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Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act

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Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act

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As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.

—*Appalachian Coals, Inc. v. United States* (1933) (Hughes, C. J.)¹

[T]he Sherman Act can be regarded as "enabling" legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways. The standards to be applied always have and probably always will shift as ideology, technology and the American economy changes.

—Herbert Hovenkamp (1985)²

As the courts refine antitrust law by incorporating new insights and resolving old confusions, they act much like Congress (at least in principle) when it updates statutory law.

—William F. Baxter (1982)³

[T]he courts . . . have set sail on a sea of doubt, and have assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

—*United States v. Addyston Pipe & Steel Co.* (1898) (Taft, J.)⁴

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1. 288 U.S. 344, 359-60 (1933). The Supreme Court often quotes this language, without supporting citation to the Act's legislative history. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 439 (1978).

2. H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 52 (1985).

3. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 672 (1982).

4. 85 F. 271, 283-84 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

All the contending antitrust schools agree on one critical point: that the Sherman Act⁵ cannot, and should not, be given a settled meaning derived from traditional statutory sources. They are all wrong.

According to the conventional wisdom, the statute's language conveys little, if anything, of value. If taken literally, section 1's prohibition of "every contract . . . in restraint of trade" would condemn all contracts affecting interstate commerce.⁶ Proponents of this view claim that the Act's words mean little even when read in its common law context because "Congress neither specifically adopted any particular English doctrines nor those of any state."⁷

Indeed, proponents claim that the legislative history reveals almost nothing that might settle any Sherman Act question.⁸ Courts have thus wisely ignored this legislative history, and have regarded the Act "as 'enabling' legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways."⁹ According to these commenta-

5. 15 U.S.C. §§ 1-7 (1982). Sections 1 and 2, which contain the Act's substantive provisions, provide:

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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

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, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

6. In Justice Brandeis's oft-quoted phrase, "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

7. P. AREEDA, *ANTITRUST ANALYSIS* 48-49 (3d ed. 1981). At common law, these phrases described a much smaller class of agreements than their literal reading indicates. In the words of Milton Handler, the use of these common law terms of art by the 1890 Congress gave § 1 "a concreteness of meaning not otherwise apparent on its face." M. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS* 5 (TNEC Monograph No. 38, 1941), *quoted in* H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 11 n.7 (1954).

8. The history "seldom discusses specific applications and thus seldom reveals legislative preferences on the hard questions that will have to be resolved." 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* 14 (1978); *see also id.* at 4 ("query the significance of a legislative history so lacking in careful weighing or deliberate choices").

9. H. HOVENKAMP, *supra* note 2, at 52. All the antitrust schools accept this thesis. For representative statements by leading members of the Chicago school, *see* Baxter, *supra* note 3, at

tors, the Fifty-first Congress intended this result when it passed the Act in 1890.¹⁰

To the uninitiated, this view of statutory construction may be disquieting. The standardless delegation of lawmaking power to unelected judges does not square with traditional conceptions of the separation of powers required by the Constitution. Moreover, the result of this delegation has been a body of antitrust law that rivals only constitutional law in its indeterminacy.¹¹ Clients quickly discover that while antitrust counselors seldom can provide more assurance than that proposed actions "probably" will withstand possible challenge, they have little trouble submitting large bills for withstanding those challenges. Antitrust litigation remains notoriously costly and unpredictable, despite repeated efforts to simplify both the doctrine and the litigation process.¹² In short, the norms that govern other areas of statutory law go unobserved in antitrust, which imposes high costs on traditional rule-of-law values.¹³

The commentators make two Panglossian replies to those who fail to see the conventional wisdom as the best of all possible antitrust worlds. First, the costs of antitrust's constitution-like vagueness soon

662-72; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136 (1984) ("The Sherman Act of 1890 told the courts to make up a law on the subject of restraint of trade") [hereinafter cited as Easterbrook, *Vertical Arrangements*]; Easterbrook, *Is There a Ratchet in Antitrust Law?* 60 TEX. L. REV. 705, 706 (1982) ("Sherman and Clayton Acts authorized the Supreme Court to invent and enforce a law of restraint of trade" (footnotes omitted)).

For representative statements by leading members of the sociopolitical goals school, see Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 577 (1973) (Congress "chose not to specify proscribed conduct in the Sherman Act, but, in effect, to delegate to the courts broad power to devise solutions to the current problem and its future manifestations"); Rowe, *Antitrust Trends for the Eighties*, N.Y. ST. B.A. ANTITRUST L. SYMP. 3 (1982) (Act an "adaptable legal charter"); see also Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1567-68 (1984) [hereinafter cited as Rowe, *Decline of Antitrust*].

For a representative statement by leading members of the "Harvard school," see 1 P. AREEDA & D. TURNER, *supra* note 8, at 14-15 (antitrust statutes "invest the federal courts with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts" and "the legislative history . . . deserv[es] . . . relatively little weight").

10. See, e.g., Baxter, *supra* note 3, at 670 ("Neither this evolution [of doctrine] nor its lack of direction should be surprising. It is exactly what the framers of the antitrust laws intended.").

11. See generally *infra* text accompanying notes 238-316, 505-616. This indeterminacy necessarily follows from the concept of an act with constitution-like vagueness. The courts' interpretations of such a "constitutional" Sherman Act will vary with the intellectual trends of various eras, to the extent those ideas are shared by contemporaneous Supreme Court majorities. The Act's construction has in fact so varied. See generally Kauper, *The Burger Court and Antitrust Philosophy*, in N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 2-4, 11-12 (1981); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 MICH. L. REV. 325 (1968) [hereinafter cited as Kauper, *The "Warren Court"*]; Rowe, *Decline of Antitrust*, *supra* note 9, at 1516-40.

12. See generally *infra* text accompanying notes 317-35.

13. The costs of the standardless delegation approach to the Sherman Act are detailed *infra* at text accompanying notes 317-367.

will be substantially reduced. Doctrine will be "rationalized"¹⁴ by some overarching principle;¹⁵ procedural tinkering and new forms of judicial management will reduce litigation costs.¹⁶ Second, the benefits of the current regime will justify any remaining costs. For the "constitutional" Sherman Act, we should understand, is not just the unfortunate product of a feckless Congress. It is "a positive instrument of progress"¹⁷ through which the courts may impose beneficial microeconomic regulation, in the absence of the political branches' desire or ability to do so.

Commentators assert that it is unreasonable to expect courts to be bound by standards in carrying out this role.¹⁸ As the latest hornbook pronounces, only the most benighted could expect settled law. "[T]he most isolationistic and regressive of views is that in 1890 or today we have all the right answers. We did not and we do not." The permanently unsettled "common law nature of antitrust policy permits us to make the best of what we have."¹⁹

The argument, in a word, is that the benefits of this noninterpretivist approach outweigh its costs to the rule-of-law and separation of powers, and thereby justify wholesale judicial policymaking in Sherman Act

14. I borrow this phrase from the title of a panel discussion moderated by Donald F. Turner. Panel Discussion, *Has Economics Rationalized Antitrust?*, (September 29, 1983) (part of a National Institute on Antitrust and Economics sponsored by the American Bar Association's Section of Antitrust Law), reprinted in *ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS* 461 (E. Fox & J. Halverson eds. 1984).

15. See, e.g., Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (emerging consensus on antitrust economics), reprinted in *ANTITRUST LAW AND ECONOMICS* 17 (O. Williamson ed. 1980); Williamson, *Antitrust Law and Economics: Some Perspectives*, in *ANTITRUST LAW AND ECONOMICS* 1, 17 (O. Williamson ed. 1980) (same). But see Nelson, *Comments on a Paper by Posner*, 127 U. PA. L. REV. 949 (1979) (claims of consensus on antitrust economics are exaggerated) reprinted in *ANTITRUST LAW AND ECONOMICS* 41 (O. Williamson ed. 1980); Rowe, *Decline of Antitrust*, *supra* note 9, at 1540-59 (impermanence of economic paradigms); see *infra* text accompanying notes 301-16 (impossibility of consensus socioeconomic view).

16. But see *infra* text accompanying notes 317-32 (persistence of high litigation costs after 30 years of procedural reforms).

17. This phrase comes from Eugene Rostow's influential 1947 article extolling the Supreme Court's use of § 2 of the Act (in disregard of precedent that had been followed for more than 20 years) to implement the prevailing economic views of that era. See Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947).

18. As the leading treatise says, "[n]othing else could reasonably have been expected in the judicial administration of this 'charter of freedom'." 1 P. AREEDA & D. TURNER, *supra* note 8, at 15.

19. H. HOVENKAMP, *supra* note 2, at 53-54. The same idea has been expressed by others. See, e.g., Baxter, *supra* note 3, at 670-71. Baxter admits that "[c]onfusion is inevitable" under this "adaptive approach," confusion which even now "reflects the still evolving character of the answers to the basic questions in antitrust law." He also recognizes that even after "close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise," with the necessary result that "uncertainty remains over the measures against which the social desirability (and hence legality) of various types of business conduct should be tested." *Id.* (footnotes omitted).

cases.²⁰ The prevalence of this judgment explains why, in the words of a distinguished jurist, in "the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law," an authority so broad that "the only comparable examples" are "the economic role they formerly exercised under the fourteenth amendment, and the role they now exercise in the area of civil liberties."²¹ Proponents of this approach assert that the 1890 Congress shared this view, and specifically authorized this judicial lawmaking role when it passed the constitutional Sherman Act.²²

The 1890 Congress, however, did not pass the Sherman Act described by this conventional wisdom. It did not authorize the federal judiciary to make the basic policy choices in antitrust. The Fifty-first Congress enacted instead a real statute with real content, a statute which gave the courts only the interstitial lawmaking role they assume in applying other general statutory standards to specific cases.

This Article argues that if the Act is read in light of its legislative history, it is clear that the 1890 Congress indicated which common law cases the courts were to follow. The history also reveals that Congress made enough hard choices to enable the courts to give the Act a reasonable and settled construction.

The usual course is to adhere to a settled statutory construction, even if erroneous, to avoid the costs of unsettled law.²³ Thus one might argue that the inconsistency of the constitutional Sherman Act with the intentions of the 1890 Congress may not, by itself, justify jettisoning it. However, the usual course should not be followed here. Courts need standards if they are to operate as courts. Yet the standardless constitutional Sherman Act of the conventional wisdom²⁴ has produced neither settled law nor desirable social policy. It permits courts continually to reappraise and reshape the basic policies of antitrust law, and thus provides no workable standard to guide the decision of hard cases. The result has been unacceptably high costs on business and litigants and, worst of all, on traditional American concepts of the rule of law and the proper role of an unelected, independent judiciary. So long as we inter-

20. The traditional norms governing judicial lawmaking in construing and applying statutes are discussed *infra* at text accompanying notes 359-67.

21. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953) (Wyzanski, J.), *aff'd per curiam*, 347 U.S. 521 (1954).

22. See *supra* notes 9-10 and accompanying text (contentions that 1890 Congress authorized judicial policymaking in antitrust area by enacting standardless statute).

23. See *infra* text accompanying notes 137-39.

24. The first courts to construe the Act did not espouse the standardless, "enabling act" theory. See *infra* text accompanying notes 142-72. Rather, this theory evolved in the 1930's and 1940's, although the seeds of its development date from 1911. See *infra* text accompanying notes 172-236.

pret the Act to be as standardless and adaptable as the due process clauses, antitrust doctrine can never be rationalized.

To avoid these costs, the courts should give the Act a settled construction derived, to the extent possible, from the enacting Congress's basic policy choices, with an eye toward providing a standard for resolving cases consistently and cheaply.²⁵ Accordingly, I develop a workable decisional framework for all section 1 cases, predicated on the Fifty-first Congress's basic policy choices and the common law restraint-of-trade cases cited by the Senators at that Congress.

I base this proposed framework upon two key concepts. First, the existing per se/rule of reason analysis should be replaced by a naked restraint/ancillary restraint distinction, which Judge (later President and Chief Justice) Taft derived from the common law of restraint of trade in *United States v. Addyston Pipe & Steel Co.*²⁶

"Naked restraints," restraints which only restrain trade and do not further any productive transaction, should be per se unlawful without regard to the parties' market power, allegedly benign purposes, or actual effect on competition. "Ancillary restraints," restraints that arguably aid productive business transactions, should be illegal only if the plaintiff can overcome a strong presumption that the challenged restraint is reasonably calculated to further a productive purpose, or if the plaintiff can show that the restraint is part of a comprehensive scheme to gain monopoly control of an entire market. Second, I build on Taft's formulation by (1) establishing a threshold requirement that the plaintiff establish that the defendant's conduct meets the common law definition of contract, combination or conspiracy in restraint of trade; (2) defining the productive business transactions to which a challenged restraint may be ancillary; (3) clarifying the required relationship between an ancillary restraint and its proffered business justification; and (4) using the monopolization standards of section 2 to judge the handful of reasonably ancillary restraints which arguably create or maintain monopoly power.

