a two-part argument that trial courts can submit quick look cases to a jury. First, I examine the quick look jurisprudence and how lower courts have applied all three methods of analysis. Part I explains that courts have been reluctant to let quick look go to the jury because juries are not sophisticated enough to handle quick look and because they reason that quick look analysis amounts to a summary judgment.¹¹ This section also argues that with the fading application of *per se*, quick look will become more important in the future.

In Part II, I argue that quick look ought to go to the jury because, according to *California Dental Ass'n*, the three methods of analysis are

⁶ “The selection of the proper mode of antitrust analysis is a question of law, which [courts] review *de novo*.” Cal., ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1124 (9th Cir. 2011) (citations omitted).

⁷ See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 701 (1962) (discussing the type of evidence a jury can balance in *per se* cases). In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Supreme Court affirmed rule of reason cases sent to the jury. See Section III. A & B *infra*.

⁸ 610 F.3d 820 (3d Cir. 2010).

⁹ *Id.* at 833.

¹⁰ 526 U.S. 756 (1999).

¹¹ I would argue that quick look is not limited to summary judgment because it would seem redundant to have both summary judgment and quick look in Antitrust law. They serve different functions and as such abide by different standards and rules. See generally Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493 (2009) (detailing the relationship between quick look and summary judgment).

part of the same inquiry.¹² Since the three methods of analysis live along a spectrum of analyses and since *per se* and rule of reason already go to the jury, quick look should also go to the jury.

In Part III, I argue that quick look ought to go to the jury because the Supreme Court decision creates an observer standard.¹³ The observer standard sparks confusion about whether quick look involves questions of fact, which the jury can weigh, or questions of law reserved for the court. To understand this observer standard, this section looks at other, better-defined observer standards. The Court employs observer standards in two other contexts, the Establishment Clause and Patent contexts. In both of these contexts, the Supreme Court defines observer in a way that implicates questions of fact (and juries) to different degrees. Since other comparable observer standards go to the jury, I argue that the *California Dental Ass'n* quick look observer standard must involve juries as well.

A trial court's rule selection has resounding impact upon antitrust cases whether the parties litigate or settle their case. Whether the case can be sent to the jury, however, should not be impacted by the rule selection. This paper questions why the Supreme Court would create an antitrust specific summary judgment, discusses how inconsistent it would be for quick look not to go to the jury, and objects to the notion that defendants could avoid jury trials simply by requesting quick look.

II. QUICK LOOK: A BRIEF HISTORY

The Supreme Court created rule of reason, then *per se*, and finally quick look, almost as gap filler.¹⁴ This chronology supports that the Court created quick look to address a need: the Court wanted the

¹² This paper argues that since *per se* and rule of reason are submitted to the jury, quick look should be as well, without weighing in on the debate of whether courts should submit to a jury *per se* and rule of reason questions.

¹³ "In *California Dental*, [the Supreme Court] held (unanimously) that abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2237 (2013) (quoting *Cal. Dental Ass'n*, 526 U.S. at 770).

¹⁴ C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. LOUISVILLE L. REV. 67 n.255 (2013) (arguing that the expending rule of reason has created more gap uncertainty, which quick look has failed to reduce). For a better understanding of the quick look, see Andrew I. Gavil, *Moving Beyond Caricature and Characterization: the Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012) (discussing the evolution of the application of the rule of reason and the rise of quick look).

flexibility of rule of reason without losing the efficiencies of *per se* and hence created quick look. Antitrust literature, however, does not dwell much on quick look because it is the victim of a vicious circle: courts do not apply quick look as often as *per se* or rule of reason because plaintiffs do not request quick look as often as *per se* and rule of reason; plaintiffs do not request the application of quick look because plaintiffs cannot well predict the outcome of its applications; plaintiffs cannot well predict this outcome because neither courts nor plaintiffs understand quick look as well as *per se* and rule of reason; courts do not understand quick look as well because they do not apply quick look as frequently as *per se* and rule of reason.¹⁵ This vicious circle will likely endure because most plaintiffs are not repeat players and have little to gain from helping a court understand quick look; hence, cases applying quick look are rare. This section looks at the history of the quick look analysis first by discussing three necessary stages that lead to the birth of quick look: the Sherman Act;¹⁶ the births of rule of reasons; and the birth of *per se*. This section then explains the birth of quick look and closes by diving into more detail into some of its progeny.

A. The Road and Stops to Quick Look

Congress passed the Sherman Antitrust Act in 1890. The Act uses broad common law language and uses terms such as “in restraint of trade”¹⁷ or “attempt to monopolize”¹⁸ that the courts must interpret. Courts have interpreted these terms over time.

In 1911, the Supreme Court established the Rule of Reason in *Standard Oil Co. v. United States*,¹⁹ which made illegal any “unreasonable restraint of trade.”²⁰ “Under this rule, the factfinder

¹⁵ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1413 (2009).

¹⁶ 15 U.S.C. §§ 1–7 (2012).

¹⁷ *Id.* at § 1 (“Every 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.”).

¹⁸ *Id.* at § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”).

¹⁹ “[T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.” 221 U.S. 1, 62 (1911).

²⁰ *Id.* at 87–88.

weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”²¹ This rule is the default method of analysis.²²

In *Standard Oil Co.*, the defendants were accused of conspiring to monopolize the oil market.²³ The participants in the conspiracy combined through agreements, stock purchase, and coercion to control almost all the oil refineries in the Cleveland area.²⁴ Judicial history ironically notes, much like Justice Harland did in his dissent, that *Standard Oil Co.* involved restraints of trade, such as price fixing, that do not require rule of reason, but instead require *per se*.²⁵

The evolution to the modern rule of reason took many years. The modern rule of reason commands a case-specific complex market analysis²⁶ that requires the plaintiff to identify the relevant geographical market²⁷ and the relevant product market, which parties can establish in a number of ways.²⁸

As early as 1927, the Supreme Court prohibited horizontal price fixing agreements as unreasonable regardless of the pricing reasonableness. In the Court’s view, price fixing had obvious adverse effects on consumers: “naked” horizontal price fixing raises prices, decreases output, and harms consumers.²⁹ In 1940, the Supreme Court in

²¹ *Cont. TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

²² *Bus. Elects. Corp. v. Sharp Elects. Corp.*, 485 U.S. 717, 723–24 (1988).

²³ *Standard Oil Co.*, 221 U.S. at 31.

²⁴ *Id.* at 32–33.

²⁵ *Id.* at 82–83.

²⁶ *Id.*

²⁷ *See United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (noting that the “area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”) (citations omitted).

²⁸ *See United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (“Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.”). This case is often referred as the cellophane fallacy. The Supreme Court used cross-price elasticity to determine whether two products are substitutes, whether the product manufacturer has market power and thus whether he can raise prices without affecting quantity as substantially. The Court failed to differentiate between capacity to increase prices further and capacity to increase prices: du Pont in this case may have already used its market power and explaining why it could not further increase prices; but the Court interpreted the high cross-elasticity to signify that it never had power to increase prices. For further discussion of this issue, *see generally* Robert Harris and Thomas Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 1 (1984).

²⁹ *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (holding unlawful an agreement between manufacturers that represented 82% of the market to fix prices regardless of the reasonableness of the price fixing).

*United States v. Socony-Vacuum Oil Co.*³⁰ established the *per se* rule for price fixing agreements. “[P]rice-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”³¹ In other words, *per se* condemns the actions of price fixing regardless of whether it succeeds. Judicial history ironically notes again that *Socony-Vacuum* dealt with quantity restriction, not price fixing.³² Numerous other kinds of conduct that have similar effects upon prices or quantities have been and remain *per se* unlawful.³³

In *per se* cases, the plaintiff carries the burden of proof to show that the defendant’s restraint falls within the category of *per se* restraints. Once the plaintiff satisfies its burden of proof, “the *per se* rule create[s] an irrebuttable presumption of unreasonableness,”³⁴ not created by rule of reason.

Per se finds support in judicial and business efficiencies. Justice Black explained that the benefits of *per se* are three-fold: *per se* warns businessmen of the unlawfulness of particular practices, avoids administrative costs of repetitively proving the anticompetitive effects of the same practices, and helps judges treat similar conduct in the same way.³⁵

Over twenty years later, Justice Stevens lamented the degree to which courts apply *per se* and explained that “[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.”³⁶ As time went on, the cost of finding guilty innocent venturers (false positives) outweighed the benefits of judicial consistency and efficiency: broad application of *per se* did not seem worth these benefits any more and, thus, slowly lost support.

³⁰ 310 U. S. 150 (1940).

³¹ *Id.* at 218.

³² *Id.* at 223–24 (holding that an agreement between horizontal competitors to buy excess supplies from non-participating manufacturers was *per se* unlawful because the agreement aimed at removing supply from the market in order to increase prices).

³³ For instance, horizontal agreements to allocate markets or customers remain *per se* unlawful because it has the same effect of decreasing competition, and raising prices. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Palmer v. BRG of Georgia*, 498 U.S. 46 (1990).

³⁴ Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, 1 ISSUES IN COMP. L. & POL. 125, 138 (2008).

³⁵ *N. Pacific Ry. Co. v. United States v. United States*, 356 U.S. 1, 5 (1958).

³⁶ *Ariz. v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 344 (1982).

The waves were changing and the Court was ready to ride them.³⁷ These waves lead the Court to create a new analysis that combines elements from *per se* and rule of reason and addresses their respective drawbacks. Quick look was this new analysis, decreasing the number of false positives associated with *per se* and also decreasing the judicial inefficiencies associated with rule of reason.

B. BMI, NCAA, and California Dental: Moving Slowly But Surely

The *Per Se* rule and Rule of Reason form a dichotomy of rules: antitrust cases are analyzed under either of these rules. However, discontent grew with this dichotomy. Quick Look soon appeared as the gap filler analysis that bridged the two already-established analyses. The Court did not create this quick look bridge in one case but instead slowly created it without giving it a name for a long time. This section focuses on the slow birth of quick look.

During the same era when Justice Stevens expressed his discontent with *per se*, the Supreme Court was already moving away from *per se* and the dichotomy of rules. The first nail in the coffin of this dichotomy came in *National Society of Professional Engineers v. U.S.*³⁸ In this case, engineers who were members of the National Society of Professional Engineers were prohibited from submitting any price information to customers.³⁹ The association asserted that price competition affected “the public health, safety, and welfare” because engineers will use “inefficient and unnecessarily expensive structures and methods of construction” in order to cut costs and be more competitive.⁴⁰ The Court rejected this justification, however, ruling the restriction unreasonable⁴¹ and determining that *per se* and rule of reason

³⁷ In *Rules Versus Standards in Antitrust Adjudication*, Daniel A. Crane discussed the movement from rules embodied by *per se* illegal and *per se* legal activity and toward standards embodied by the rule of reason. 64 WASH. & LEE L. REV. 49 (2007). In *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, Alan J. Meese discussed the Court’s move away from the *per se* rule and toward the rule of reason with the end of the Populist era. Meese argued that quick look was a byproduct of this movement and should be abandoned as over inclusive and leading to errors. 68 ANTITRUST L.J. 461 (2000). Prof. Nachbar argued that “[i]f the evolution of antitrust analysis—the gradual abandonment of *per se* approaches to virtually every restraint—teaches anything, it is that there are very few restraints that will harm efficiency with the constancy necessary to justify their absolute prohibition in all circumstances.” *The Antitrust Constitution*, 99 IOWA L. REV. 57, 113 (2013).

³⁸ 435 U.S. 679 (1978).

³⁹ *Id.* at 683.

⁴⁰ *Id.* at 685.

⁴¹ *Id.* at 696.

were complementary.⁴² More importantly, the holding in *National Society of Professional Engineers* dimmed the line between the two rules: the Court affirmed the lower court's finding that the restriction was *per se* illegal and did not require an in-depth market analysis;⁴³ yet, the Court allowed the defendant to offer some justifications. But those justifications were not quite pro-competitive in nature, which courts usually overlook in *per se* analysis.⁴⁴

The following year, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*⁴⁵ [BMI] put a second nail in the dichotomy's coffin. In *BMI*, the defendants sold music recordings through blanket license agreements.⁴⁶ Even though these blanket licenses were naked price fixing agreements, the Court found that the agreements were necessary for the license provider to offer this new product and achieve the associated efficiencies.⁴⁷ Thus, the Court allowed some efficiency justifications in its analysis of a horizontal price fixing agreement because "the whole is truly greater than the sum of its parts; it is, to some extent, a different product."⁴⁸ In other words, Columbia Broadcasting System created a new product, the bundle license, that cannot exist without a horizontal agreement on prices. Since *BMI*, the question of whether joint-venturers must horizontally agree on price to create a new product has become central when courts investigate cooperation issues.⁴⁹

A few years later, in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*,⁵⁰ the Court further addressed this cooperation-necessity issue. In this case, an association of colleges horizontally agreed to form a football league.⁵¹ This association also negotiated the league's broadcasting rights.⁵² The Court recognized that competitors, the schools, needed to cooperate in order to create a new product: the

⁴² *Id.* at 692.

⁴³ "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers." *Id.*

⁴⁴ The Court heard but yet rejected the Society's argument with regard to safety under the rule of reason. *Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 695.

⁴⁵ 441 U.S. 1 (1979).

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 21.

⁴⁸ *Id.* at 21–22.

⁴⁹ See e.g. *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (holding that price agreement of a lawful joint venture does not violate the Sherman Act).

⁵⁰ 468 U.S. 85 (1984) [hereinafter *NCAA*].

⁵¹ *Id.* at 94.

⁵² *Id.* at 95.

college football league. League participants must agree on the size of the field, the number of players, and so forth.⁵³ Competitors, however, did not need to agree on price and output to create that league.⁵⁴

The Court asserted that “[t]his naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”⁵⁵ More importantly, the Court let the association present its pro-competitive justifications for its broadcasting agreement.⁵⁶ But, the Court found that this agreement constituted a blanket price agreement that was not necessary (and only ancillary) to create the new product.⁵⁷ As a result, the Court struck down the price fixing portion of the cooperation.

In *BMI* and *NCAA*, the Court faced horizontal price fixing agreements. Instead of ruling them *per se* invalid, the Court looked at the actions of the defendants and also considered pro-competitive justifications for these actions. This double inquiry subtly marked a movement away from *per se* on price fixing issues but did not quite involve a rule of reason market inquiry.

The Supreme Court put the final nail in the proverbial coffin of *per se*-rule of reason dichotomy in *California Dental Ass’n v. FTC*.⁵⁸ The Court recognized the existence of a third mode of analysis and coined it Quick Look; nonetheless, the Court found that the Federal Trade Commission (FTC) erred in using quick look.⁵⁹ In this case, the FTC investigated an association of dentists, the California Dental Association (CDA). The dental association had multiple purposes, from providing insurance to lobbying on behalf of its members.⁶⁰ The association also required that its members not advertise using misleading or deceiving information.⁶¹ The FTC “brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of the FTC Act,”⁶² which prohibited members from advertising about prices and quality;⁶³ and hence amounted to a “‘naked’ restraint on price competition itself.”⁶⁴

⁵³ *Id.* at 101.

⁵⁴ *Id.* at 110.

⁵⁵ *Id.*

⁵⁶ *NCAA*, 468 U.S. at 114.

⁵⁷ *Id.* at 114–15.

⁵⁸ 526 U.S. 756 (1999).

⁵⁹ *Id.* at 765.

⁶⁰ *Id.* at 767.

⁶¹ *Id.* at 768.

⁶² *Id.* at 762.

⁶³ *Id.*

⁶⁴ *Cal. Dental Ass’n*, 526 U.S. at 763.

During the administrative proceedings, an Administrative Law Judge (ALJ) found a violation of § 5 of the FTC Act because the limitation on advertising harmed dentists and consumers. The ALJ, however, came to this conclusion without requiring an inquiry into market powers under *In re Massachusetts Board of Registration in Optometry*.⁶⁵ The Commission affirmed this ruling and affirmed that the quick look analysis was appropriate.⁶⁶ On appeal, the Ninth Circuit determined that *per se* analysis would have been inappropriate, but approved of the quick look analysis because the association's restrictions amounted to a naked restraint on price.⁶⁷

The Supreme Court reversed. In *California Dental Ass'n*, the Court found that quick look was inappropriate for analyzing restraints on advertising because this case “fail[ed] to present a situation in which the likelihood of anticompetitive effects [was] comparably obvious.”⁶⁸ The Court ruled that the rule of reason analysis was the appropriate analysis for this restrictive agreement because the effect on price is less obvious than naked price fixing and requires a more in depth examination.⁶⁹ The Court stated that a quick look analysis was appropriate “when the great likelihood of anticompetitive effects can easily be ascertained.”⁷⁰ The Court cited three such cases in which it applied an analysis close to a quick look analysis: *National Society of Professional Engineers*;⁷¹ *NCAA*;⁷² and *FTC v. Indiana Federation of Dentists*.⁷³

The Court articulated two important points. First, the Court recognized that the “categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”⁷⁴ The Court described a spectrum⁷⁵ where quick look falls between the two extremes (*per se* and rule of reason). In other

⁶⁵ 110 F.T.C. 549 (1988).

⁶⁶ *Cal. Dental Ass'n*, 526 U.S. at 764.

⁶⁷ *Id.* at 763.

⁶⁸ *Id.* at 771.

⁶⁹ *Id.* at 779.

⁷⁰ *Id.* at 770.

⁷¹ 435 U.S. 679, 692 (1978) (holding that “no elaborate industry analysis is required to demonstrate the anticompetitive character of” horizontal conspiracy to refuse to discuss prices with consumers).

⁷² 468 U.S. 85, 120 (1984) (holding that an association of colleges that coordinated to create a new football league conspired to restrict output when it restricted “the ability of member institutions to respond to consumer preference” when the association restricted their ability to televise games individually).

⁷³ 476 U.S. 447, 459 (1986) (holding that an horizontal agreement to withhold a service was unlawful without requiring further inquiry into market analysis).

⁷⁴ *Cal. Dental Ass'n*, 526 U.S. at 771.

⁷⁵ *Id.* at 780.

words, the Court interpreted the three choices as choosing one analysis along a single and continuous spectrum of analyses. In the Court's view, this choice depends on the investigated restraint.

Second, the Court explained that the quick look analysis is appropriate 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."⁷⁶ But, the Court left the identity of this observer open to interpretation.

Recently, the Court referred to quick look in *Texaco, Inc. v. Dagher*,⁷⁷ and in *FTC v. Actavis, Inc. et al.*⁷⁸ In *Dagher*, the Court limited *per se* and quick look further, finding that these two analyses were inappropriate when addressing pricing decisions of a lawful joint venture.⁷⁹

In *Actavis, Inc.*, the FTC brought a case against the participants of reverse payment settlements because the FTC wanted these settlements to be reviewed under antitrust laws.⁸⁰ Reverse settlements occur when a patent holder settles with an alleged infringer who receives a substantial settlement payment in exchange for agreeing not to enter the market for an agreed-upon period.⁸¹ In its decision, the Supreme Court refused to apply quick look to reverse settlements because the anticompetitive effects of reverse payments depend on a number of factors such as the size of the payment and the litigation costs.⁸²

From these Supreme Court decisions, courts must decide when to apply quick look. The next section addresses the situations where plaintiffs requested quick look and it describes how courts applied it. As the next section evidences, courts often refuse to apply quick look and quick look remains the territory of the FTC.