My proposal also would limit the scope of Sherman Act coverage to the business restraints of trade against which the Act was originally

25. This does not mean that the courts should not engage in any lawmaking when construing the Act. I recognize that the legislature's choices are seldom totally unambiguous, and that in choosing one possible construction over another courts necessarily engage in lawmaking. Moreover, judges must construe statutes to avoid constitutional questions and to promote rule-of-law values. See *infra* text accompanying notes 46-51. Finally, they must fill in gaps in the statutory scheme which are inevitably presented by the need to apply general choices to specific cases. See *infra* text accompanying notes 41-45.

However, there are two limits on this lawmaking role. First, the courts have a duty to search in good faith for the enacting legislature's basic choices and to abide by them. Second, courts must follow a settled doctrine in subsequent cases. See *infra* text accompanying notes 363-65. The "enabling act" theory of the Sherman Act does not recognize either limitation.

26. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

directed. I propose that the courts not apply the Sherman Act to restrictions on competition imposed by local governments or nonprofit, eleemosynary institutions.

This is the first approach to the Sherman Act since *Addyston Pipe* that is both consistent with a fair reading of the statute and capable of being implemented by the courts consistently and cheaply. These unique but vital merits justify its adoption.

This Article proceeds as follows. Part I examines the legislative history of the Sherman Act to discover the policy choices actually made by the 1890 Congress. Part II sketches the development, operation and social costs of the conventional "constitutional" approach which now dominates section 1 adjudication. This Part demonstrates how the Supreme Court's failure to establish a workable methodology for resolving hard cases in the first Sherman Act decisions enabled it later to create the myth that the 1890 Congress made no hard policy choices. It then shows that the lack of a recognized statutory standard inevitably leads to doctrinal chaos and unacceptable social costs. Part III sets out the proposed methodology summarized above for resolving all section 1 cases. Part IV compares the two approaches as applied to the actual practices most frequently challenged under section 1. This Part demonstrates that because it treats like cases alike, at reasonable cost and in accordance with a fair reading of the original congressional intent, the proposal would substantially reduce the severe costs of the "constitutional" approach.

I

SETTING THE COURSE: THE BASIC POLICY CHOICES OF THE 1890 CONGRESS

A. *How to Read a Statute*

It is fair to ask how the conventional wisdom could be so generally accepted if the above contentions are true. Much of the answer stems from the principles of statutory construction that the Court applied during the formative period of Sherman Act interpretation, which compelled it to construe the Act without resort to its legislative history discussed below. Although the Court reached the correct results in the early cases, its failure to adopt Taft's operational common law methodology, which was derived from the American majority cases discussed in the legislative history, later permitted it to transmogrify the Act into the standardless enabling legislation of the conventional wisdom. By the time that legislative history became an accepted component of statutory interpretation, it was too late for judges to look beyond the authoritative construction the Court had earlier conferred on the Act. Modern judges consequently

accepted the conventional wisdom, quoting the boilerplate formulations from these earlier opinions.²⁷

Most academic commentators have also failed to comprehend the Act correctly in terms of its legislative history. Since the first scholarly review of the Act's history in 1954,²⁸ five more studies of its history have been published,²⁹ only two of which repudiate the standardless delegation theory.³⁰ While the authors of these studies all agree on the basic facts, they differ in their interpretation of those facts, particularly as to which facts are most significant—and over just what that significance is. A legislative historian's task is always difficult. The task is made particularly difficult by the lack of any commonly accepted mode of statutory interpretation.³¹ It is therefore not surprising that some historians have found support in the untidy legislative discussions of 1890³² for the broad view of the Sherman Act that the Supreme Court and the antitrust establishment have accepted for decades.

The answers provided by the materials depend, at least in part, on the questions we ask of them. The method used to interpret the legislative materials is thus critical. In this Article, I follow a few basic premises to discern the policy choices actually made by the 1890 Congress. The first premise is that the framers of the Constitution intended article I to make the passage of new legislation difficult by giving it a built-in bias against new laws.³³ The second premise is that this bias requires propo-

27. For a discussion of this development, see generally *infra* text accompanying notes 142-236.

28. H. THORELLI, *supra* note 7, at 164-232; see also *id.* at 164:

It was surprising to find that apparently no one among the numerous writers on antitrust has attempted to make, or succeeded in making, a presentation of the legislative process meeting the requirements of being at once well-balanced, in the sense of what the author would consider objective, and reasonably detailed.

29. See 1 E. KINTNER, *FEDERAL ANTITRUST LAW* 125-242 (1980); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965) (Chapter three reprinted from Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956)); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). Briefer views are contained in Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1136-46 (1985); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82-106 (1982). The entire legislative history has been reprinted in 1 *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 51-363 (E. Kintner ed. 1978) [hereinafter cited as *LEGISLATIVE HISTORY*].

30. See Bork, *supra* note 29, at 7-14 (Congress motivated solely by concern for consumer welfare); Clark, *supra* note 29, at 1136 (act enacted "for the explicit purpose of condemning cartelization").

31. See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214-16 (1983).

32. The Sherman Act debates were probably typical in this respect. As Thorelli notes, while it "is true that congressional debates [on the Sherman Act] were unsystematic, that many inconsistent speeches and statements based on muddled thinking were made . . . [T]he same thing may be said about the debates on many other important topics in Congress or, in fact, in any other legislature." H. THORELLI, *supra* note 7, at 217.

33. See *INS v. Chadha*, 462 U.S. 919, 945-51 (1983); Mayton, *The Possibilities of Collective*

nents of new measures to accept compromises in order to gain the assent of other legislators.³⁴ The third premise is that the necessity to hammer out agreement among a host of divergent interests precludes the notion of legislative intent as we normally conceive of individual intent. It is a mistake to treat a statute like a will, the product of a single mind. A statute is more like a contract among many parties.³⁵ The final premise

Choice: Arrow's Theorem and Article I (forthcoming in 1986 DUKE L.J.). The lawmaking process established by article I raises the costs of legislating and deters enactment of measures opposed by a significant portion of the population. First, article I requires approval of a proposed law by a majority of each House of Congress, which not only "assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings," *Chadha*, 462 U.S. at 951, but also decreases the likelihood that the legislative power will be exercised at all. See M. IRISH & J. PROTHRO, *THE POLITICS OF AMERICAN DEMOCRACY* 402 (2d ed. 1962). Second, the different representational bases of the two Houses (especially the equal representation of the states in the Senate) operate to require the support of a "supermajority" of the public to overcome opposition to new legislation. Mayton, *supra*; see also J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 232-48 (1962). Finally, the provision that permits Congress to overcome the President's veto only by a two-thirds vote of both Houses further discourages the passage of measures which inspire significant opposition, especially in view of the fact that the President is selected by yet a third constituency, the nation as a whole. Mayton, *supra*.

The framers intended article I to have this built-in bias against new legislation. THE FEDERALIST NO. 51, at 338 (A. Hamilton or J. Madison) (E. Earle ed. 1938) (bicameral legislature and executive veto employed "to guard against dangerous encroachments," that is, improvident measures by a transient majority); *id.* NO. 62, at 402 (A. Hamilton or J. Madison) (equal representation of states in Senate provides "an additional impediment . . . against improper acts of legislation"); *id.* NO. 73, at 476-78 (A. Hamilton) (usefulness of presidential veto in blocking unwise legislation). The framers understood that these safeguards would inhibit the passage of *all* proposed laws, good and bad, but believed this price was worth paying: "The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones." *Id.* at 478; see also *Chadha*, 462 U.S. at 951 ("Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions" and "protect the whole people from improvident laws"); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 245 n.102 (1986).

Article I is thus part of the general scheme of power-limiting checks and balances which the framers designed to frustrate a potentially too-activist national government. J. BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR PARTY POLITICS IN AMERICA* 16, 19-23 (1963); R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 8-9 (1948); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43-45 (1985).

34. See Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809-10, 819-20 (1983) [hereinafter cited as Posner, *Statutory Interpretation*]; Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 273 (1982). For an able application of Posner's realistic theory of legislation, see Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1 (1984).

35. Posner, *Statutory Interpretation*, *supra* note 34, at 808-09, 812, 819-20. As Posner argues, this premise indicates the use of caution in searching for a single consistent "legislative purpose" in each piece of legislation. *Id.* at 819-20. Proponents of the "legislative purpose" school of statutory construction, see, e.g., 2 H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1410-17 (tent. ed. 1958), too readily assume a unanimity of will among a legislative majority, and do not "recognize that many statutes are the product of compromise between opposing groups and that a compromise is quite likely not to embody a single consistent purpose." Posner, *supra*, at 819.

is that, regardless of legislative agreements, courts must construe statutes to be operational, to give fair notice to citizens and counselors, and to promote consistent enforcement at a reasonable cost by agencies and courts.³⁶

From these basic premises flow several concrete rules of statutory interpretation. First, the task is to discern the actual agreements the legislators reached on basic policies. Because language seldom is plain, extrinsic aids are essential to find these agreements. Legislative history, however, must be used with care. Not all statements should be accorded equal weight.³⁷ The judge must be careful not to use general rhetoric to create a statute that was not passed.

The real question is not what the general goals of the legislators were, but what means they agreed upon to reach them. The judge should look to specific statements in the history, especially where the main sponsors explained the intended operation of their proposed statutory language. Construing courts should not read statutes to do any more than what the sponsors say in good faith they are intended to do. Otherwise, courts might bypass article I's built-in bias against new legislation.

Of particular importance are statements by sponsors of what their proposals will *not* do. If a measure's sponsors represent that their bill will not cover certain practices, construing courts should hold those practices outside the final act's coverage.

In addition, as Posner argues, the "judge should try to think his way as best he can into the minds of the enacting legislators"³⁸ Particularly when construing older enactments such as the Sherman Act, the judge must act as a historian, attempting to understand the Act and its "legislative history" in their broader historical context. This context includes both the surrounding events of that period and also the "values and attitudes, so far as they are known today, of the period in which the legislation was enacted."³⁹ Any construction contrary to those "values

36. See *infra* text accompanying notes 317-62 (costs of statutory indeterminacy).

37. See Wald, *supra* note 31, at 201-02 (slight value of "ad lib comments by marginal participants"). Even the general statements of sponsors may be suspect. First, the actual legislation might contain compromise provisions which fall short of the speaker's public claims about its goals. Posner, *Statutory Interpretation*, *supra* note 34, at 809. Second, as Bork has noted, some may express support for a measure because of its expected side effects, rather than its specific objectives. It would be a mistake to measure legality under the statute in terms of achievement of those incidental effects. R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 65 (1978). Third, despite their general rhetoric in favor of certain goals, some supporters of an act may hold back on approval of the specific provisions that would guarantee the achievement of their stated goals because they are not willing to pay the full cost (that is the sacrifice of other goals their constituents value) these provisions entail. Posner, *supra*, at 809.

38. Posner, *Statutory Interpretation*, *supra* note 34, at 817.

39. *Id.* at 818.

and attitudes" almost certainly was not agreed upon and should be rejected.⁴⁰

Of course, even the most discerning reading of the statutory sources will not provide clear answers to all questions. Statutes must necessarily speak in general terms, and courts must apply those general terms to particular cases. The legislature cannot foresee every possible fact pattern implicated by its general standard; all it can do is make basic policy choices for courts to apply in good faith to individual cases.⁴¹ In addition, legislative agreements may be unclear because of either sloppy drafting or an intent to retain generality in order to avoid making politically difficult choices.⁴² Consequently, courts are compelled to assume an interstitial lawmaking function in statutory cases.⁴³

The basic premises of statutory interpretation outlined above⁴⁴ provide guidance for performing this gap-filling function. First, article I's built-in bias against regulation requires ambiguities as to a statute's scope of coverage to be resolved in favor of noncoverage. Second, courts should adopt only those interpretations and applications which are consistent with the legislature's agreements on basic policy.⁴⁵ Third, where legislative direction as to the specific test of legality is unclear, courts should opt for a construction that can be applied consistently and with reasonable litigation expense.⁴⁶

The last point deserves emphasis. There are important interests that the judicial branch protects by creating operational legal rules. Operational legal rules are those that trial courts and juries can apply with

40. Because a majority of the public may not share those "values and attitudes" today, a judge may be tempted to ignore them in favor of what she perceives to be the more modern view. This temptation should be resisted. First, such a course would ignore the lawmaking procedures and limitations of article I. Second, even if one believes that article I's cumbersome, status-quo-favoring procedures should not stand in the way of the modern majority's values, there is a danger that judges will in fact apply the values of the elite socioeconomic group from which judges typically are selected rather than those of a majority of their fellow citizens. Of course, where the enacting Congress's values and attitudes are less than certain, that uncertainty might provide the judge with some opportunity to impose her own values in the guise of statutory interpretation. But a good faith effort to discern and apply the enacting legislature's views provides fewer temptations and opportunities for the judge to engage in judicial legislation than does the task of discerning the consensus view of fellow citizens. For the former task, there is at least a definitive source to look to for guidance: the statute and its history. For the latter task, there is no such source.