C. Since California Dental, Precedents Remain Far and Few With No Consensus: Quick Look A Modified Per Se or A Truncated Rule of Reason?

Around the same time that the Supreme Court accepted the possibility of a quick look analysis, political changes pushed the Federal

⁷⁶ *Id.* at 779.

⁷⁷ 547 U.S. 1 (2006).

⁷⁸ 133 S. Ct. 2223 (2013)

⁷⁹ *Dagher*, 547 U.S. at 7 n.3.

⁸⁰ *See Actavis, Inc.*, 133 S. Ct. at 2227.

⁸¹ *Id.*

⁸² *Id.* at 2237 (affirming that because of the complexity of reverse payment settlement agreements, "the FTC must prove its case as in other rule-of-reason cases").

Trade Commission toward the same inquiry.⁸³ Lower courts, however, simultaneously struggled with quick look. As this section explains, these courts reserve quick look for anticompetitive behaviors that satisfy two requirements. First, courts reserve quick look for cases involving anticompetitive behaviors for which they have accumulated some judicial experience. This is because courts must rely on their experience and precedents to employ quick look. Second, courts reserve quick look for cases that involve anticompetitive behaviors that have the same *effects* as *per se*, but are not *per se* on their face. Rather, these cases may have pro-competitive justifications because of the unique market conditions, which demand that courts compare the advantages and disadvantages of the restraint.

Lower courts have reserved quick look for behavior with which they already have extensive experience.⁸⁴ In this respect, quick look resembles *per se* since a “*per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason.”⁸⁵

Similarly, courts apply quick look only if they have the required experience. For instance, the Ninth Circuit ruled in *California, ex rel. Harris v. Safeway, Inc.*⁸⁶ that the case could not be decided under quick look because prior judicial experience does not allow courts to resolve the issue under *per se* or quick look analysis.⁸⁷

*California, ex rel. Brown v. Safeway, Inc. et al*⁸⁸ involved a horizontal agreement amongst competitors to exercise their buying power, referred to as monopsony or oligopoly power. The Ninth Circuit initially found that a horizontal profit sharing agreement among grocery store competitors was unlawful after “apply[ing] a *per se*-plus or a quick

⁸³ “The power of appointment (and removal), we want to stress, is the most potent means a president has to create a responsive bureaucracy. This is illustrated by the Reagan administration’s careful choice of officials whose policy perspectives coincided with those of the president and who were willing to act accordingly.” B. Dan Wood and James E. Anderson, *The Politics of U.S. Antitrust Regulation*, 37 AM. J. OF POL. SCIENCE 1, 8 (1993) (citation omitted).

⁸⁴ “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.” *Cal. Dental Assn. v. FTC*, 526 U.S. 756, 781 (1999).

⁸⁵ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (U.S. 2007) (internal quotations omitted).

⁸⁶ 651 F.3d 1118 (9th Cir. 2011).

⁸⁷ *Id.* at 1139.

⁸⁸ 615 F.3d 1171 (9th Cir. 2010).

look-minus analysis.”⁸⁹ However, after a rehearing *en banc*, the Ninth Circuit reversed⁹⁰ and ruled that the “quick look-minus analysis” was not appropriate because prior judicial experience does not allow the court to resolve the issue under *per se* or quick look analysis.⁹¹ The court thus found that the defendants established sufficient doubt to raise the analysis to a full-blown rule of reason analysis: co-conspirators still have an interest in competing to retain current consumers or gain future consumers because the pooling agreement is short-lived and limited to 15% share of the grocery market.⁹²

Next, courts have limited the application of quick look to practices with *effects* similar to the effects of horizontal territorial division and price fixing. Courts usually investigate horizontal territorial division and price fixing under *per se*, but investigate other anticompetitive behaviors with similar effects under quick look. The anticompetitive behavior may present a factor or context that commands further analysis.

The Supreme Court reserves *per se* analysis for restraints that “always or almost always tend to restrict competition and decrease output.”⁹³ Courts seemingly reserve the quick look for the same types of cases and “have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.”⁹⁴

Courts has used quick look to review cases involving horizontal conspiracies to restrain prices. For instance, in *Polygram Holding, Inc., v. FTC*,⁹⁵ the D.C. Circuit ruled that the FTC appropriately uses quick look when direct competitors conspire to restrain trade.⁹⁶ In *Polygram Holding*, two record companies formed a joint venture to produce a new record. As part of the joint venture, they agreed to temporarily suppress

⁸⁹ *Id.* at 1180 (“[A] *per se*-plus or a quick look-minus analysis [is] a combined or mixed approach, somewhere between pure *per se* and pure quick look, along the lines suggested by the Court in *California Dental Association*.”).

⁹⁰ *Cal., ex rel. Harris*, 651 F.3d at 1118.

⁹¹ *Id.* at 1139.

⁹² *Id.*

⁹³ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

⁹⁴ *Dagher*, 547 U.S. at 7 n.3.

⁹⁵ 416 F.3d 29 (D.C. Cir. 2005).

⁹⁶ *Crane*, *supra* note 38, at 63. *Crane* interprets *Polygram* to mean that “[r]ather than specifying *ex ante* rules of conduct, it allocates burdens of proof and persuasion within the litigation: Step One: The judge or agency considers whether the restraint obviously harms consumers; Step Two: If so, the judge or agency concludes that the practice does presumptively harm consumers, the defendant must come forward with a plausible and legally cognizable efficiency justification; Step Three: If the defendant does, the burden shifts back to the agency to address the justification, in one of two ways; and so forth.” *Id.*

promotion and price competition on two discs individually owned by each company because these individual records were competing with the companies' joint venture.⁹⁷ The D.C. Circuit found that the companies had unlawfully horizontally conspired to restrain trade.⁹⁸

The Fifth Circuit, in *North Texas Specialty Physicians v. FTC*,⁹⁹ also found that quick look is appropriate in cases involving horizontal conspiracies to restrain price competition.¹⁰⁰ In this case, the FTC challenged a minimum fee agreement by an association of independent physicians where the independent and competing physicians associated to negotiate fees with insurance companies.¹⁰¹ The association polled its members, asking which minimum fee they were willing to accept, and used their responses "to calculate the mean, median, and mode of the minimum acceptable fees identified by its physicians."¹⁰² Using quick look, the ALJ and the Commission found that this sort of polling represented horizontal price-fixing in violation of the FTC Act.¹⁰³ The Fifth Circuit court affirmed, finding that the "practices [bore] a very close resemblance to horizontal price-fixing, generally deemed a per se violation."¹⁰⁴

However, courts have not applied quick look to practices not involving horizontal agreements with the effects of a naked price or output fixing.¹⁰⁵ Rather, courts demand a rule of reason analysis for horizontal agreements on non-price factors, such as industry standards. For instance, in *Continental Airlines, Inc. v. United Airlines, Inc.*,¹⁰⁶ the court dealt with a non-price horizontal restriction involving restraints on the permissible size of carry-on bags that passengers can fit through x-ray machines at security gates. The Fourth Circuit ruled that a cursory quick look analysis was inappropriate because a court may find that some of the pro-competitive justifications were not "illusory."¹⁰⁷ The court determined that quick look was inappropriate when "a challenged

⁹⁷ *Polygram*, 416 F.3d at 32.

⁹⁸ *Id.* at 38–39.

⁹⁹ 528 F.3d 346 (5th Cir. 2008).

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 353.

¹⁰² *Id.*

¹⁰³ *Id.* at 365.

¹⁰⁴ *Id.* at 362.

¹⁰⁵ *See, e.g., American Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 790 (9th Cir. 1996) (holding that "the present case does not present the type of naked restraint on price or output that would justify a 'quick look'" when a vertical market participant put price restriction on the downstream participants or agents) (citations omitted).

¹⁰⁶ 277 F.3d 499 (4th Cir. 2002).

¹⁰⁷ *Id.* at 514.

restraint ‘might plausibly be thought to have a net pro-competitive effect, or possibly no effect at all on competition.’”¹⁰⁸

Courts also demand rule of reason analysis for vertical restraints. For instance, in *Gordon v. Lewistown Hospital*,¹⁰⁹ the court dealt with a vertical restriction between a hospital and a physician. The Third Circuit court ruled that quick look analysis was inappropriate when a hospital disciplines and revokes the privileges of one of its doctors because this revocation restrains the doctor’s practice. The court noted, however, that “even if the Conditions [of the disciplinary decision imposed on the defendant] were a restraint, they represent a nonprice vertical restraint between one hospital and one physician,” which it had previously reviewed under the traditional rule of reason.”¹¹⁰

Finally, courts demand the rule of reason analysis for vertical and horizontal conspiracies. For instance, in *Craftsmen Limousine, Inc. v. Ford Motor Co.*,¹¹¹ the Eighth Circuit found that the quick look analysis was inappropriate where the manufacturer of a limousine input and an association of competing downstream limousine manufacturers attempted to prevent other downstream limousine manufacturers from advertising in trade journals if they did not comply or show compliance with certain safety standards.¹¹²

The court found that the plaintiff presented enough evidence that the defendants collectively pressured to exclude the limousine manufacturer from advertising.¹¹³ Yet, because the court found that the defendants acted to enforce safety standards and “[b]ecause the economic impact of safety standards is not immediately discernable, something more than a cursory per se analysis is required to determine whether the restraint was unreasonable.”¹¹⁴ The Eighth Circuit turned to its sister court, the Seventh Circuit, for guidance: because the anticompetitive effects were not immediately apparent, the rule of reason was appropriate to weigh whether safety concerns outweigh advertising restrictions.¹¹⁵

Courts limit their application of quick look to cases involving horizontal agreement with the effects of a naked price fixing because they have extensive experience with these behaviors. Courts may

¹⁰⁸ *Id.* at 510.