41. See, e.g., E. LEVI, AN INTRODUCTION TO LEGAL REASONING 24-31 (1949).

42. *Id.* at 31. For a good example of how Congress uses general and ambiguous statutory language to avoid a difficult policy choice, see *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring).

43. If an administrative body is to construe and apply the statute in the first instance, that body performs the gap-filling lawmaking function. Judicial review is limited to ensuring that the policy adopted by the agency conforms generally with the basic policy choices discernable in the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 497 U.S. 837, 842-45 (1984).

44. See *supra* text accompanying notes 33-36.

45. See *infra* text accompanying notes 363-67.

46. See *infra* text accompanying notes 317-62 (costs of indeterminate legal rules).

reasonable litigation effort, and that therefore provide guidance to counselors and their clients. Operational legal rules thus reduce the number of "big cases,"⁴⁷ enable private parties to plan their conduct,⁴⁸ and, most importantly, protect citizens against the arbitrary imposition of liability without prior notice.⁴⁹ Operational legal rules also reduce the discretion of individual courts, ensuring that like cases will in fact be decided alike.⁵⁰

Accordingly, courts will sometimes add an element to a statute that the legislature clearly did not provide in order to avoid undue damage to rule-of-law values. For example, where the danger of retroactive application of punitive sanctions is great, the courts may construe a statute to require proof of a specific state of mind before imposing sanctions, whether or not such a requirement appears in the legislative history.⁵¹

B. *The Means and Ends Chosen by the Fifty-first Congress*

1. *Introduction: The Statutory Language*

Sections 1, 2, and 7 of the Act as originally passed⁵² contained its operative language. Section 1 punished as a misdemeanor the formation of "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."⁵³ Section 2 made guilty of a misdemeanor "[e]very 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."⁵⁴ Section 7 provided a treble damage remedy to anyone "injured in his business or property" by a violation of the Act.⁵⁵

The language of the statute raises several basic points. First, the use of common law terms in section 1 suggests that Congress adopted specific common law doctrines against restraints of trade. The legislative history overwhelmingly supports this proposition.⁵⁶

47. See *infra* text accompanying notes 317-35 ("big case" litigation created by indeterminacy of Sherman Act doctrines).

48. See *infra* text accompanying notes 336-39 (detriment to effective business planning from indeterminate Sherman Act doctrines).

49. See *infra* text accompanying notes 341-62 (arbitrary and retroactive imposition of punitive sanctions due to indeterminate Sherman Act doctrine).

50. For a more detailed discussion of the value of operational legal tests in antitrust litigation, see Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

51. See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 435-46 (1978), discussed *infra* at text accompanying notes 343-57.

52. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 51-52.

53. *Id.*, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 51.

54. *Id.*

55. *Id.* at 210, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 52.

56. See *infra* text accompanying notes 64-91.

Second, the phrase "combination in the form of trust or otherwise" indicates that Congress intended these common law doctrines to be employed against the perceived evils of the great industrial trusts which had been formed in the last decades of the nineteenth century. Again, the legislative history establishes this beyond reasonable dispute.⁵⁷

Third, section 2 condemns only those who "shall monopolize or attempt to monopolize," that is, those who act to obtain monopoly power rather than those who merely possess it. This indicates that it was the trusts' techniques of acquiring monopoly power, rather than their size or power, that was proscribed. Again, the legislative history abundantly supports this observation.⁵⁸ The history further establishes the irrelevance of any purported side benefits of the trusts' consolidations,⁵⁹ such as the great productive efficiency that some trusts did in fact achieve.⁶⁰ On the other hand, those combinations which did not seek market domination were not proscribed, regardless of their size.⁶¹

Fourth, the Act's use of the terms "restraint of trade" and "trade or commerce," and its reference to the trusts, indicate that it was to cover only business and commercial practices, and was not directed at the activities of governments or eleemosynary organizations.⁶²

Finally, the inclusion of criminal and punitive damage sanctions indicates that the 1890 Congress did not intend to delegate standardless adjudicatory powers to the courts, and thereby rebuts the foundational

57. See *infra* text accompanying notes 92-123. The addition of the phrase "in the form of trust or otherwise" does not expand the term "combination . . . in restraint of trade" beyond its common law meaning. Several of the great industrial trusts of the late nineteenth century had been held to be "combinations in restraint of trade" in important cases decided just prior to the Act's passage. See *infra* notes 86-90 and accompanying text. "Combination in restraint of trade" was a broader term than "trust," since it included both "loose" and "tight" combinations against competition. See 1 E. KINTNER, *supra* note 29, at 80-124 (general discussion of common law regulation of combinations in restraint of trade); see also *infra* text accompanying notes 80-90 (description of "loose" and "tight" combinations). Letwin concludes that Congress added the phrase "in the form of trust or otherwise" for the political purpose of specifically prohibiting the hated trusts in so many words. W. LETWIN, *supra* note 29, at 96. Once trusts were specifically mentioned, it became necessary to add "or otherwise" so that the term "combination in restraint of trade" would cover more than just those monopolistic combinations in the technical form of a common law trust. *Id.*

58. See *infra* text accompanying notes 100-13.

59. See *infra* text accompanying notes 114-115.

60. McCraw, *Rethinking the Trust Question*, in REGULATION IN PERSPECTIVE 14-16 (1981). The Standard Oil and American Tobacco trusts, perhaps the two most notorious, were especially efficient. Standard Oil reduced its average cost of refining oil by two-thirds between 1882 and 1885. *Id.* at 16. American tobacco reduced the average wholesale price of its cigarettes from \$3.02 per thousand in 1893 to \$2.01 per thousand in 1899. *Id.*

61. See *infra* text accompanying notes 106-113.

62. There is no mention of these activities in the Act's legislative history. See 1 LEGISLATIVE HISTORY, *supra* note 29 at 89-363. The political origin of the Act appears to have been the public reaction to the business combination and consolidation of the late nineteenth century. See W. LETWIN *supra* note 29, at 54-70; H. THORELLI, *supra* note 7, at 108-63.

argument behind constitutional Sherman Act theory.⁶³

2. Adoption of the Common Law

"Contract in restraint of trade" is a common law term of art, and it is to the common law that we must resort for its meaning. Historians agree that the 1890 Congress intended the Sherman Act to federalize and codify existing common law.⁶⁴ As Thorelli states, it is "futile and superfluous to discuss whether the Sherman Act was intended to bring the body of common law on the subject within reach of the United States courts." Those who assert the contrary "manifest a striking lack of familiarity with the records of legislative proceedings."⁶⁵

Senator Sherman "repeatedly said his bill was based on a tried formula: 'It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.'"⁶⁶ After redrafting by the Senate Judiciary Committee,⁶⁷ the committee spokesmen, Senators Edmunds and Hoar, confirmed that the revised bill applied the com-

63. See *infra* text accompanying notes 124-134.

64. See 1 E. KINTNER, *supra* note 29, at 240-41; W. LETWIN, *supra* note 29, at 95-99; H. THORELLI, *supra* note 7, at 228, 571; Bork, *supra* note 29, at 36-39, 45-47.

65. H. THORELLI, *supra* note 7, at 228. He adds, "There is ample evidence that not only the bills reported by Sherman in the 51st Congress but also the bill finally passed were intended by their sponsors primarily to be federal codifications of the common law of England and the several states." *Id.*

66. W. LETWIN, *supra* note 29, at 95-96 (quoting 21 CONG. REC. 2456 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 114). According to Letwin, Sherman made this point "repeatedly" in his March 21, 1890 speech explaining his bill. *Id.* Sherman also explained that "[t]he purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations that injuriously affect the interest of the United States that have been applied in the several states to protect local interests." *Id.* at 2456, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 114. Later in his speech he stated that "[t]his bill . . . has for its single object to invoke the aid of the courts of the United States to . . . supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states." *Id.* at 2457-58, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 115-16. Sherman then proceeded to discuss specific cases in which the state courts had refused to enforce cartel agreements or had dissolved domestic corporations for participation in "combinations in restraint of trade," that is for participation in one of the new trusts or monopolistic mergers. *Id.* at 2457-60, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 117-22. Near the end of his speech he offered the following summary: "Now Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies." *Id.* at 2461, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 126.

67. The bill was referred to the committee after extensive amendment both to clean up its text and to ensure that it was based on a constitutional source of lawmaking power. W. LETWIN, *supra* note 29, at 93-94; H. THORELLI, *supra* note 7, at 197-99; Bork, *supra* note 29, at 14, 45 & n.111. Congress enacted the bill as redrafted by the Judiciary Committee with no further changes. H. THORELLI, *supra* note 7, at 199. The historians agree that the committee intended its redraft to impose the same legal standards as had Sherman's bill. The committee changed the form but not the substance of Sherman's measure. *Id.* at 200, 210-14; see also 1 E. KINTNER, *supra* note 29 at 203; W. LETWIN, *supra* note 29, at 94; Bork, *supra* note 29, at 45-47.

mon law. Hoar identified the redraft with the common law on three occasions, explaining that the "great thing this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."⁶⁸ Edmunds affirmed that the redraft employed "terms that were well known to the law already" which made it "clear in its terms" and "definite in its definitions."⁶⁹

In short, the principal proponents of the Act offered it to their colleagues as the adoption of the common law of restraint of trade.

3. *The Common Law Adopted*

Whether the common law of restraint of trade provided a suitable means for effecting the policies that the Senators intended to adopt is more disputed. Several writers emphasize the fact that the common law was not uniform, and that courts in some jurisdictions were not hostile to restraints of trade. They also stress the laissez faire view of the English courts toward cartel agreements during this era.⁷⁰ Some commentators infer from these facts that the 1890 Congress could not have designated any coherent common law view as the policy behind the Sherman Act.⁷¹ However, three facts support the opposite conclusion.

First, the American majority-view cases, which I describe below, formed a coherent body of common law that the 1890 Congress intended to codify. As shown in the next section, the 1890 Congress agreed to proscribe combinations formed for the purpose of gaining power over output and prices, regardless of whether they produced beneficial productive efficiencies. Conversely, they agreed not to condemn combinations created "in aid of production," no matter how large, as long as they did not aim at monopoly power. Nor were the Act's prohibitions meant to apply to those businesses which were able to exercise monopoly power by offering better products or lower prices because of their superior efficiency. The American majority cases I describe below embodied these policies, while the English and American minority cases did not.

Second, Senator Sherman cited majority-view American cases as examples of the common law incorporated by his bill. These cases out-

68. 21 CONG. REC. 3152 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 293. For Hoar's other statements identifying the Judiciary Committee redraft with the common law standards incorporated in Sherman's bill, see *id.* at 3146, 3152, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 282, 293.

69. *Id.* at 3148, reprinted in 1 Legislative History, *supra* note 29, at 286.

70. See Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 761, 776-83 (1955); Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 297, 308, 326-50 (1940).

71. See, e.g., Baxter, *supra* note 3, at 664 n.12.

lawed both loose cartels and tight trust agreements,⁷² as well as monopolistic mergers and predatory practices.⁷³ Other senators concurred in Sherman's reading of the law and none objected to it.⁷⁴ The Senator's citation of these cases indicates which common law doctrines Congress expected the federal courts to enforce against the trusts, and demonstrates that the 1890 Congress did not recognize the policies of the new English and minority American cases.

Third, the differences among jurisdictions have been exaggerated. While it is true that the American and English restraint of trade doctrines diverged toward the end of the nineteenth century, there was no similar divergence among most American jurisdictions. In this country there was a rather clear-cut majority view, from which only few courts varied.⁷⁵

Judge Taft identified this majority view in *United States v. Addyston Pipe & Steel Co.*,⁷⁶ which, according to Thorelli, "represented a truer version of the old law than that of almost any other authority in the field at the time."⁷⁷ According to Taft, the cases representing the majority view declined to enforce contracts in restraint of trade unless they were (1) ancillary to an otherwise valid productive business transaction and (2) reasonably related to effecting it or protecting its fruits.⁷⁸ The latter requirement was the original common law rule of reason. Note that this rule of reason applied only to ancillary restraints. Naked restraints, those not intended to further a valid business transaction, were condemned without inquiry into their reasonableness.⁷⁹

72. See 21 CONG. REC. 2457-60 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 117-22; 1 E. KINTNER, *supra* note 29, at 163-64 & n.201; H. THORELLI, *supra* note 7, at 183; Bork, *supra* note 29, at 36-37.