¹⁰⁹ 423 F.3d 184 (3d Cir. 2005).

¹¹⁰ *Id.* at 210.

¹¹¹ 363 F.3d 761 (8th Cir. 2004).

¹¹² *Id.* at 776.

¹¹³ *Id.* at 772.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 775–76.

usefully apply quick look to other types of cases, but remain reluctant to do so because quick look remains misunderstood. A handful of other district court cases have touched upon quick look without applying it to the facts at hand.¹¹⁶ These district and circuit cases, however, show that only the FTC has applied a quick look analysis without being overturned on appeal. This fact has led some commentators to believe that only the FTC can apply this type of analysis¹¹⁷ and that questions of quick look cannot reach the jury. The following section shows that quick look can and should reach the jury because courts should approach all three analyses consistently.

III. A SPECTRUM OF ANALYSES: QUICK LOOK IN TWO STEP

In *Deutscher Tennis Bund v. ATP Tour Inc.*,¹¹⁸ the plaintiff alleged that the defendants conspired to restrain professional tennis players from playing in the plaintiff's tournament because the defendants lowered the tournament ranking of the plaintiff and requested that these professional players attend more highly ranked tournaments.¹¹⁹ The Third Circuit held that, because the defendants offered pro-competitive justifications, the district court had properly instructed the jury "to analyze the alleged restraints under the rule of reason."¹²⁰ In dictum, the Third Circuit, citing

¹¹⁶ See, e.g., *New Eng. Carpenters Health Benefits Fund v. McKesson Corp.*, 573 F. Supp. 2d 431, 435 (D. Mass. 2008) (holding that the quick look analysis was not appropriate because the plaintiff failed to show "any anticompetitive effects at all, other than to say in conclusory fashion" of an agreement between non-competitors to state fraudulent drug prices); *Madison Square Garden v. NHL*, 2007 U.S. Dist. LEXIS 81446, at *19 (S.D.N.Y. Nov. 2, 2007) (holding that "quick look doctrine is inappropriate because the casual observer could not summarily conclude that this arrangement has an anticompetitive effect on customers" when the plaintiff who owns a team who participate complained of an horizontal agreement to restrain competition when the other league members agreed by majority to have their website hosted together); *Med Alert Ambulance, Inc. v. Atlantic Health System, Inc. et al.*, 2007 U.S. Dist. LEXIS 57083, at *27-28 n.9 (D.N.J. Aug. 6, 2007) (refusing to use a quick look analysis "[b]ecause Plaintiff can bring its claim under the rule of reason analysis, and further because the issue of the 'quick look' test was not challenged by Defendants"); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (holding that the quick look analysis was inappropriate because "a rudimentary understanding of the market demonstrates that the eligibility rules may have net procompetitive effects" when the plaintiff alleged that the PGA Tour's action prevented the formation of a competing Senior league).

¹¹⁷ Stephen Calkins, *California Dental Association: Not a Quick Look but not the Full Monty*, 67 ANTITRUST L.J. 495 (2000). Some observers believe that this may be a mixed question of fact and law, which "may be hard to accomplish in a jury trial, but it plays to the Commission's unique role as an expert adjudicator." *Id.*

¹¹⁸ 610 F.3d 820 (3d Cir. 2010).

¹¹⁹ *Id.* at 826.

¹²⁰ *Id.* at 833.

the A.B.A. model jury instructions, went on to explain that quick look could not be submitted to the jury anyway because “‘the application of the quick look analysis is a question of law to be determined by the court,’ and therefore the concept of ‘quick look’ has no application to jury inquiry.”¹²¹ However, the A.B.A. never justified this statement,¹²² which has left the Third Circuit’s view subject to a great deal of criticism.¹²³ In fact, the Third Circuit Court was too hasty in determining that quick look cannot go to the jury.

This section investigates the first reason behind why quick look ought to go to the jury. Specifically, the Supreme Court in *California Dental Association* stated that “[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”¹²⁴ Thus the three analyses lie along a continuous spectrum, sometimes referred to as a single inquiry.¹²⁵ Furthermore, since *per se* and rule of reason analyses have gone to the jury, the third analysis within this same inquiry

¹²¹ *Id.* (quoting ABA Section of Antitrust Law, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES A-8 n.2 (2005)).

¹²² The ABA’s Model Jury Instructions provide in the pertinent part: These instructions do not include a separate instruction for the ‘quick look’ analysis because application of the quick look analysis is a question of law to be determined by the court. If the court, based on its quick look analysis, determines that the defendant has come forward with a sound procompetitive justification for the alleged restraint, then the ‘court must proceed to weigh the overall reasonableness of the restraint using a full scale rule of reason analysis.’ *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (holding that district court should have engaged in full rule of reason analysis because quick look showed that defendant had sound procompetitive justification for the alleged restraint); *see also* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771 (1999) (full rule of reason analysis was required where challenged restraint ‘might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition’). For an overview of the situations in which quick look analysis should be applied and the factors that should be assessed, *see* ABA Section of Antitrust law, 1 *Antitrust Law Development* 62-65 (5th ed. 2002). *See also* *Cal. Dental*, 526 U.S. at 769–71, 779–80; *Viazis v. American Ass’n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002); *Brown Univ.*, 5 F.3d at 699; *Chicago Prof’l Sports, Ltd. P’ship v. NBA*, 961 F.2d 667 (7th Cir. 1992).

ABA Section of Antitrust Law, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES A-8-A-9 n.2 (2005).

¹²³ *See* Gavil, *supra* note 17, at 779 n.223 (“The Model Jury Instructions misread the cases it cites in support of this bold proposition, which was uncritically embraced in *Deutscher Tennis Bund.*”).

¹²⁴ *Cal. Dental Ass’n*, 526 U.S. at 779.

¹²⁵ *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 826 (6th Cir. 2011).

must go the jury for consistency reasons, in the absence of any other indication from the Supreme Court.

A. Per Se Rule Goes to the Jury and Quick Look Must Follow

When trial courts investigate antitrust cases under *per se*, the courts involve the juries in a number of ways. Under Section 1 of the Sherman Act, a jury must decide whether a horizontal cartel exists in order to find for the plaintiff.¹²⁶ For example, litigants centered Section 1 cases around cartel existence issues in *United States v. Trenton Potteries Co.*¹²⁷ and the Supreme Court found that the lower court correctly submitted the question of whether an agreement existed to the jury.¹²⁸ The Court agreed that, because a conspiracy to fix prices is a *per se* violation, whether the prices is reasonable is not an issue or a defense.¹²⁹

Some courts, like the Eleventh Circuit, have fashioned pattern jury instructions for civil cases.¹³⁰ Among these pattern instructions, the Eleventh Circuit includes pattern jury instructions on *per se* investigations.¹³¹ Similarly, the A.B.A. model jury instructions, upon which the Third Circuit bases its dictum, contain a section on *per se* offenses.¹³² Thus, cases that courts decide under *per se* still go to the jury to determine whether the elements of the case (such as price collusion) are present.

Finally, quick look mirrors *per se* in some aspects because both investigate the defendant's actions, instead of the defendant's market

¹²⁶ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 701 (1962). Parties may use circumstantial evidence to prove a conspiracy under Sections 1 and 2 of the Sherman Act: the parties must present "sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" *Id.* at 700–01 (quoting *Tennant v. Peoria & P.U. R. Co.*, 321 U.S. 29, 35 (1944)).

¹²⁷ 273 U.S. 392 (1927).

¹²⁸ *See id.* at 401 ("The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents.").

¹²⁹ *See id.* ("Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict.").

¹³⁰ ELEVENTH CIRCUIT PATTERN JURY INSTRUCTION (CIVIL CASES) (2005), available at <http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf>; see also FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS – CIVIL (2006) (including sections on *per se* violation §§ 6.1–6.2), available at <http://www.lb5.uscourts.gov/juryinstructions/>.

¹³¹ ELEVENTH CIRCUIT PATTERN JURY INSTRUCTION (CIVIL CASES) 278–79 (2005), available at <http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf>.

¹³² American Bar Association, MODEL JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 54–56 (2009).

power.¹³³ Additionally, both focus on judicial precedents and theories instead of reasonableness of the actions.¹³⁴ Courts already send *per se* to juries through general and special jury instruction.¹³⁵ Therefore, courts should also submit quick look to the jury – through general or special jury instructions – if litigants are worried about the complexity of certain issues.¹³⁶

B. Rule of Reason and Quick Look Demand the Trier of Facts to Balance the Evidence

The fact that the quick look analysis mirrors *per se* is not the only reason why it must also go to the jury. Quick look should go to the jury because it mirrors the rule of reason in its other aspects. While cases under *per se* focus on the issue of actions and horizontal agreements, cases under rule of reason address less targeted questions and center on the issue of reasonableness. Quick look mirrors rule of reason in the way courts require a balancing of the proposed evidence and theories.¹³⁷ The two analyses borrow from each other.

¹³³ See Cal., ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) (discussing how “*per se* treatment is proper only “[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it”” and how quick look requires “experience of the market . . . [to reach] a confident conclusion”) (citation omitted).

¹³⁴ *Id.* at 1134 (holding that “[f]ull rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis” and hence affirming that a court applies *per se* and quick look in this situation – focusing on the anticompetitive behavior and circumventing the market analysis).