73. Bork, *supra* note 29, at 22, 25.

74. *Id.* at 46.

75. See 1 E. KINTNER, *supra* note 29, at 85, 87, 101-02; H. THORELLI, *supra* note 7, at 39-48; Note, *The Rule of Reason in Loose-Knit Combinations*, 32 COLUM. L. REV. 291, 295-97 (1932). But see Dewey, *supra* note 70, at 786 (no significant divergence between English and American courts); Peppin, *supra* note 70, at 334-51 (same). Kintner and Thorelli, in their more thorough reviews, acknowledge the cases cited by Dewey and Peppin, but conclude that they were not representative of the majority view. 1 E. KINTNER, *supra* note 29 at 85, 87, 101-102; H. THORELLI, *supra* note 7 at 39-48. See also Note, *supra* at 297. Kintner's review of the common law cases is the most complete of those cited.

76. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

77. H. THORELLI, *supra* note 7, at 469. See also M. HANDLER, ANTITRUST IN PERSPECTIVE 11 (1957) ("Taft's scholarship [in *Addyston Pipe*] remains unassailable.").

78. See 85 F. at 281-91 (collecting cases); 1 E. KINTNER, *supra* note 29, at 54-76, 84-101 (collecting cases); H. THORELLI, *supra* note 7, at 40-44 & n.136 (collecting cases); Note, *supra* note 75, at 293-97 (collecting cases). This is still the law. See RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188 (1981).

79. *Addyston Pipe*, 85 F. at 281-90; 1 E. KINTNER, *supra* note 29, at 85-88; Note, *supra* note 75, at 295-97; see also RESTATEMENT (SECOND) OF CONTRACTS § 187 (1981) (non-ancillary restraint is unreasonable in restraint of trade).

For example, most American courts in the late 1800's applied a *per se* rule against enforcement of cartel agreements.⁸⁰ Because maverick cartel members could not be prevented from shaving the cartel price to gain extra sales, these so-called "loose combinations"⁸¹ were ineffective ways of restricting output and controlling prices. So many cartels broke up because of "cheating" by members that John D. Rockefeller once characterized them as "ropes of sand."⁸²

Rockefeller and other would-be market controllers were forced to resort to "tight combinations." At first, these were actual trust agreements under which cartel members turned the management of their concerns over to a common trustee. Later, market controllers turned to holding companies and other forms of corporate consolidation. Business historians agree that the impetus for these tighter forms of organization came from the failure of the loose combinations to control output, which in turn was due to the refusal of most American courts to enforce cartel

80. 1 E. KINTNER, *supra* note 29 at 88-99; H. THORELLI, *supra* note 7, at 41-43 & n.136; Note, *supra* note 75, at 295-97 & n.18. While the minority cases cite lack of market control as a factor in upholding cartel agreements, *see infra* note 84 and accompanying text, it does not appear to be the controlling rationale of the majority cases refusing to enforce those agreements. As the author of a thorough student note published in 1932 noted, "the courts often failed to mention this factor and if they did, generally did not emphasize it." Note, *supra* note 75, at 296 (footnote omitted). The author bolstered his conclusion with a review of the cases holding cartel agreements void and unenforceable. The results of the cases there cited do not appear to turn on market control. In at least one of the cases, the parties clearly lacked control. *Id.* at 295 & n.18 (citing *More v. Bennett*, 140 Ill. 69, 29 N.E. 88 (1892)). In a large number of other cases, the market share of the defendants is not stated. As to this latter group, the author stated that in "most of these cases the courts say that the absence of control is immaterial." *Id.* at 296 n.18.

In other cartel cases courts assumed that the defendants controlled relevant markets, but made no serious effort to ascertain that fact. These cases contain no market definition analysis, nor is there any discussion as to whether the high market shares reported actually conveyed power to limit output. *See, e.g.*, *Craft v. McConoughy*, 79 Ill. 346, 348 (1875) (assuming market power from cartel of four grain merchants in Illinois town, without market analysis); *Anderson v. Jett*, 89 Ky. 375, 378-79, 12 S.W. 670, 671 (1889) (assuming that pooling agreement by two steamboats on a river created power to restrict output, without market analysis). The simple explanation for this is that proof of monopoly power was not required at that time. As stated by the Supreme Court in 1895, "all the authorities agree" that to hold a cartel agreement invalid it "is not essential that its result should be a complete monopoly;" it was enough if it "tends to that end." *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895). All cartel agreements necessarily do so. To be sure, the defendants in most of these cases appear to have had substantial market shares, and probably had some degree of power to limit production. This is not surprising. It would be senseless to attempt a cartel scheme without the hope of achieving some degree of potential market power. But it does not follow that the majority cases turned on a showing of such power.

81. "Loose combinations" were those cartel arrangements in which the participants retained control over their firms. "Tight combinations," by contrast, were those in which the members gave up control to a trustee or merged their companies into one large firm. *See* H. THORELLI, *supra* note 7, at 72-85.

82. A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 321 (1977).

agreements.⁸³

It is true that a minority of American cases followed the divergent English trend which developed toward the end of the nineteenth century. These cases held a few cartel agreements valid as "reasonable," on grounds such as the need to prevent "ruinous competition," the belief that the prices set were reasonable, the fact that the product in question was not a necessity, and the cartel's failure to control the entire market.⁸⁴ But these cases were few and insignificant. If it were otherwise, cartel members would not have been driven to the extreme step of giving up control of their own businesses.

American courts in the late nineteenth century also interdicted the formation of tight combinations to gain market power—both through the trust device and later through corporate consolidation. A number of state courts held that domestic corporations had violated their state charters by joining trusts, which these courts characterized as combinations in restraint of trade.⁸⁵ There were enough of these decisions to induce the reorganization of many of the trusts into corporations.⁸⁶ In some states courts also held the charters of these new corporations invalid as restraints of trade.⁸⁷

Because the formation of a business unit was a classic form of reasonable ancillary restraint,⁸⁸ the courts condemned the new trusts and corporate consolidations on a different rationale than they had the loose combinations. The controlling reason for their illegality seems to have been that these new business units were formed to obtain or retain power over production and price, and appeared capable of doing so.⁸⁹ According to Kintner's review of these cases, the courts "looked to the tendency, power and ability of these entities to restrain trade. Whether such power was exercised, or whether prices were in practice actually lowered, did not alter the view of the majority of courts" that they were illegal.⁹⁰ As Kintner's summary indicates, the courts disregarded any alleged effi-

83. See *id.* at 317-20; 1 E. KINTNER, *supra* note 29, at 88-91; I. TARBELL, *THE NATIONALIZING OF BUSINESS: 1878-1898*, at 73, 76 (1936); H. THORELLI, *supra* note 7, at 75.

84. See 1 E. KINTNER, *supra* note 29, at 101-04; H. THORELLI, *supra* note 7, at 45-48; Note, *supra* note 75, at 297.

85. See 1 E. KINTNER, *supra* note 29, at 104-10; H. THORELLI, *supra* note 7, at 49, 79-82.

86. See 1 E. KINTNER, *supra* note 29, at 110-11; H. THORELLI, *supra* note 7, at 82-83.

87. See 1 E. KINTNER, *supra* note 29, at 111-18; H. THORELLI, *supra* note 7, at 49-50.

88. See *United States v. Addyston Pipe Co.*, 85 F. 271, 280-81 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

89. See 1 E. KINTNER, *supra* note 29, at 111-18; see also *Addyston Pipe*, 85 F. at 291.

90. 1 E. KINTNER, *supra* note 29, at 113 (footnotes omitted). These were easy eases for the courts. Since the tight combinations evolved from unsuccessful cartels, there was little ambiguity about their purposes. This fact may explain the courts' readiness to find that they had a "tendency" toward monopoly.

ciencies of these monopolistic mergers. The resulting entity's potential power over price and output alone made it illegal.

Ultimately, however, these state suits were inadequate to halt the movement to tight combinations. As Kintner concludes,

these state efforts at controlling the huge business organizations were ineffective, largely because each state's jurisdiction was limited to conduct occurring within its own borders and because the states generally lacked sufficient enforcement resources. A single state acting alone was unable to control a corporate entity which could reincorporate in other states or otherwise adapt its practices to avoid specific state restrictions.⁹¹

A federal solution was needed. The doctrines invoked by the majority of states against cartels and trusts were the model from which Congress sought to curtail the trusts' interstate activities. The American majority doctrines therefore became federal law.

4. *The Basic Policy Choices of the 1890 Congress*

a. *The Competing Political Considerations*

A review of the Act's legislative history reveals why the 1890 Congress incorporated the common law decisions discussed above. It is not disputed that the 1890 Congress was reacting to the popular outcry against the trusts. What is not as well recognized is that Congress also was attempting to preserve the unparalleled prosperity created by the rapid industrialization of that era. Congress seized on the common law approach to business combination as a means of prohibiting the abuses of cooperation without sacrificing its benefits.

Perceptive historians have noted the ambivalent attitude Americans displayed toward large business in the formative era of antitrust.⁹² On the one hand, there was considerable disquiet over the sheer size of the new enterprises, and the prospect that they might convert entire generations of entrepreneurs into employees.⁹³ On the other hand, few wished to kill the geese that laid so many golden eggs.⁹⁴

At the same time, there was disagreement over the relation of business size and scope to the fantastic productivity increases of the period. Opinions ranged from Brandeis's view that all large organizations were inherently inefficient⁹⁵ to Holmes's view that many industries might be

91. *Id.* at 128 (footnotes omitted); see also H. THORELLI, *supra* note 7, at 53.

92. See, e.g., W. LETWIN, *supra* note 29, at 71-85. See generally R. HOFSTADTER, *THE AGE OF REFORM*, 131-269 (1955).

93. R. HOFSTADTER, *supra* note 92, at 227-33; Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 168, 195-97 (1965).

94. See R. HOFSTADTER, *supra* note 92, at 244-45; Hofstadter, *supra* note 93, at 192.

95. Brandeis's thoughts on the relation of business size to productive efficiency are well summarized in McCraw, *Rethinking the Trust Question*, in *REGULATION IN PERSPECTIVE* 1, 28-46

natural monopolies.⁹⁶ Many others shared the views articulated best by Woodrow Wilson in his 1912 campaign speeches, in which he tried to strike a balance between the evils of size created by monopolistic mergers and the benefits of size achieved by business efficiency. Significantly, Wilson's distinction is the same as Sherman's:⁹⁷

That is the difference between a big business and a trust. A trust is an arrangement to get rid of competition, and a big business is a business that has survived competition by conquering in the field of intelligence and economy. A trust does not bring efficiency to the aid of business; it buys efficiency out of business. I am for big business, and I am against the trusts. Any man who can survive by his brains, any man who can put the others out of the business by making the thing cheaper to the consumer at the same time that he is increasing its intrinsic value and quality, I take off my hat to, and I say: "You are the man who can build up the United States, and I wish there were more of you."⁹⁸

Although acting twenty-two years earlier, the 1890 Congress felt the same pressures, and attempted to strike a balance similar to that described by Wilson. They too were "for big business" but "against the trusts."⁹⁹

b. The Policy Choices Made

i. Tight combinations. The conflicting policy goals were presented most starkly by the new tight combinations. A simple proscription of all large businesses would halt the formation of the trusts, but also stifle the

(T. McCraw ed. 1981). Brandeis was convinced that large firms survived only because they succeeded in obtaining monopoly power. This "monopolistic position," according to Brandeis, somehow permitted them to exclude smaller competitors despite those smaller firms' superior efficiency. Large firms that could not attain this position ultimately failed, according to Brandeis, because of their inefficiency. *Id.* at 34-35. He was convinced that only small firms would be formed if efficiency was the sole determinant of business success.

I am so firmly convinced that the large unit is not as efficient—I mean the very large unit—is not as efficient as the smaller unit, that I believe that if it were possible today to make the corporations act in accordance with what doubtless all of us would agree should be the rules of trade no huge corporation would be created, or if created, would be successful.

Id. at 36. Business historians suggest that Brandeis was wrong. In some industries, large firms were inefficient and failed. In others, superior efficiency through economies of scale caused some firms' apparently "monopolistic position." See *id.* at 17-24; A. CHANDLER, *supra* note 82, at 287-376. McCraw states that Brandeis's economic views were colored by his personal preference for small organizations. McCraw, *supra*, at 25.

96. For this reason, Holmes believed "that the Sherman Act is a humbug based on economic ignorance and incompetence," and admired "the originality, the courage, the insight shown by the great masters of combinations." 1 HOLMES-POLLOCK LETTERS 163, 141 (M. Howe ed. 1941). Many economists of the era shared Holmes's opinion. See W. LETWIN, *supra* note 29, at 71-77.

97. See *infra* text accompanying notes 106-109.

98. W. WILSON, THE NEW FREEDOM 109 (W. Leuchtenburg ed. 1961).

99. The major historians of the Act all agree that the 1890 Congress tried to strike a balance between the productive advantages of business consolidation and its monopolistic vices. See 1 E. KINTNER, *supra* note 29, at 240-41; W. LETWIN, *supra* note 29, at 96-97; Bork, *supra* note 29, at 26-31.

new prosperity that had been achieved through more efficient size. Allowance of all mergers would encourage these new economies of scale, at the cost of permitting the tight combinations to wield monopoly power. The legislative history reveals the choices the 1890 Congress made.

First, Congress made the basic policy choice to prohibit all business combinations that sought monopoly power, regardless of their possible efficiencies. It permitted productive new business organizations that fell short of achieving monopolistic control. These choices are revealed both in the texts of the proposed and final Sherman Act provisions, and in the statements of their sponsors.

Sherman's original bill outlawed those combinations formed "to prevent full and free competition" and "to advance the cost to the consumer. . . ."¹⁰⁰ In explaining his bill, Sherman made clear that it attacked only those combinations that by "embrac[ing] the great body of all the corporations engaged in a particular industry in all of the States of the Union" tended "to advance the price to the consumer."¹⁰¹ The other two antitrust bills introduced concurrently in the Senate had similar provisions. One would have forbidden agreements and combinations which had the "effect of advancing the cost . . . to the consumer."¹⁰² The other would have punished as a misdemeanor the creation of a "trust," specifically defined as a combination formed for the purpose of limiting production and fixing prices.¹⁰³

Further evidence is found in the Senate's addition of the Reagan amendment to Sherman's bill.¹⁰⁴ The Reagan amendment expressly defined an illegal trust as a "combination of capital, skill, or acts by two or more persons, firms, or associations of persons" to (1) "create or carry out any restrictions in trade," (2) "limit or reduce the production or to increase or reduce the price of merchandise or commodities," (3) "prevent competition," (4) fix prices, (5) "create a monopoly," or (6) enter "any contract, obligation, or agreement" on minimum or fixed prices or "to pool, combine, or unite" to affect prices.¹⁰⁵ Each practice is a technique to reduce output and control prices.

100. S.1, 51st Cong., 1st Sess. (1889), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 89.

101. 21 CONG. REC. 2457 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 117.

102. S.6, 51st Cong., 1st Sess. (1889), *reprinted in* 1 E. KINTNER, *supra* note 29, at 154 n.147.

103. S.62, 51st Cong., 1st Sess. (1889), *reprinted in* 1 E. KINTNER, *supra* note 29, at 154 n.148. Similar bills were introduced in the House of Representatives. *See* Bork, *supra* note 29, at 20-21. These are not as important as those considered in the Senate, however, because the text of the final act was identical to the bill passed by the Senate. *See supra* note 67.

104. 21 CONG. REC. 2611 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 205. *See* Clark, *supra* note 29, at 1141-42.

105. 21 CONG. REC. 2597 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 183-

84. The Judiciary Committee dropped this amendment's specific language in its redraft of the bill.

Sherman also explained the distinction between trusts and other business combinations. Courts applying the Act, he said, must "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade."¹⁰⁶ Businesses could "combine in any way and enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition."¹⁰⁷

Indeed, according to Sherman, corporations "ought to be encouraged and protected as tending to cheapen the cost of production . . . [as] they were the most useful agencies of modern civilization . . . enabl[ing] individuals to unite to undertake great enterprises only attempted in former times by powerful governments." They had demonstrated their usefulness in the "vast development of our railroads and the enormous increase of business and production of all kinds." They "tend to cheapen transportation, lessen the cost of production, and bring within the reach of millions comforts and luxuries formerly enjoyed by thousands."¹⁰⁸ That new corporations were large was irrelevant, so long as they did not encompass the entire industry to obtain monopoly power.¹⁰⁹

None of the bills introduced in the Senate or House specifically attacked business size. All were directed against combination to secure control over output and price.¹¹⁰ Moreover, the members of the Senate Judiciary Committee, which redrafted Sherman's bill,¹¹¹ indicated that the distinguishing characteristic of the trusts was their combination to obtain power over output and prices.¹¹²

The composition of the 1890 Senate casts further doubt on the theory that the Act was meant to strike at mere business size. As Thorelli notes, the "51st has sometimes been called the 'Billion Dollar' Congress," referring "to the seemingly strong influence of wealthy senators or to the fact that in some respects, such as its dealing with the tariff question, the Congress seemed to give more than fair consideration to the interests of big business."¹¹³

This does not signify a rejection of the amendment's definition, however, because the redraft changed only the measure's form, not its substance. See *supra* note 67 and accompanying text.

106. 21 CONG. REC. 2456 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 115. Sherman repeatedly emphasized this distinction. See *id.* at 2456-60, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 115-22.

107. *Id.* at 2457, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 116.

108. *Id.*

109. See *id.*

110. See Bork, *supra* note 29, at 20-21.

111. The committee did not intend this redraft to alter the policy choices embodied in Sherman's amended bill. See *supra* note 67.

112. See Bork, *supra* note 29, at 17-19.

113. H. THORELLI, *supra* note 7, at 215. See also R. HOFTSTADTER, *supra* note 92, at 198.

ii. *Monopoly Power Through Efficiency Rather than Combination or Predation.* Unlawful combinations were thus defined by their purpose to obtain market control, not by their absolute size. Where the effect of a combination was to obtain market power such a combination would be unlawful under the Act without more. Thus, monopolistic mergers in whatever form were condemned, despite any possible efficiencies. Senator Sherman expressly rejected the argument that these combinations "reduce prices to the consumer by better methods of production," as "all experience shows that this saving of cost goes to the pockets of the producer."¹¹⁴ Sherman and other legislators agreed that claimed productive efficiencies could not save an otherwise illegal merger.¹¹⁵

By contrast, the 1890 Congress intended to permit monopoly power achieved through superior goods and services and lower prices, rather than by monopolistic merger or predation. Section 2 of the Act,¹¹⁶ indicates the legislative intent to make this distinction. By its terms, section 2 applied not against the mere possession of monopoly, but against those who "shall monopolize, or attempt to monopolize, or combine or conspire" to do so.¹¹⁷ The emphasis on conduct rather than market structure was emphasized in a colloquy among Senators Kenna, Hoar, and Edmunds, in which the latter two confirmed:

that a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same

114. 21 CONG. REC. 2460 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 122.

115. Sherman cited several cases which condemned monopolistic mergers without regard to possible productive efficiencies. *See Bork, supra* note 29, at 25 & n.54. Those cases were *Richardson v. Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889) (refusing to enforce terms of merger agreement because in furtherance of scheme to monopolize) (cited by Sherman at 21 CONG. REC. 2458 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 118 (citing this case as *Richardson v. Alger*)); *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N.E. 798 (1889) (gas company which purchased all other gas companies in Chicago to secure monopoly violated terms of its charter) (cited at 21 CONG. REC. 2459 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 119-20)); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890) (company which transferred its stock to sugar trust, a combination in restraint of trade, held in violation of corporate charter and subject to dissolution) (cited at 21 CONG. REC. 2459 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 120-21 (citing lower court opinions)).

As to the concurrence of other legislators with Sherman's view, *see, e.g., id.* at 2726, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 265 (Sen. Edmunds); *id.* at 4100, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 318 (Rep. Mason).

116. The Senate Judiciary Committee added section 2 in its redraft of Sherman's bill. 1 LEGISLATIVE HISTORY, *supra* note 29, at 275-76 (text of the bill as reported by Judiciary Committee, showing Committee's amendments to original bill).

117. *Id.* at 276. This language remains today from the original Senate Judiciary Committee redraft. *See Sherman Act*, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 29, at 51 (final text of act).

business.¹¹⁸

As just noted, the 1890 Congress decided to proscribe only business consolidations formed to control the market; other mergers, regardless of size, were allowed. Although Congress did not explicitly prescribe a method for distinguishing the two, the legislative history in the Senate indicates that Congress intended to adopt the standard of the common law merger cases that had distinguished monopolistic business combinations from ordinary business associations on the basis of monopoly power.¹¹⁹ The Senators' specific citation to those cases justifies the use of the monopoly-power standard in those cases to distinguish among lawful and unlawful tight combinations.

iii. *The Prohibition of Loose Combinations.* The definition of an unlawful trust also included "loose combinations," or cartels. Many in the 1890's understood the term "trust" to include all collective efforts at market control, including cartels.¹²⁰ The very language of section 1, "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade,"¹²¹ encompasses more than just tight combinations in the trust or holding company form.¹²² Finally, Sherman cited several restraint of trade cases against loose cartels when explaining the scope of his bill.¹²³

5. *A Limited Delegation to the Courts*

While the policy determinations of the Fifty-first Congress were extensive, the Act nonetheless left an important task to the courts. In addressing Congress, Sherman stated:

[I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare

118. 21 CONG. REC. 3152 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 293.

119. See *supra* text accompanying notes 88-90 (common law prohibition of monopolistic mergers).

120. See Bork, *supra* note 29, at 22 n.38; Clark, *supra* note 29, at 1137-38. Others used the term to refer only to tighter combinations. See, e.g., Bork, *supra*, at 21-22.

121. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 51. See *supra* note 57 for an explanation of the original meaning of the phrase "in the form of trust or otherwise."

122. The terms "contract" and "conspiracy in restraint of trade" certainly cover the looser combinations.

123. Loose combination cases cited by Sherman were *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887) and *Craft v. McConoughy*, 79 Ill. 346 (1875). 21 CONG. REC. 2458-59 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 118-119. Thorelli expresses doubt as to Sherman's opposition to loose combinations because Sherman indicated in his March 21 speech that "[o]nly one or two of the [common law] cases referred to, and two or three of the 'trusts' enumerated" in them "belong to this category." H. THORELLI, *supra* note 7, at 185. He concludes, however, that loose combinations were included in the Act's proscriptions for essentially the same reasons cited in the text. *Id.*

general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law. . . . This bill is only an honest effort to declare a rule of action.¹²⁴

Congress thus left the courts to apply to particular cases the general policy choices it had made. As with all statutory enactments, the courts were expected to fill in gaps left by the legislature. With the Sherman Act, the largest gap was the definition of the "precise line between lawful and unlawful combinations," that is, between the monopolistic mergers and cartels Sherman condemned and the combinations in aid of production he praised.¹²⁵ The federal courts were to draw this "precise line" in the same way the state courts had in the American majority cases.¹²⁶ The Senators viewed these cases, which reflected their basic policy choices, as the common law.¹²⁷

Contrary to conventional belief,¹²⁸ Sherman's statement does not support the standardless delegation premise. Rather, his words confirm that the Act declares a "rule of action" to guide the courts in particular cases. Sherman directed the courts to apply the "general principles" declared by the 1890 Congress "to carry out the meaning of the law."¹²⁹ To the extent that the common law failed to provide operational legal rules, courts were to develop and apply them, but only so as to implement the 1890 Congress's basic policy choices. This is the power that every statute delegates to courts.¹³⁰ Both the Supreme Court¹³¹ and lead-

124. 21 CONG. REC. 2460 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 122.

125. Bork has argued from these facts that the 1890 Congress adopted the standard of "maximization of consumer welfare" under which "competition" is a "term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree." R. BORK, *supra* note 37, at 51. This standard "requires courts to distinguish between agreements or activities that increase wealth through efficiency and those which decrease it through restriction of output." Bork, *supra* note 29, at 7. Bork is probably correct that the policy objectives of the Act are consistent with overall economic efficiency. He overstates his case, however, in asserting that the 1890 Congress expressly adopted "efficiency" or "consumer welfare" as the statutory standard.

First, the welfare economics concept of efficiency was not known at that time. While the Senators clearly understood that monopoly leads to higher prices through restriction of output, it is unlikely that they comprehended the deadweight welfare loss that it entails. The analysis of the welfare loss from monopoly came later. See H. HOVENKAMP, *supra* note 2, at 50; Lande, *supra* note 29, at 87-89.

Second, as Bork concedes, the Senators clearly forbade trusts even if their increased productivity might outweigh the ill effects of their power to restrict output. Bork, *supra* note 29, at 25-27. McCraw notes that two of the most notorious trusts, Standard Oil and American Tobacco, may have been beneficial because of their productivity gains. McCraw, *supra* note 95, at 15-18. Yet all monopolistic mergers were prohibited.

126. See *supra* text accompanying notes 64-91.

127. See *supra* notes 72-74 and accompanying text.

128. See, e.g., Baxter, *supra* note 3, at 664 n.13.

129. 21 CONG. REC. 2460 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 122.