¹³⁵ Courts can approve special interrogatories in order to help the jury focus on the proper issues. See, e.g., ELEVENTH CIRCUIT PATTERN JURY INSTRUCTION (CIVIL CASES), *supra* note 132, at 284–85.

¹³⁶ A group of 118 Law, Economics and Business Professors and the American Antitrust Institute filed an amicus brief in *FTC v. Watson Pharmaceutical*, 133 S.Ct. 787, No. 12-416 (filed 23 Jan. 2013) [hereinafter Scholars Brief]. In their brief, these scholars argue in favor of reviewing reverse payment under quick look. They suggest a test that focuses on the intent of the settlor and on pro-competitive justifications. The settlor’s intent can be assessed from the size of the payment in comparison to litigation cost. The pro-competitive justifications may take any form like in rule of reason cases. This amicus brief also offers some specific questions that could guide a jury.

¹³⁷ *Polygram Holding, Inc., v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). The D.C. Circuit court accepts the four step analytic framework that FTC employed. *Id.* at 35-36. In *North Texas Specialty Physicians v. Federal Trade Commission*, 528 F.3d 346 (5th Cir. 2008), the Fifth Circuit fashioned a shorter three-part analysis. *Id.* 361–62. Both quick look analyses, however, employed by these circuit courts involved a balancing of evidence and theories. Even in *California v. Safeway, Inc.*, 615 F.3d 1171, 1179 (9th Cir. 2010), the Ninth Circuit discussed a three step process involving weighing of the evidence before the case was later reversed *en banc* because the majority found that quick look was inappropriate for this case in *California, ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1139 (9th Cir. 2011).

Sometimes, quick look and rule of reason mirror each other so much that trial court applying quick look may move their investigation into rule of reason territory. For instance, in *Realcomp II, Ltd, v. FTC*,¹³⁸ the Sixth Circuit court affirmed, under rule of reason, a Commission's decision made under quick look without requiring further steps.¹³⁹ "[N]otwithstanding its initial quick-look analysis, the Commission alternatively invalidated the challenged restraints under a more searching inquiry, which included an assessment of Realcomp's market power and the actual, as well as likely, anticompetitive effects of its policies."¹⁴⁰ The Commission used a more extended quick look analysis, akin to a rule of reason analysis.¹⁴¹ In spite of the labeling, the two analyses live along a not-well-delimited spectrum.¹⁴²

Sometimes, quick look and rule of reason mirror each other so much that trial court applying rule of reason rely on tools usually reserved for quick look analysis. For instance, in *Todd v. Exxon Corp. et al.*, the Second Circuit affirmed that anticompetitive effects used to determine market power are not limited to quick look and used anticompetitive effects as an "alternative way[] of demonstrating market power."¹⁴³ In this case, the plaintiff alleged that the six major oil producers, particularly Exxon, exchanged information regarding employees' compensation in order to use that information to depress employee wages and to essentially decrease competition for qualified employees, excising their oligopoly power.¹⁴⁴ Because the plaintiff's market definition was over-inclusive and under-inclusive,¹⁴⁵ the lower court determined that the plaintiff failed to prove market power and dismissed the case for failure to state a claim.¹⁴⁶ The Second Circuit, however, reversed and remanded the case,¹⁴⁷ determining that the market

¹³⁸ 635 F.3d 815 (6th Cir. 2011).

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 827.

¹⁴¹ *See id.*

¹⁴² One problem with quick look being so close to a rule of reason analysis is that the litigants have to prepare for a full blown rule of reason case, unless it is very clear what kind of evidence will not be needed early on. This dual trial preparation offers no savings for the litigations. However, parties to a suit will most likely argue which analysis applies and hence will often have to prepare regardless for the rule of reason analysis. Therefore, the savings will come from judicial efficiency, and not necessarily on trial preparations. The determination of the case will affect the procedure and the burdens of proof during the trials.

¹⁴³ *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2d Cir. 2001).

¹⁴⁴ *Id.* at 196–97.

¹⁴⁵ *Id.* at 201.

¹⁴⁶ *Id.* at 206.

¹⁴⁷ *Id.* at 214–15.

definition is plausible.¹⁴⁸ In its analysis, the Second Circuit court denied that the district court applied quick look when this lower court used anticompetitive effects to assess market power.¹⁴⁹ The circuit noted that using anticompetitive effects to assess market power “is not limited to ‘quick look’ or ‘truncated’ rule of reason cases.”¹⁵⁰

Finally, quick look mirrors rule of reason in some respects but rule of reason borrows some of quick look tools as well. Trial courts affirm that rule of reason and the reasonableness of restraints both remain questions of fact.¹⁵¹ Therefore, quick look should be a question of fact as well.

C. Parties’ Jury Preferences Should Not Dictate the Mode of Analysis

In the past, the trial court decided whether to call a case *per se* or rule of reason. Once it made that decision, the case went to the jury after arguments to determine whether the plaintiff had satisfied his burden of proof and showed all the elements of *per se* offenses (e.g. collusion) or the unreasonableness of a restraint under rule of reason.

Today, on the other hand, a trial court decides whether *per se*, quick look or rule of reason applies. Only *per se* and rule of reason, however, go to the jury. Quick look cases should go to the jury because, in and of itself, quick look is not a new mode of analysis since it borrows from both the *per se* and rule of reason analyses, both of which already go to the jury.

Additionally, quick look cases should go to the jury because they live on the same spectrum as *per se* and rule of reason cases. Since all the other elements of this spectrum go to the jury, the logical conclusion is that so should quick look cases.¹⁵² Furthermore, quick look should go to the jury because judicial consistency dictates that it should. If the Supreme Court wanted to carve out an exception for the non-involvement of juries with quick look, it would carve out an explicit exception; in the absence of such instruction, quick look cases should remain uniform with the other to modes of analysis, and thus go to the jury.

¹⁴⁸ *Id.* at 207.

¹⁴⁹ *Todd*, 275 F.3d at 206–07.

¹⁵⁰ *Id.* at 207.

¹⁵¹ *See* *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 958–59 (9th Cir. 2000) (“[R]easonableness is a question of fact . . .”); *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co.*, 341 F.2d 287, 287 (6th Cir. 1965) (“Whether a restraint is unreasonable or whether there is any restraint is a question of fact.”).

¹⁵² *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 831 (6th Cir. 2011).

Defendants will always argue for an analysis that allows them to present more elements. They will argue that *per se* cases should be analyzed under quick look or rule of reason; they will argue that quick look should be analyzed under rule of reason. Yet, a hypothetical case may present itself where a defendant will request quick look instead of the rule of reason because he wants to avoid a jury and even if it faces more unfavorable presumptions under the quick look. Under the current rule, a defendant can defeat the plaintiff's request for a jury trial merely by arguing that the case ought to be analyzed under quick look instead of *per se*.

Similarly, plaintiffs will always argue for an analysis that creates more presumptions against the defendant. Plaintiffs will argue that rule of reason cases should be analyzed under quick look or even *per se*; they will argue that quick look cases should be analyzed under *per se*. Yet, a plaintiff may request the rule of reason to assure that he gets a jury even if quick look applies and offers more favorable presumptions because the current rule inconsistently discourages them from requesting a quick look analysis since the plaintiffs must give up their right to a jury trial. To prevent these inconsistencies, quick look cases should go to the jury.

D. Quick Look Creates Presumptions and Shifts the Burden of Proof

This section discusses how quick look is not merely a mode of analysis, but also a different burden of proof that creates different presumptions.¹⁵³ When a court decides to investigate under quick look, the court not only decides the type of information to investigate but also puts different burdens of proof on the plaintiff and the defendant.

The selection between the modes of analysis has been equated with establishing the burden of proof, the presumptions to instruct the jury, and the admissibility of evidence.¹⁵⁴ Quick look analysis has its own

¹⁵³ For instance in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), the Supreme Court refused to “hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a ‘quick look’ approach, rather than applying a ‘rule of reason’” because the anticompetitive effects of reverse payments depend on a number of factors such as the size of the payment and the litigation costs. *Id.* at 2237. Lower courts should consider anticompetitive arguments, as well as pro-competitive or competition-neutral arguments.

¹⁵⁴ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999) (explaining that the “quality of the proof required should vary with the circumstances;” that “naked restraint[s] on price and output need not be supported by a detailed market analysis in order to” move to the second step of the quick look analysis and “require” defendants to produce “some competitive justification;” and that not “every case attacking a less obviously anticompetitive restraint . . . is a candidate for plenary market examination”).

presumptions¹⁵⁵ and admissibility issues: courts have interpreted quick look as a process of weighing of evidence.

First, the plaintiff has the burden of proving that the restraint is theoretically or actually anticompetitive.¹⁵⁶ If the plaintiff fails to carry this burden, the court will dismiss the complaint.¹⁵⁷ Nothing indicates, however, that a jury is unable to make the same findings.¹⁵⁸ On the other hand, if the plaintiff satisfies this burden of proof, then the burden shifts to the defendant to show that the restraint has pro-competitive or competition-neutral effects. At this point, the defendant may bring in empirical evidence but may also argue within the theoretical framework, as the defendant attempted in *North Texas Specialty Physicians v. FTC*.¹⁵⁹ If the defendant fails, the court can rule in the plaintiff's favor. If the defendant shows pro-competitive or competition-neutral effects, however, the burden shifts back to the plaintiff, who has one last chance to introduce evidence. The court must then balance the evidence. This balancing is not new to juries. They already perform this balancing for the rule of reason analysis and they already balance facts in every civil case, regardless of the subject matter, when deciding whether to believe particular witnesses or evidence provided by plaintiffs or the defendants.

While the concept may not be new, some may argue that the topic might be more "complicated."¹⁶⁰ But, recall that quick look only

¹⁵⁵ *Actavis, Inc.*, 133 S. Ct. at 2237 ("Quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects.") (citing *Cal. Dental Ass'n*, 526 U. S., at 775 n.12)).

¹⁵⁶ *Polygram Holding, Inc., et al. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

¹⁵⁷ *See, e.g., Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 766-67 (5th Cir. 2002) (affirming summary judgment, finding that, even under the quick look analysis, the plaintiff failed to carry his burden of proof and "to present data demonstrating the anticompetitive effects of the advertising restrictions of which he complains").

¹⁵⁸ Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181 (Robert E. Litan ed., 1993) (arguing that since his previous article on the topic entitled *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICHIGAN L. REV. 68 (1981) little or no evidence has emerged suggesting that "judges can cope with complex issues that juries cannot master"—including antitrust cases).

¹⁵⁹ *N. Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 368-69 (5th Cir. 2008) (finding that the defendants offered "some evidence in the record of spillover effects from the risk contract to non-risk panels, and [some] evidence that NTSP physicians perform as well or better than non-NTSP groups"); *see also supra* text accompanying notes 101-106.

¹⁶⁰ *See, e.g.,* Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CAL. L. REV. 1 (1981) (arguing that antitrust economic questions are too complicated for juries and should be left to judges—while juries should only address questions of conduct and damages); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 813 (1987) ("[T]he Court also

requires a rudimentary understanding of economics—unlike the rule of reason analysis, which involves practices requiring more than a rudimentary understanding of economics and demands juries to determine reasonableness of complicated business practices.

Both the *per se* rule and rule of reason analyses leave a number of complicated questions for the jury.¹⁶¹ Both have been submitted to juries. As a result, there is no reason why quick look should not be submitted to juries as well. Courts' fears that quick look cases are more complicated than *per se* or rule of reason cases can easily be diffused by adequate guidance from the judge and jury instructions, spelling out what must be proven under the quick look test. If properly instructed, the jury will decide properly.

E. Scholastic Interpretation of Quick Look

Scholars are split on their interpretations of quick look: some argue that quick look is a shorter version of rule of reason,¹⁶² others argue that quick look is an analytic procedure.¹⁶³ However, these two interpretations are sometimes nothing more than subtle semantic differences.

First, detractors of quick look interpret the rule as a poor-man's rule of reason in which shortcuts lead to costly judicial mistakes. For

has limited the right to jury trial by stating that it hinges, among other things, on 'the practical abilities and limitations of juries.' While the Court offered this test with reference to issues, not entire cases, several lower courts have denied jury trials in antitrust cases of great complexity.") (internal citations omitted). *See infra* Part III (arguing that Patent questions already go to the jury and often require more complicated engineering questions than rudimentary economic questions).

¹⁶¹ In *Board of Trade of City of Chicago v. United States*, Justice Brandeis identified the following factors that a judge or jury must consider when determining reasonableness:

The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

246 U.S. 231, 244 (1918).

¹⁶² Catherine Verschelden, *Is the Quick-Look Antitrust Analysis in PolyGram Holding Inherently Suspect?*, 32 J. OF CORP. L. 447, 452 (2007).

¹⁶³ *See Deutscher Tennis Bund v. ATP Tour Inc.*, 610 F.3d 820, 830–31 (3d Cir. 2010) (explaining that quick look is a three step process); Crane, *supra* note 38, at 63 (explaining that "[a]lthough a reticulated burden-shifting framework remains in place, it is procedural and flexible rather than substantive and rigid").

instance, Judge Frank Easterbrook¹⁶⁴ argues that because of these shortcuts to the rule of reason, judges will condemn new practices that they do not at first understand because of their lack of experience and expertise.¹⁶⁵ Judge Easterbrook asserts that if defendants do not have market power, their harmful practices will be unsuccessful and the market will correct this harm, which makes judicial intervention pointless.¹⁶⁶ Other scholars argue that market power remains important because market power is dispositive of intent.¹⁶⁷ In short, market power and even consumer harm¹⁶⁸ act as a filter for cases, but not for bad behavior.

Some scholars, however, have advocated that quick look should be applied in a sequential way, adapting as each case develops.¹⁶⁹ If the cost of gathering information on efficiency of horizontal behaviors is lower than the cost of gathering information on market power, then the analysis should start with the efficiency of horizontal behaviors.¹⁷⁰ This first step of the analysis will act as a gatekeeper for cases and the court can stop its analysis if the plaintiff does not successfully carry his burden of proof on each balancing question.¹⁷¹

Of recent times, the Court has encouraged judicial efficiencies by giving a more important gatekeeping role to courts. In *Bell Atlantic Corp. v. Twombly*,¹⁷² the Supreme Court held that a plaintiff must allege enough specific facts when stating a claim in order to avoid a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹⁷³ Therefore, the Supreme Court encourages lower courts to filter cases

¹⁶⁴ Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983 (1987).

¹⁶⁵ *Id.* at 986–87.

¹⁶⁶ *Id.* at 989.

¹⁶⁷ C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L. J. 41, 48 (1999).

¹⁶⁸ Meese, *supra* note 38, at 479–80 (arguing that quick look is a step in the wrong direction and that courts should apply the merger guideline to anticompetitive behavior because, without a thorough investigation, the court shifts the burden of proof without meaningful proof of consumer harm and anticompetitive effects).

¹⁶⁹ Beckner, *supra* note 169, at 68–70.

¹⁷⁰ *Id.* at 69.

¹⁷¹ *Id.* at 70.

¹⁷² 550 U.S. 544 (2007).

¹⁷³ In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court removed the doubts that this gatekeeping duty was limited to antitrust cases. See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL'Y 61, 64 (2007) (“As matters now stand, it looks as though the decision has made a general transformation in pleading rules in all cases, not just within the antitrust area, although only the future will show for sure.”).

better; it should encourage these courts to apply quick look to further filter cases: if a plaintiff cannot win under quick look, he will not succeed under rule of reason.

However, these two gatekeeping tools differ. If the Court wanted only judges to apply quick look, it need not have created a new mode of analysis because such a tool already exist in the form of summary judgment. The Supreme Court wanted courts to have two tools and it should encourage the use of both. Courts can benefit from this encouragement because, with practice, lower courts will understand quick look better and will be able to direct juries better.

Second, supporters of quick look argue that quick look, as a procedural tool, offers the flexibility that courts have already enjoyed with *per se* but yet should not exist: after a trial court chooses which analysis to apply and reviews the facts of the case, it may not be satisfied with its choice and extend its analysis beyond the traditional analysis boundaries—and reach a rule of reason analysis.¹⁷⁴ The Supreme Court essentially applied this logic in the *per se* analysis in *NCAA* and *BMI*, where the Court began by applying a *per se* analysis and, when it became more familiar with the facts, let in pro-competitive justifications.

Like any analysis, quick look offers some pros (e.g. judicial efficiencies much like *per se*) and cons (e.g. higher rate of false positives than rule of reason). Courts should not, however, treat quick look like the unwanted middle-child: courts should apply quick look more often, potentially in that gatekeeping role. Courts should not prevent juries from reviewing quick look merely because the courts, themselves, do not understand this analysis as well as the other two. Instead, courts should direct the quick look analysis inquiry better.

Third, quick look advocates interpret the rule as a structured rule of reason for inherently anticompetitive behaviors. Because quick look applies to inherently anticompetitive behavior, some scholars point to specific scenarios in which quick look should prevail over *per se* and rule of reason analysis. For instance, a large number of legal and economic scholars as well as the American Antitrust Institute encourage the use of quick look in courts' review of reverse payment settlement.¹⁷⁵ They

¹⁷⁴ *Deutscher Tennis Bund v. ATP Tour Inc.*, 610 F.3d 820, 832 (3d Cir. 2010) (“Although competitive harm is initially presumed under ‘quick look,’ ‘[i]f the defendant offers sound procompetitive justifications . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.’”) (quoting *U.S. v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir.1993)); *see also* *Crane*, *supra* note 38, at 63 (explaining that quick look “is procedural and flexible rather than substantive and rigid”).

¹⁷⁵ Scholars Brief, *supra* note 138, at 30–35.

argue that the rule of reason is not appropriate because reverse payment have only anticompetitive effects and no pro-competitive effects.¹⁷⁶ In this group's view, quick look is appropriate because it creates a rebuttable presumption of illegality.¹⁷⁷

Some quick look advocates argue that standard setting is another area in which quick look could be useful.¹⁷⁸ Since standard setting has great benefits – such as network effects¹⁷⁹—but also great drawbacks—such as lock-in effects¹⁸⁰—standard setting lends itself to quick look and its balancing.¹⁸¹ Standard-setting consortia should hold the presumption of validity because standard setting offers such large benefits.¹⁸²

IV. IMPLICATION OF THE “OBSERVER STANDARD”

The Supreme Court determined that quick look is appropriate only where “an *observer* with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”¹⁸³ When defining its observer standard, the Court did not specify a *judge* with rudimentary understanding of economics (or the FTC) but an *observer* with a rudimentary understanding of economics.¹⁸⁴ Thus, it would be improper to assume the Court intended to restrict quick look to judges or the FTC because if the Court wanted such restriction, it could have simply written so. This section addresses the economics-educated observer standard that the Supreme Court defined in *California Dental Association*. Although courts have expressed that the economics-educated observer standard is too high a standard to meet, I argue that this heightened standard may not be as high as first thought.

¹⁷⁶ *Id.* at 32.

¹⁷⁷ *Id.* at 34 (arguing that the “[t]he presumption in *K-Dur* ‘could be rebutted by showing that the payment (1) was for a purpose other than delayed entry or (2) offers some pro-competitive benefit’”) (citing *In re K-Dur Antitrust Litigation*, 686 F. 3d 197, 218 (3d Cir. 2012)).