130. Although this gap-filling function somewhat resembles the lawmaking role of common law courts, there is a significant difference. In statutory cases, courts are not free to reformulate the general doctrine they are applying—even if they find that doctrine inappropriate. They are limited

ers in the other two federal branches¹³² shared this view of the judicial function.

Finally, and perhaps most significantly, the Act's imposition of punitive damages and criminal sanctions indicates that the 1890 Congress intended to prohibit specifically defined conduct, rather than delegate the task to the courts. Then, as now, criminal offenses had to be defined with reasonable specificity.¹³³ The lawyers in the Senate would have known that the Supreme Court had previously declined the invitation to create common law crimes.¹³⁴ It is therefore unlikely that they would have intended to delegate to the federal courts the task of defining specific antitrust crimes.¹³⁵

to applying the binding legislative standard to new fact situations. See, e.g., E. LEVI, *supra* note 41, at 5. See *infra* text accompanying notes 359-65.

131. In its first exposition of the Sherman Act's substantive provisions, for example, the Supreme Court rejected defendants' invitation to "read into the Act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government. . . . If the Act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897). For a more complete discussion of *Trans-Missouri*, see *infra* text accompanying notes 143-55. The early Sherman Act cases followed this view of the judicial function. See *infra* text accompanying notes 143-68.

132. President Taft declared that the assumption of competition policymaking power by the courts "might involve our whole judicial system in disaster." Presidential Message to Congress (Jan. 7, 1910), quoted in G. HENDERSON, *THE FEDERAL TRADE COMMISSION* 16 (1924).

Believing that the rule of reason announced in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) gave the judiciary unfettered discretion in Sherman Act cases, the Senate Committee on Interstate Commerce protested:

The committee has full confidence in the integrity, intelligence, and patriotism of the Supreme Court of the United States, but it is unwilling to repose in that court, or any other court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated. It substitutes the court in the place of Congress, for whenever the rule is invoked, the court does not administer the law, but makes the law. If it continues in force, the Federal courts will, so far as restraint of trade is concerned, make a common law for the United States just as the English courts have made a common law for England.

The people of this country will not permit the courts to declare a policy for them with respect to this subject.

Report of Senate Committee on Interstate Commerce (Feb. 13, 1913), at xii, quoted in G. HENDERSON, *supra*, at 16.

133. Sherman understood this. He noted in his March 21, 1890 speech that a criminal statute "would be construed strictly and [be] difficult to . . . enforce[.] . . ." 21 CONG. REC. 2456 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 115.

134. *United States v. Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812); accord, *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

135. The Federal Trade Commission Act and Clayton Act were passed in 1914 in response to political pressure for an antitrust law stricter than the Sherman Act, see G. HENDERSON, *supra* note 132, at 15-18; W. LETWIN, *supra* note 29, at 265-78. The enforcement scheme of these acts suggests the prevalence of the idea that courts should not perform legislative functions.

The Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 12-27 (1982)), which granted a treble damage remedy, limited judicial enforcement powers by attempting to define specific offenses. Section 5 of the FTC Act, ch. 311, 38 Stat. 719 (1914) (codified at 15 U.S.C. § 45 (1982)), proscribed "unfair methods of competition," a vague standard that might encompass business practices not illegal under the new Clayton Act or the Sherman Act as construed in 1914. The

II

THE SEA OF DOUBT: THE CONSTITUTIONAL APPROACH TO
THE SHERMAN ACT

As a rule, courts do not upset a settled statutory construction, absent extraordinary circumstances. There are two reasons for this prudential policy. First, it promotes responsible and consistent government. As Levi explains, "[l]egislatures and courts are cooperative law-making bodies. It is important to know where the responsibility lies."¹³⁶ If courts are free to reinterpret legislation, the legislature will avoid controversial issues by reasoning that "the court in the future will make a more appropriate interpretation."¹³⁷ Second, private parties come to rely upon a settled statutory construction. Judicial revision of that construction may upset these reliance interests.¹³⁸ As Justice Brandeis put it, "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹³⁹

To establish the case for abandoning the current constitutional approach to the Sherman Act, it is not sufficient to show that the 1890 Congress did not pass the enabling legislation described by the conventional wisdom. I must also show that the doctrine of stare decisis should not apply.

There are two instances where courts should decline to follow erroneous precedent instead of awaiting legislative correction. The first is where the precedent creates uncertainty by failing to set forth a workable

enforcement of this largely undefined standard, however, was not entrusted to the courts. Rather, section 5 provided for enforcement only by an agency whose sole sanction was the issuance of prospective cease-and-desist orders. In sum, the enforcement structure of these acts indicates the prevalent view of the time that judges could not be regulators, and that punitive sanctions could not be imposed for violation of indeterminate provisions.

136. E. LEVI, *supra* note 41, at 23.

137. *Id.* Levi adds that a court is not likely to be any more courageous in dealing with controversial issues. "In all likelihood it will do enough to prevent legislative revision and not much more." *Id.*

138. *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (refusing to overrule precedent holding baseball not subject to antitrust statutes because of "confusion and retroactivity problems" that would result); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (same, emphasizing the baseball "business has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation"); *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947) (prior construction of overtime provision of Fair Labor Standards Act would not be overturned even if the Court "doubted the wisdom of the [prior] decision as an original proposition," where "[e]mployers and employees (including those involved in this case) have regulated their affairs on the faith of it.").

139. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Brandeis emphasized that this "is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation." *Id.* In contrast, when constitutional concerns are implicated, legislative remedies are "practically impossible," and correction is a matter of judicial discretion and authority. *Id.* at 406-10.

legal rule. In this case, the precedent cannot have given rise to legitimate expectations.¹⁴⁰ The other instance is where the prior construction is inconsistent with the Constitution.¹⁴¹

This Part demonstrates that the constitutional approach to the Sherman Act should be abandoned for both reasons. Section *A* establishes that, although the Supreme Court originally followed the intent of the 1890 Congress to reach correct results, its failure to adopt Taft's workable methodology later enabled it to create the myth that the 1890 Congress made no policy choices. Section *B* demonstrates that this standardless approach has resulted in doctrinal chaos. Past precedents have *not* created settled doctrine around which expectations could form. Section *C* exposes the severe legal and social costs caused by this doctrinal indeterminacy. These costs are so extraordinary that they require the courts to initiate and adhere to an operational statutory standard.

A. Setting Sail: The Court's Shift from the Statutory to the Constitutional Approach

In early cases, judges understood that the Sherman Act's common law background gave section 1 "a concreteness of meaning not otherwise apparent on its face."¹⁴² They thought their task was to apply this meaning to specific cases. This interpretation of the Act raised two initial questions: Was Congress's use of the word "every" in section 1 intended to invalidate all contracts in restraint of trade, even those which had been enforceable at common law? If not, which of the common law "rules of reason" for distinguishing "reasonable" from "unreasonable" restraints best carried out the congressional policy choices?

Although turn-of-the-century courts reached the right results in the

140. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 118-19 (1940) (precedent necessitating the "multiplication of gossamer distinctions" overruled in favor of a "harmonizing principle" derived from "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," where no interests were "created or maintained in reliance on those cases").

141. E. LEVI, *supra* note 41, at 5-6. The most famous example of upsetting a settled construction because of the inconsistency between statutory interpretation and the Constitution is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Supreme Court overruled a 96-year old precedent, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), because *Swift's* construction of the Rule of Decision Act, (28 U.S.C. § 1652 (1982)), required federal courts to make substantive law in nonfederal cases. Writing for the Court, Justice Brandeis noted that, "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Swift*, 41 U.S. (16 Pet.) at 77-78 (footnote omitted). Brandeis also emphasized the costs of the legal indeterminacy resulting from the operation in the same state of two independent court systems, with the state courts applying state law as determined by their highest court and the federal courts in diversity cases applying a "general common law" developed by the federal judiciary. *Id.* at 74-77.

142. M. HANDLER, *A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAW 2* (TNEC Monograph No. 38, 1941), quoted in H. THORELLI, *supra* note 7, at 11 n.7.

initial, easy cases, they failed to state an operational standard for the resolution of more difficult disputes. This failure enabled activist judges subsequently to interpret the statute as the standardless "constitutional" act of the conventional wisdom, while at the same time purporting to follow earlier, good faith attempts at implementing the 1890 Congress's choices.

1. Trans-Missouri

The first Sherman Act case decided on the merits by the Supreme Court was *United States v. Trans-Missouri Freight Association*.¹⁴³ In interpreting the Act, both the majority and the dissenting opinions closely examined legislative intent and statutory language,¹⁴⁴ and both dealt at length with the common law doctrines of restraint of trade.¹⁴⁵ Unfortunately, neither the majority nor the dissent reached a satisfactory construction of the Act.

The cartel defendants urged a rule of reason derived from permissive American minority and late nineteenth century English cases.¹⁴⁶ Justice White, writing for the dissenters, endorsed this view: "[A]lthough a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which produces it be unreasonable."¹⁴⁷ Under this proposed rule of reason, the defendants' cartel price fixing was reasonable because (1) their aim of thwarting excessive price competition in order to prevent railroad bankruptcy was a reasonable purpose; (2) they had not engaged in predatory practices designed to prevent new competition; and most importantly, (3) the rates they set were "fair and reasonable."¹⁴⁸

In his majority opinion, Justice Peckham argued that this rule of reason was inadequate because it provided no operational standard for

143. 166 U.S. 290 (1897). Among the defendant's members were 19 railroads whose lines extended from the Mississippi to the west coast. According to the government's bill of complaint, these members together controlled the freight traffic west of the Missouri River. The bill charged the association and its members with fixing rates for this traffic, and establishing other illegitimate rules and regulations governing its carriage. The government's bill prayed for an injunction dissolving the association and prohibiting its members from engaging in further rate-fixing agreements. *Id.* at 293-301.

144. 166 U.S. at 316-28, 340-41 (majority opinion); 344-45, 351-61 (dissenting opinion).

145. 166 U.S. at 328, 333-35 (majority opinion); 346-51 (dissenting opinion). Other Sherman Act decisions of the era also reflected *Trans-Missouri's* dual emphasis on statutory construction and common law doctrines incorporated in the statute. *See, e.g.,* Northern Sec. Co. v. United States, 193 U.S. 197 (1904); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898). *See also* W. LETWIN, *supra* note 29, at 143-81 (discussing the evolution of common law interpretation of the Sherman Act from 1890 to 1899); H. THORELLI, *supra* note 7, at 432-99 (examining judicial interpretation of and reliance upon common law background for Sherman Act litigation from 1890 to 1903).

146. *See supra* text accompanying note 84.

147. *Trans-Missouri*, 166 U.S. at 343 (White, J., dissenting).

148. *Id.* at 303-04, 343-44.

resolving cases. "[T]he subject of what is a reasonable rate is attended with great uncertainty. . . . [I]t is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates" ¹⁴⁹ Such a rule would render the Act impossible to administer and enforce.

Moreover, Peckham reasoned that even if it could be applied to actual cases, the defendants' proposed rule of reason would eviscerate the Act, and permit the very restraints of trade the 1890 Congress had intended to prohibit. ¹⁵⁰ Unfortunately, although Peckham's opinion recognizes the existence of common law cases adverse to the defendants' position, ¹⁵¹ it does not formulate them into a rule of reason which would condemn cartel price fixing and thus effectuate precisely this intent. Instead, Peckham resorted to a "plain meaning" approach, holding that the Act prohibited all restraints of trade, even those reasonable at common law. ¹⁵²

While this bright-line approach worked in the immediate case, it created insurmountable doctrinal problems. It proscribed not only the defendants' defective rule of reason, but also any principled technique to discern and validate ancillary restraints used for productive rather than monopolistic purposes. Peckham thus left the courts with no tools to perform Congress's directive to distinguish between combinations to restrict output and those in aid of production.

Subsequent cases forced Peckham to retreat from his *Trans-Missouri* position to avoid an absurd construction of the statute. In *United States v. Joint Traffic Association*, ¹⁵³ Peckham stated that at least some restrictive agreements were lawful under the Act. He asserted, for example, that a covenant not to compete with the purchaser of a business was "a contract not within the meaning of the act." ¹⁵⁴ In addition, he resorted to an ambiguous distinction between "direct" and "indirect" restraints to avoid condemning those which were innocuous and ancillary. ¹⁵⁵

149. *Id.* at 331-32.

150. *Id.* at 337, 340-41. Defendants' proposed rule of reason would have permitted many cartel price-fixing agreements, despite the 1890 Congress's decision to prohibit loose combinations. See *supra* text accompanying notes 120-23.

151. *Trans-Missouri*, 166 U.S. at 333-35.

152. *Id.* at 328, 340-41.

153. 171 U.S. 505 (1898) (evaluating rate-setting association of railroads operating between Chicago and east coast).

154. *Id.* at 568.

155. *Id.* at 567-69. Peckham stated that an agreement for the purpose of promoting the parties' "legitimate business . . . with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce" was not prohibited by the Act, "although the agreement may indirectly and remotely affect that commerce." *Id.* at 568. As Professor Sullivan has observed, Peckham "outlined no systematic ways in which concerted arrangements which violate the Act were to be distinguished from those which do not." L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 170 (1977). The distinction between direct and indirect effects seems to parallel Taft's

2. Addyston Pipe

In *United States v. Addyston Pipe and Steel Co.*,¹⁵⁶ Judge Taft derived a rule of reason from the American majority cases to condemn the bid-rigging activities of the cartel defendants before him. Taft rejected the cases proffered by the defendants, which upheld the "reasonableness" of suppressing "ruinous" competition through cartels as long as the prices the cartels charged were reasonable.¹⁵⁷ Instead, Taft followed the line of cases favored by Sherman and the other Senators.¹⁵⁸ Taft explained that these cases applied a rule of reason test only to restraints ancillary to a valid business transaction. These cases categorically condemned all "naked" restraints, those with no purpose other than to suppress competition, without consideration of the reasonableness of the defendants' purposes or the prices they set.¹⁵⁹ Taft found the bid-rigging scheme of the defendants before him to be such a naked restraint.¹⁶⁰

Taft also explained how the common law would deal with monopolistic mergers under the ancillary restraint test. Business combinations were legal as long as they fell short of monopoly power. When mergers were used to control the market, however, "the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose."¹⁶¹

Taft's reasons for adopting this American majority version of the

system, see *infra* text accompanying notes 156-64, especially in light of Peckham's examples of reasonable ancillary restraints. 171 U.S. at 568. But in view of its emphasis on a restraint's purpose and effects, it is equally, if not more, suggestive of the formless "purpose and effects" test found in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See *infra* text accompanying notes 170-97. The Court used a similar analysis to decide its next two Sherman Act cases. See *Hopkins v. United States*, 171 U.S. 578 (1898) (livestock association limiting members' market access not considered to have direct effect on interstate commerce or to be restraint of trade); *Anderson v. United States*, 171 U.S. 604 (1898) (same).

156. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

157. This was the "rule of reason" which Justice White advocated in his *Trans-Missouri* dissent. See *supra* text accompanying notes 147-48.

158. Taft cited with approval four of the six cases which Sherman mentioned in his March 21, 1890 speech as examples of the common law incorporated in his bill. Compare 21 CONG. REC. 245-59 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29 at 117-21 (Sherman's citations) with *Addyston Pipe*, 85 F. at 289, 291 (Taft's citations).

159. *Addyston Pipe*, 85 F. at 282-91 (discussing cases). See also *supra* text accompanying notes 78-83 (describing American majority rule). In addition, these cases do not consider the actual output-restrictive effects of the defendants' conduct, or even their power to produce such effects. See *supra* notes 78-83.

160. *Addyston Pipe*, 85 F. at 291-95. The government brought suit to enjoin the defendants' division of markets. Under the defendants' scheme, each defendant had a first option to win all bids in its "home" territory. Other jobs were allocated by an "auction" among the defendants, with the job going to the firm willing to pay the most to the others for their forbearance in bidding against it. The scheme was effectuated by bid-rigging. *Id.* at 272-75.

161. *Id.* at 291.

common law are important. He recognized that the vague rule of reason urged by the defendants provided no workable standard for judicial decisionmaking. With naked restraints, where the "sole object . . . is merely to restrain competition, and enhance or maintain prices," the defendants' rule gave no firm standard to guide the court, only "the vague and varying opinions of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition."¹⁶²

Courts deciding cases on this basis had necessarily deviated from their proper judicial role. These courts had "set sail on a sea of doubt and [had] assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not."¹⁶³ Taft warned that there is a "manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard."¹⁶⁴ By contrast, the doctrine of ancillary restraints provided the courts with a workable standard. The "main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."¹⁶⁵

Taft also surely realized that only the American majority version of the common law would effectuate the Act's purposes.¹⁶⁶ The defendants' proposed rule of reason would permit the very cartel agreements that the Act was intended to outlaw. Taft's methodology, on the other hand, would enable the courts to resolve hard cases consistently with the 1890 Congress's policy choices. The ancillary restraints doctrine protected legitimate productive business transactions. The *per se* prohibition of naked restraints condemned the cartel price-fixing efforts of the "loose combinations" of Sherman's day. The requirement that nonnaked restraints be "reasonably ancillary" to a valid business purpose provided a tool to ferret out cartel restraints disguised as ancillary to legitimate ventures. Finally, Taft adopted the common law rule against the consolidation of an industry into one firm, regardless of claimed efficiencies, and thereby condemned the tight combinations whose formation had sparked the passage of the Act.¹⁶⁷

Unfortunately, the Supreme Court never adopted Taft's methodology.¹⁶⁸ The Court thus missed its best opportunity to establish a coher-

162. *Id.* at 282-83.

163. *Id.* at 284.

164. *Id.*

165. *Id.* at 282.

166. As a lower court judge, bound to follow *Trans-Missouri*, Taft could not assert that this was the rule chosen by the 1890 Congress, particularly given a historical context discouraging the use of legislative history. His discussion of the common law took the form of an "even if" argument. Taft argued that even if *Trans-Missouri* did not apply, as the defendants urged, their practices were unlawful at common law. *Addyston Pipe*, 85 F. at 278-79.

167. *Id.* at 291.

168. The Supreme Court affirmed the Sixth Circuit's judgment in *Addyston Pipe*, with a minor

ent Sherman Act jurisprudence. Instead it gradually drifted from a statutory to a constitutional approach to the Act. The next three sections point out the key cases that marked this fateful transition.

3. Standard Oil

*Standard Oil Co. v. United States*¹⁶⁹ provided the definitive statement of what has come to be known as the rule of reason. In deriving this rule, Chief Justice White's opinion did not make a sharp break with the traditional approach to statutory cases. Like *Trans-Missouri*, the *Standard Oil* opinion placed heavy emphasis on statutory construction and the common law meaning of the terms used in section 1.¹⁷⁰

As Bork has shown,¹⁷¹ White correctly perceived that the 1890 Congress had intended the Sherman Act to inhibit the activities of the classic industrial trusts. In particular, Congress desired to curb the power to restrict output by fixing prices, limiting production and reducing product quality.¹⁷² To this end, the Court reached the correct result in condemn-

modification of the decree. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 247 (1899). As Thorelli notes, Justice Peckham "in no way objected to Taft's method of distinguishing the *Addyston Pipe* and the *Trans-Missouri* cases as regards the interpretation of the restraint-of-trade concept itself. At least inferentially he also approved Taft's reasoning in reference to the common law and its proper significance in the application of the Sherman Act." H. THORELLI, *supra* note 7, at 470. Nevertheless, the Court did not expressly adopt Taft's methodology, nor did it expressly mention it. Instead, it dealt primarily with the issue of whether the defendants' conduct had affected interstate commerce. *Addyston Pipe*, 175 U.S. at 226-35, 238-47.

In subsequent cases the Court never mentioned Taft's methodology, and continued to apply the *Joint Traffic* approach, *see supra* text accompanying notes 153-55. *See, e.g.*, *Northern Sec. Co. v. United States*, 193 U.S. 197, 329-33 (1904) (railway company merger held to be illegal restraint of interstate commerce); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904) (manufacturers' purchase agreement constituted illegal agreement to restrain trade).

169. 221 U.S. 1 (1911).

170. *Id.* at 49-51, 59-68 (statutory construction), 51-59 (discussion of common law). Although it held that courts must use the rule of reason to decide cases under the Act, the *Standard Oil* Court did not dispute the view of the judicial function enunciated in *Trans-Missouri*. *See supra* note 131. Chief Justice White's majority opinion makes clear that the only function of the rule of reason is to identify the conduct that Congress has proscribed. Once it is determined that challenged practices were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made . . . disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

Id. at 65. In short, while it was necessary for courts to exercise their judgment in applying congressional policy to concrete cases, they had no right to employ such judgment to form the policy itself.

171. R. BORK, *supra* note 37, at 35-36.

172. *Standard Oil*, 221 U.S. at 52, 59-60. As summarized in Chief Justice White's opinion for the Court:

The statute . . . evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference—that is, an undue restraint.

Id. at 60.

ing the paradigmatic trust.

Nonetheless the *Standard Oil* Court took the first step away from the statutory approach. The case provided no operational test for detecting "undue restraints," which White held were condemned by both the common law and the Act.¹⁷³ Instead, White stated only that "the standard of reason which had been applied at the common law and in this country" was the statutory test "intended [by Congress] to be the measure used."¹⁷⁴ The opinion thus propounded a third version of the rule of reason, unlike those proposed by Taft or by the *Trans-Missouri* and *Addyston Pipe* defendants. White's rule of reason was an ad hoc, fact-bound evaluation of the purpose behind each challenged restraint and its probable or actual effects. Under White's rule a restraint would be illegal if either its effects were "unduly" output restrictive or its evident purpose was to monopolize an industry.¹⁷⁵ The latter was the case in *Standard Oil*.

This rule of reason was far more difficult to apply than Taft's structured methodology. The determination of the purposes behind a challenged practice and its actual or predicted economic effects is often a complex task. Certainly, in a monopolistic merger case such as *Standard Oil*, the purpose to achieve monopoly power is clear. In other cases, however, discerning the defendants' purpose becomes difficult, particularly after skilled counsel have been at work. Take, for example, the professed purposes of the defendants in *Chicago Board of Trade v. United States*:¹⁷⁶ "not to prevent competition or to control prices, but to promote the convenience of members . . . and to break up a monopoly in [one] branch of the grain trade acquired by four or five warehousemen in Chicago." Or consider the statements of the defendants in *Appalachian Coals, Inc. v. United States*,¹⁷⁷ who "insist[ed] that the primary purpose" of their scheme was not "to restrain or monopolize interstate commerce," but rather to market their coal more effectively and "to eliminate abnormal, deceptive and destructive trade practices." As detailed below,¹⁷⁸ neither statement adequately characterized the defendants' conduct, but both were found sufficient to uphold anticompetitive practices that could only benefit producers at the expense of consumers.¹⁷⁹

173. *Id.* at 59-60.

174. *Id.* at 59.

175. *Id.* at 70-77 (application of test to *Standard Oil* defendants). White's most specific statement of the rule of reason came in the companion *American Tobacco* case, where he declared that the prohibitions of the Act reached practices "which, either because of their inherent nature or effect or because of the evident purpose of the Acts, etc., injuriously restrained trade . . ." *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

176. 246 U.S. 231, 237 (1918).

177. 288 U.S. 344, 359 (1933).

178. See *infra* text accompanying notes 202-12.

179. See R. BORK, *supra* note 37, at 44-46 (*Chicago Bd. of Trade* result proinoted producer over

In cases like these, the vagueness of White's rule matters very much. Would the purpose to alleviate "evils" in a depressed or oligopolistic industry avoid liability? Stated another way, would only the purpose to achieve the supracompetitive profits of the economist's pure monopoly model suffice? White's rule gives no answers.

The rule's "effects" inquiry has proved just as troublesome. The economic analysis required to determine the probable or actual effects of a challenged restraint entails the complicated market definition and market power determinations that plague current monopolization and merger litigation. Scholars have termed such investigations as both theoretically and practically "as difficult an undertaking as any in antitrust."¹⁸⁰ Whether one has market power, and if so how much, turns both on whether vendors are sufficiently close by to provide substitutes for the product, and on how close these substitutes are.¹⁸¹ There are no "right" answers to these questions; all is a matter of degree. Any substitute will limit the would-be monopolist's ability to restrict output, but how much limitation is enough? Or, put another way, how much power over output and price is too much? The courts have struggled with these issues of market definition and power for years without producing consistent results. This struggle has been a major cause of the "big case" in antitrust.¹⁸² In light of this, Easterbrook has concluded that "the search for the 'right' market is a fool's errand," which "should be avoided whenever possible."¹⁸³

Moreover, White's concept of "undue restraint" is inherently ambiguous. Does a practice that affects market prices but falls short of generating the classic monopolist's unilateral power over prices constitute an undue restraint?¹⁸⁴

White's failure to follow Taft's clear-cut category of per se offenses for naked restraints aggravated these ambiguities. Although Bork and others¹⁸⁵ argue that White's approval of the *Trans-Missouri* re-

consumer welfare); L. SULLIVAN, *supra* note 155, at 177-79 (same); see also *id.* at 179-81 (same for *Appalachian Coals*); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (Part I)*, 74 YALE L.J. 775, 822-26 (1965) (same).