¹⁷⁸ Douglas D. Leeds, *Raising the Standard: Antitrust Scrutiny of Standard-Setting Consortia in High Technology Industries*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 641 (1997).

¹⁷⁹ *Id.* at 646–47.

¹⁸⁰ *Id.* at 650.

¹⁸¹ *Id.* at 669–70.

¹⁸² Leeds argues that reviews impose delay that can hamper innovation. *Id.* at 665. If the purpose of antitrust review is to promote innovation and the best standards, quick look creates a presumption hard to overcome. *Id.* at 669.

¹⁸³ *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (emphasis added).

¹⁸⁴ *Id.*; see also *NCAA*, 468 U.S. 85 (1984); *Nat’l Soc’y Of Prof’l Eng’rs*, 435 U.S. 679, 692 (1978).

While the Court did not explicitly address whether quick look cases should go to the jury, it provided enough context to assert that it should. The Court used the term “observer” in two separate occasions; the Establishment Clause context and Patent law context.

A. Establishment Clause and the Reasonable Observer Standard

The Supreme Court first introduced the objective or reasonable observer in *Lynch v. Donnelly*¹⁸⁵ and this observer standard “gradually became a part of the Court’s Establishment Clause doctrine as a means for evaluating the constitutionality of a government action’s effect.”¹⁸⁶ *Lynch* called for the “[e]xamination of both the subjective and the objective components of the message communicated by a government action . . . to determine whether the action carries a forbidden meaning.”¹⁸⁷

Thus, the Court called upon the values of a reasonable person to resolve two questions: (1) whether a reasonable observer would perceive the challenged action as a governmental action,¹⁸⁸ and (2) whether the challenged action is an endorsement of religion.¹⁸⁹ The Court interpreted the first question, whether the challenged action amounted to a governmental action, as a question of fact.¹⁹⁰ Recently, the Court has reiterated this interpretation in *Salazar v. Buono*,¹⁹¹ in which it acknowledged that the reasonable observer standard is a fact-sensitive inquiry.¹⁹² Yet, the Court interpreted the second question, whether the challenged action amounts to an endorsement of religion, as a question of law.¹⁹³

Lower courts are left wondering:¹⁹⁴ they must call upon the average consciousness because “reasonable observer” has also been equated to

¹⁸⁵ 465 U.S. 668 (1984).

¹⁸⁶ Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer’s Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL’Y 417, 445 (2006) (internal quotation omitted).

¹⁸⁷ *Lynch*, 465 U.S. at 690 (1984) (O’Connor, J., concurring).

¹⁸⁸ *Id.*; see also *Joki v. Board of Educ. of Schuylerville Central Sch. Dist.*, 745 F. Supp. 823, 827, 829 (N.D. N.Y. 1990).

¹⁸⁹ Bowman, *supra* note 188, at 485.

¹⁹⁰ *Id.*

¹⁹¹ 559 U.S. 700 (2010).

¹⁹² *Id.* at 721 (quoting *Van Orden v. Perry*, 545 U.S. 677, 700 (2005)); *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

¹⁹³ Bowman, *supra* note 188, at 485. See *Lynch* 465 U.S. at 694 (O’Connor, J., concurring) (“[T]he question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.”).

¹⁹⁴ *Utah Highway Patrol Ass’n v. American Atheists*, 132 S. Ct. 12, 19–20 (2011) (The Court rejected the petition for certiorari, writing that “[o]ne might be forgiven for

the “average observer” but fail to find a consistent standard.¹⁹⁵ It seems almost natural that a jury of our peers would be more adept to express this average opinion than a bench of well-educated judges. That is why, unsurprisingly, the reasonable observer standard has evolved into a mixed question of law and fact¹⁹⁶ and with *Salazar*, seems to moving closer to a question of fact.¹⁹⁷

The leap from one observer to the next seems easy. The reasonable observer standard, however, can arguably be distinguished from the economics-educated standard because a juror does not require any outside knowledge to apply the reasonable observer standard. The same cannot be said about the explicitly termed economics-educated standard. This outside knowledge distinction has little hold because the Court has allowed information to be introduced at trial even with reasonable observer standards:¹⁹⁸ the Court softens its hold upon the reasonable observer because the Court believes that the “endorsement test necessarily focuses upon the perception of a reasonable, *informed* observer.”¹⁹⁹ Thus, the reasonable observer must either already be informed or must receive some information or evidence during the trial. The observer with rudimentary understanding of economics could be put in the same category.

failing to discern a workable principle that explains . . . wildly divergent outcomes [of previous cases]. Such arbitrariness is the product of an Establishment Clause jurisprudence that does nothing to constrain judicial discretion, but instead asks, based on terms like ‘context’ and ‘message,’ whether a hypothetical reasonable observer of a religious display could think that the government has made a law ‘respecting an establishment of religion.’ Whether a given court’s hypothetical observer will be ‘any beholder (no matter how unknowledgeable), or the average beholder, or . . . the ‘ultra-reasonable’ beholder,’ is entirely unpredictable.” (internal quotations omitted).

¹⁹⁵ *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) (finding issue of material fact regarding how average observer would interpret city logo).

¹⁹⁶ See Christian M. Keiner, *Preaching from the State’s Podium: What Speech is Proselytizing Prohibited by the Establishment Clause?*, 21 *BYU J. Pub. L.* 83, 84 (2007) (“Most recently, in the 2005 term Ten Commandments cases, ‘proselytizing’ appeared to evolve into a question of fact, or mixed question of law and fact, rather than a conclusion of law.”).

¹⁹⁷ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 798 n.3 (1995); *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 US 677 (2005).

¹⁹⁸ *Weinbaum v. City of Las Cruces, NM*, 541 F.3d 1017, 1031 (10th Cir. 2008) (“The objective or reasonable observer is kin to the fictitious ‘reasonably prudent person’ of tort law. So we presume that the court-created ‘objective observer’ is aware of information ‘not limited to ‘the information gleaned simply from viewing the challenged display.’”) (internal citations omitted).

¹⁹⁹ See *Pinette*, 515 U.S. at 773 (1995) (O’Connor, J., concurring) (emphasis added).

As the Court continues to refine this reasonable observer standard, the Justices will move toward making the question of a “reasonable observer” more and more a question of fact instead of a question of law.

The Court has established this reasonable observer standard as a question of fact for more than a century. The quick look observer standard need not go through the same slow process as the reasonable observer standard. This new standard should benefit from the Court’s experience with the reasonable observer standard and with the ordinary observer standard discussed next.

B. Patent Litigation and the Ordinary Observer

The Supreme Court uses an “ordinary observer” standard in the intellectual property context.²⁰⁰ The Court established this ordinary observer test in *Gorham Manufacturing Co. v. White*.²⁰¹

If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.²⁰²

In the same opinion, the Court rejected an “expert” standard.²⁰³ Thus, an ordinary observer of the two products has to decide whether the products are similar enough to risk deception.

Considering this ordinary observer standard, the Court later affirmed that the question of infringement “might present a question of fact for a court or jury.”²⁰⁴ Of course, different circuit courts have had to refine the ordinary observer standard over the years²⁰⁵ and these refinements led to two different tests: “the copying/unlawful appropriation test associated with the Second Circuit [and] the extrinsic/intrinsic test associated with the Ninth Circuit.”²⁰⁶ The distinction between the two is not germane to this paper.

²⁰⁰ See, e.g., *Columbia Mill Co. v. Alcorn*, 150 U.S. 460, 467 (1893); *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 140 (1905).

²⁰¹ 81 U.S. 511 (1871).

²⁰² *Id.* at 528.

²⁰³ *Id.* at 527.

²⁰⁴ See *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 441 (1902).

²⁰⁵ Robert C. Osterberg and Eric C. Osterberg, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW, § 3 (2012).

²⁰⁶ *Id.* at § 3–2.

As technology becomes more complex, however, some questions will naturally become more difficult than others.²⁰⁷ Courts must decide whether to admit expert testimony to educate the jury.²⁰⁸ Depending on the test, some experts have been allowed to weigh-in and educate the trier of facts on the similarities between the products.²⁰⁹ Of course, the courts only allow the trier of fact to make the final decision on the question of infringement.²¹⁰

The general “ordinary observer test” differs from the copyright infringement subtests because “expert testimony generally [is] not considered in connection with the ordinary observer test.”²¹¹ Courts do limit what experts may do: the experts cannot tell a jury whether two products are similar; however, the experts may educate a jury on some subtests and the function of each element of the product.²¹²

This distinction between telling a jury that two items are similar and describing to a jury a selection of functions of two separate products seems almost fictional and has led some to call for the end of this artificial subtle distinction.²¹³ As technology and computer programs become more and more predominant on the copyright infringement scene, juries are going to need experts. Courts have already made

²⁰⁷ *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232–33 (3d Cir. 1986) (holding that the ordinary observer test should not be applied in cases where the subjects of copyright are particularly complex, such as computer programs).

²⁰⁸ *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (allowing expert testimony under the substantial similarity test); *Jada Toys, Inc. v. Mattell, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (drawing the distinction between extrinsic and intrinsic test, where the former test allows expert, while the latter does not).

²⁰⁹ *See, e.g., Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 291 (3d Cir. 1991), *cert. denied*, 502 U.S. 939 (1991) (discussing the differences between the substantial similarity test, intrinsic test, and the involvement of expert testimony with each test).

²¹⁰ *See, e.g., Arnstein*, 154 F.2d at 473.

²¹¹ *Osterberg*, *supra* note 207, at 3-5.

²¹² *See, e.g., Lakewood Eng'g & Mfg. Co. v. Lasko Metal Prods.*, 2001 U.S. Dist. LEXIS 13491, at *14 (N.D. Ill. Aug. 16, 2001) (“The Federal Circuit has recognized that expert testimony and testimony by a defendant’s employee are proper evidence upon which a jury could rely in deciding that a design patent has been infringed.”).

²¹³ *See Graham Ballou, Substantial Disparity: Copyright Chaos in the Second Circuit*, 2 N.Y.U. INTELL. PROP. & ENT. L. LEDGER 45 (2011) (“Expert testimony on substantial similarity would, at the least, clear judicial fog at this stage of a copyright infringement analysis: courts could abandon the fiction of an objective, ‘ordinary observer’ perspective – the controlling test for substantial similarity – and allow specialists to conduct what is in fact a highly technical analysis.”).

exceptions,²¹⁴ and more will come until the superfluous distinction fades.²¹⁵

In many respects, the ordinary observer standard may best represent the way in which lower courts should interpret the economics-educated standard because of their similarities and the potential for complicated questions. These complicated questions must involve experts in the same way: courts must use experts to educate the jury.

C. The Role of Expert Witnesses

The ordinary and reasonable observers are legal fictions, much like the reasonable person in tort law.²¹⁶ The observer with a rudimentary understanding of economics is likely to be a legal fiction as well: the average juror will have little understanding of economics, whereas the average expert will have more than a rudimentary understanding. Who are those observers with rudimentary understanding of economics?

Because courts have allowed quick look analysis only for cases brought and administered by the FTC, the FTC is the obvious answer. I would argue, however, that all Commissioners have more than a rudimentary understanding of economics. More importantly, Justice Stevens could have as easily limited quick look analysis to FTC reviews. But he did not. Therefore, in the absence of such language, the Court must have intended to include other individuals in the category of economics-educated observers.

Because a number of judges receive some economics education during various continuing legal education programs, the Supreme Court may arguably have extended this new observer standard to judges.²¹⁷ These programs are usually short, a few days at most. Courts could encourage parties to educate juries through experts in the same ways

²¹⁴ See, e.g., Marta Kowalczyk, *Design Patent Infringement: Post-Egyptian Goddess*, 2010 U. ILL. J.L., TECH. & POL'Y 239 (2010) (discussing the use of expert in patent infringement litigation).

²¹⁵ See, e.g., Christopher V. Carani, *The New "Extra-Ordinary" Observer Test for Design Patent Infringement—On a Crash Course With the Supreme Court's Precedent in Gorham v. White*, 8 J. MARSHALL REV. INTELL. PROP. L. 354 (2009).

²¹⁶ See *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1180 (10th Cir. 2009) (“[T]he ‘ordinary observer,’ like the ‘reasonable person’ in tort law, is a legal fiction; it is the measure by which the trier of fact judges the similarity of two works.”); *Weinbaum v. City of Las Cruces, NM*, 541 F. 3d 1017, 1031 (10th Cir. 2008) (“The objective or reasonable observer is kin to the fictitious ‘reasonably prudent person’ of tort law.”).

²¹⁷ See, e.g., ABA Section of Antitrust Law and George Mason Judicial Education Program, *Antitrust Law & Economics Institute for Judges at the George Mason University School of Law & Economics Center* (Oct. 2011).

during trials; alternatively, the court could pick the expert in order to have a more neutral education.

The education of judges has had important impacts upon antitrust cases. According to one empirical study, the education of judges affects the outcome of cases and appeal rates.²¹⁸ This study used data on antitrust cases brought between 1996 and 2006, and included information on the training and experience of the judge, the judge's political affiliation, whether an appeal was filed, and circuit in which it was filed.²¹⁹ The researchers found that a judge's basic economic training has a negative and statistically significant effect upon the probability of a plaintiff filing appeal for simple cases.²²⁰ This education, however, has no statistically significant effect on complicated cases.²²¹ Thus, educating juries can have potentially the same impact in giving them rudimentary economics and can help with simple cases.

Most of the jury's education will come from experts. However, because this study classifies a case as simple or complex if judge's opinion includes terms like "expert witness," "expert report," and "economic expert",²²² then the presence of an expert renders the case automatically complicated. Therefore, this study does not allow one to determine whether *experts* affect a court's appeal rate. As a result, this study cannot be relied upon to determine whether an expert can educate a court in a case that only requires a rudimentary understanding of economics and it does not clarify whether a court (or a jury) can be educated during the course of a case.

What are we to draw from this analysis? I would argue that juries can easily gain a rudimentary understanding of economics: if juries have been educated about engineering issues and similarities between product functions, then they could be educated in economic issues and similarities between business practices;²²³ if judges benefit from a

²¹⁸ Joshua Wright & Michael Baye, *The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 13 (2011).

²¹⁹ *Id.* at 6.

²²⁰ The study uses a probit with the probability of having a decision appealed as the dependent variable and the training of the judge as the independent variable. *Id.* at 14.

²²¹ *Id.* at 15.

²²² *Id.* at 7.

²²³ Crane, *supra* note 38, at 92–94 (arguing that juries are ill-equipped to deal with antitrust issues and judges are better equipped to deal with contested economic theories presented by experts). Nonetheless, I would first argue that if *per se* or the rule of reason analyses go to the jury, then all three analyses ought to go to the jury for consistency (*see infra*) and second if juries can decide the resemblances between complicated patents, they ought to be able to understand economics issues, with which they are likely to have more daily experience. Irrelevantly, judges act as gatekeepers of experts under *Daubert*

summary economics education, then juries will likely also benefit or at least will pick up enough understanding of economics to qualify as a rudimentary economics education.²²⁴

Furthermore, courts have submitted previous observer standards to the jury.²²⁵ All these standards have emanated from common law interpretations of the Constitution. Congress wrote the Sherman Act in vague terms to allow for common law interpretation and with common law in mind.²²⁶ Therefore, courts ought to similarly treat all these common law observer standards: this new observer standard ought to be no different in spite of what the Third Circuit has expressed in dictum. Courts must submit quick look cases to the jury.

V. CONCLUSION

Some commentators speak of quick look as modified *per se*, while others interpret quick look as truncated rule of reason. In practice, it could probably be either, but is there a better way to think of it? As Beckner and Salop argue, quick look may be the analysis that meets the case.²²⁷ This adaptive approach, however, could minimize the role of *per se* by shifting all *per se* cases toward quick look: courts should retain some division between the analyses to take advantage of the judicial efficiencies; yet, courts should not be timid and unwilling to look at more evidence when the situation warrants it.

The Supreme Court may have to weigh in on the issue at some point. Clues left in its previous opinions, however, point to the conclusion that quick look ought to go to the jury. First, *per se*, quick look, and rule of reason live along a continuum of analyses. Since *per se*

v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and can assure that the experts are qualified to educate the jury.

²²⁴ See generally John M. Majoras, *You Too Can Win Antitrust Cases: The Myths and Realities of Trying an Antitrust Case to a Jury*, ANTITRUST SOURCE 1, 2 (2009) (“Most jurors are unable to spout economic theory, but they intuitively understand many of the fundamentals of economic theory from everyday experiences.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun09_Majoras6_29f_authcheckdam.pdf

²²⁵ See Section IV A. & B. *supra*.

²²⁶ William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) (“The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide this flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.”).

²²⁷ Beckner, *supra* note 169, at 70.

and rule of reason can go to the jury, so should quick look. More simply put, courts determine whether a business practice falls under a certain analysis according to precedents and effects; courts do not classify practices as falling under a certain analysis according to the difficulty of the economics involved.

Before any behavior may fall under quick look, courts must have previously analyzed it under the rule of reason (and possibly *per se*) analysis. Thus, these practices, which had been previously put to the jury, should remain with the jury even if courts gained experience in dealing with them because juries have already determined reasonableness in the past.

Second, previous common law interpretations of the Constitution have bred observer standards that have gone to the jury. Courts must treat this new standard in the same way. The topic in antitrust case is economics, which is not more complicated than computer programs in patent cases. Furthermore, quick look's standard only requires a "rudimentary understanding" of economics, which ought to be attainable thanks to expert testimonies.

While jury trials are rare,²²⁸ the possibility of a jury trial has a deep influence upon the strategic decision to settle²²⁹ or even to *ex-ante* engage in any possibly anticompetitive behavior.²³⁰ Yet, with all their faults, juries are part of the American civil judicial system and are here to stay. Thus, the question is when should you use juries? The simple answer is that juries should be used in a consistent manner.

In its haste, the Third Circuit may have looked to the wrong source to determine whether quick look goes to the jury and the ABA may want to take a closer look at their model jury instructions.²³¹ Although other circuits have not yet weighed in on the issue, they must act with more careful deliberation than the Third Circuit, by following the clear clues left by the Supreme Court.²³²

²²⁸ Crane, *supra* note 38, at 78–79 notes that only nine antitrust cases out of 818 were tried by juries in 2005, less than 1% of the cases filed.

²²⁹ *Id.* at 92 (arguing that letting antitrust questions juries go to the jury has its own issues because of their inherent bias against large corporation).

²³⁰ *Id.* at 99.

²³¹ The AAI has announced that it is looking at civil antitrust jury instructions and will be release their own model jury instructions in order to address some of the biases of previous model jury instruction such as the embedded biases in the language used. http://www.antitrustinstitute.org/sites/default/files/925CLE_0.pdf (last visited Feb. 8, 2014).

²³² The Third Circuit's analysis has already been discussed in articles and should be rectified. See e.g. Ryan M. Rodenberg & Daniel Hauptman, *American Needle's Progeny? Tennis and Antitrust*, 2 PACE. I.P. SPORTS & ENT. L.F. 103, 114 (2012).