180. M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *TRADE REGULATION: CASES AND MATERIALS* 226 (2d ed. 1983) [hereinafter cited as *TRADE REGULATION*].

181. See *infra* note 184.

182. Rowe, *Decline of Antitrust*, *supra* note 191, at 1535-39.

183. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 22 (1984).

184. A few American, and many English, common law cases held cartel schemes valid where the cartelists faced competition, since this denied the cartel full control of the market. See 1 E. KINTNER, *supra* note 29, § 3.10, at 102-03 & n.171; H. THORELLI, *supra* note 7, at 45-48 & n.144. This was a prototype of today's defense of lack of market power. Cartel defendants often advanced the defense in early Sherman Act cases. See, e.g., *Appalachian Coals*, 288 U.S. at 359 (defense argues no power to dominate pricing); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (same).

185. R. BORK, *supra* note 37, at 36; 1 E. KINTNER, *supra* note 29, § 8.3, at 365.

sult,¹⁸⁶ coupled with his reference in the companion case of *United States v. American Tobacco Co.*¹⁸⁷ to practices with the "inherent nature" of injuriously restraining trade,¹⁸⁸ reflected an embryonic version of the *per se* rule,¹⁸⁹ his opinion can also be read to hold that both naked and ancillary restraints are equally subject to the "purpose and effects" analysis.¹⁹⁰ Under this reading, White's system, unlike Taft's, did not limit the reasonableness-inquiry to ancillary restraint cases. This extension of the inquiry to any case could only raise the costs of litigation and increase its indeterminacy.

By contrast, the basic inquiry under Taft's methodology, whether a challenged restraint is reasonably ancillary to a productive purpose—is a manageable issue in litigation. As Taft indicated in *Addyston Pipe*, there is precedent for distinguishing between naked and ancillary restraints.¹⁹¹ These precedents illustrate the generic productive business transactions to which restraints could be ancillary. Moreover, the distinction between naked and ancillary restraints made by these cases is not arbitrary or obscure. The distinction can be explained in basic economic terms. Put most simply, naked restraints are those which only restrict output, while ancillary restraints promote wealth-creating voluntary exchanges and facilitate joint productive activities.¹⁹² The only question of degree in this inquiry is whether the challenged restraint is reasonably related to the productive business transaction to which it is ancillary. Even here, as Taft pointed out in *Addyston Pipe*, the "main purpose of the contract," that is, the productive transaction, "suggests the measure of protection

186. *Standard Oil*, 221 U.S. at 64-65.

187. 221 U.S. 106 (1911).

188. *Id.* at 179.

189. 1 E. KINTNER, *supra* note 29, § 8.2, at 354; see also L. SULLIVAN, *supra* note 155, at 174 (*Standard Oil* "accepts and reiterates the embryonic *per se* rule").

190. 1 M. HANDLER, *TWENTY-FIVE YEARS OF ANTITRUST* 5-13 (1973); A. NEALE & D. GOYDER, *THE ANTITRUST LAWS OF THE U.S.A.* 27-30 (3d ed. 1980); Easterbrook, *Vertical Arrangements*, *supra* note 9, at 137 & n.9.

Commentators have also misconceived White's mention in *American Tobacco* of practices with the "inherent nature" of restraining trade, 221 U.S. at 179, as a source of modern *per se* analysis. But the *per se* rule against price fixing applies without regard to market power, even though price fixing without market power will not inherently restrain trade. Easterbrook, *supra* note 183, at 20-21. Nor did White's approval of *Trans-Missouri* in *Standard Oil*, 221 U.S. at 64-65, necessarily represent an "embryonic version of the *per se* rule" against price fixing, as Professor Sullivan has argued. See L. SULLIVAN, *supra* note 155, at 174. In *Trans-Missouri*, the defendants were *all* the railroads carrying freight between the Missouri River and the west coast. *Trans-Missouri*, 166 U.S. at 298. They surely possessed market power. The defense implicitly conceded this in arguing that their collective rates were reasonable. *Id.* at 304, 330-31. The *Trans-Missouri* Court thus had no occasion to consider the defense of lack of market power, which today is precluded by the *per se* rule. Moreover, in *Standard Oil* White was careful to limit his approval of *Trans-Missouri* to its result, stating that any conflict between its general language and the *Standard Oil* rule of reason must be resolved in favor of the latter. *Standard Oil*, 221 U.S. at 67-68.

191. 85 F. at 281-82.

192. See *infra* text accompanying notes 404-14.

needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."¹⁹³ Market power issues arise only in those rare cases where an ancillary restraint may have given the defendants monopoly power.¹⁹⁴

Standard Oil ended the judicial debates over the Sherman Act's basic construction. White's formula became the rule of reason for resolving future cases. At first, the rule's lack of content did little damage. The cases during the "classic age" of antitrust involved the very monopolistic mergers and cartel schemes that the 1890 Congress clearly intended to proscribe. The Court had only to reject the permissive English and American minority precedents urged by the *Trans-Missouri* and *Addyston Pipe* defendants to find liability under the rule. While *Trans-Missouri*, with its rejection of any rule of reason approach, would have been inadequate for resolving even those easy cases, *Standard Oil*'s only slightly more helpful rule of reason was sufficient.

It is doubtful that the lower courts actually looked to *Standard Oil*'s rule of reason for deciding particular cases. More likely, they did what courts typically do when faced with a vague standard: they reiterated the language of the rule, but looked for guidance in the results of prior cases. They knew that *Standard Oil* and *American Tobacco* had condemned monopolistic mergers, that *Trans-Missouri* and *Joint Traffic* had condemned cartel restraints, and that *Standard Oil* had stated that these cases were correctly decided.¹⁹⁵ Although judges probably could not define an "undue restraint" in words, they knew it when they saw it.

This approach was not sufficient for the harder cases that came next. Without a workable standard, even judges trying in good faith to implement the 1890 Congress's policy choices made errors. Moreover, activist judges were able to impose their own policy prescriptions with impunity, as long as they took care to recite White's empty words. Brandeis and Hughes were such activist judges, and in the *Chicago Board of Trade* and *Appalachian Coals* cases they skillfully used White's words to reach results that were inconsistent with the original statute. Even worse, their opinions in those cases gave birth to the standardless theory of the Sherman Act.

4. Chicago Board of Trade

Justice Brandeis's opinion in *Chicago Board of Trade v. United States*¹⁹⁶ contains a formulation¹⁹⁷ which has become the classic restate-

193. 85 F. at 282.

194. *Id.* at 291.

195. *Standard Oil*, 221 U.S. at 64-68.

196. 246 U.S. 231 (1918).

197. For those unfamiliar with it, the entire formulation follows:

ment of the *Standard Oil* rule of reason.¹⁹⁸ While Brandeis's formulation reads smoothly at first glance, it cannot withstand close analysis. Its words, like White's in *Standard Oil*, are empty.¹⁹⁹

Brandeis started with the truism that "[e]very agreement concerning trade" restrains. "To bind, to restrain, is their very essence." By concentrating on the literal meaning of the statutory words, Brandeis directed attention away from the more limited meaning these words had at common law and from the common law test of legality. For these, Brandeis substituted his own "true test of legality," which turns on whether the challenged restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

How does a court distinguish between a restraint that "merely regulates" competition and one that "may suppress or even destroy" it? Brandeis's only answer is to "consider the facts peculiar to the business" involved. This means *all* the facts. The court must review the "condition" of the business both "before and after the restraint was imposed" and "the nature of the restraint and its effect, actual or probable." It must study "the history of the restraint," the "evil believed to exist," the "reason for adopting the particular remedy," and the "purpose or end sought to be attained." These "are all relevant facts."

With this "true test" Brandeis legitimized the "big case" in anti-trust. The actual or probable effect of a restraint can only be determined after complex market definition and market power inquiries. Because those inquiries make virtually all data relevant, few discovery requests can be resisted on the grounds of irrelevancy. Delay-minded defense

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238. Portions of this formulation appear, without further citation, in the paragraphs of text which immediately follow the text accompanying this footnote.

198. See A.B.A. ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 15 (2d ed. 1984) (*Chicago Bd. of Trade* formulation "remained as the principal statement of the rule of reason standard" until the late 1970's); R. BORK, *supra* note 37, at 43 (Brandeis's "dictum is often quoted as the quintessential expression of the rule of reason").

199. Others have recognized that Brandeis's statement provides no practical guidance for lower courts. See, e.g., Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 11 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14-15 (1977).

attorneys thus have ample opportunity to abuse judicial process in serving their clients.

Worse, Brandeis gave little indication of how to apply the statute to the results of this protracted inquiry. Could "destructive competition," the justification cited by the *Trans-Missouri* and *Addyston Pipe* cartelists,²⁰⁰ be an acceptable "evil" which might support the legality of the restraint? Could courts permit the suppression of "unfair" competition that they disapproved? Could they allow competition to be suppressed for reasons that fit judges' particular notions of the public interest? If not, what did Brandeis mean when he referred approvingly to a restraint that "merely regulates" competition?²⁰¹

Brandeis's treatment of the grain exchange rule at issue further confused matters. The Board's call rule required members who purchased grain "to arrive"²⁰² in Chicago to adhere to that day's closing call bid if they made their purchases between the close of the call and the beginning of the Board's regular session the next day.²⁰³ The rule thus confined price competition in grain "to arrive" to a portion of the business day and fixed prices for the remainder of the day.

The case was a hard one. Bork correctly has observed that the call rule was "neither obviously a cartel agreement nor clearly not one."²⁰⁴ Taft's methodology, however, suggests that the rule was indeed a cartel-like restraint. While the Board's market-creating activities clearly were productive business transactions, the call rule did nothing to facilitate them. Rather, the call rule eliminated the ability of a handful of larger firms to operate at night. These firms had given country dealers a different mix of price and service than did the majority of Board members, offering more convenient business hours, but paying the dealers less for

200. *Trans-Missouri*, 166 U.S. at 329-31; *Addyston Pipe*, 85 F. at 279.

201. If Brandeis meant "merely regulates" to characterize any restraints used by small businesses to preserve themselves against their more aggressively competitive or larger rivals, small business activities similar to cartel practices could be sustained. See 1 M. HANDLER, *supra* note 190, at 27-28 (summarizing Brandeis's preference for small business, as applied to antitrust questions); McCraw, *supra* note 95, at 25-55 (same). If, on the other hand, he meant solely to refer to coordinated productive activities, only Taft's ancillary restraints in aid of joint production could pass the test.

202. Grain "to arrive" was then in transit to Chicago. In contrast, grain sold in "spot" sales was already in Chicago and available for immediate delivery, while grain sold pursuant to a "futures" contract was to be delivered at some agreed upon future date. *Chicago Bd. of Trade*, 246 U.S. at 236. Grain "to arrive" was offered mainly by country dealers and farmers. Most bids were made by sending "by the afternoon mails to hundreds of country dealers, offers to buy, at the prices named, any number of carloads, subject to acceptance" by 9:30 a.m. the next business day. *Id.* at 236-37.

203. The regular session of the Board ran from 9:30 a.m. to 1:15 p.m., except on Saturdays, when it closed at noon. Only spot and future sales occurred during this session. The call began immediately afterward, and typically lasted about 30 minutes. *Id.* at 236.

204. R. BORK, *supra* note 37, at 44.

their grain.²⁰⁵

As Bork has observed, Brandeis employed a “deviant rule of reason” under which the “judge must undertake to decide how much competition is a good thing on grounds other than consumer welfare.”²⁰⁶ It is possible that the other Justices did not recognize the novelty of this rule because the language of his formulation seemed sufficiently orthodox. His “catalogue of relevant inquiries” appeared on the surface to be the “kind of investigations into purpose and effect of the sort White had called for in *Standard Oil* and *American Tobacco*.”²⁰⁷ Applying his “true test,” Brandeis was careful to discuss the effect of the call rule on grain prices, emphasizing that it applied to only a small part of the grain traded in Chicago.²⁰⁸ He also discussed the beneficial market-creating effects of the call itself,²⁰⁹ implying that the call rule was somehow integrally supportive of the call system, despite the fact, as Bork has shown,²¹⁰ that the price-fixing provision of the rule had nothing to do with the call’s market creation.

No one seemed to notice when Brandeis in his conclusion admitted the real rationale of his decision: the “special appeal” of restraints that regulate “the hours in which business may be done,” and which “tend to shorten the working day or, at least, limit the period of most exacting activity.”²¹¹ What appealed to Brandeis was nothing more than service fixing, which is as much a cartel practice as price fixing.

Thus, Brandeis’s confusing invocation, restatement, and application of the *Standard Oil* fact-bound rule of reason was little more than the ploy of an activist judge to substitute his own policy choices for those of the statute. Without admitting it, Brandeis accepted “reasonable cartel” arguments similar to those urged by the *Trans-Missouri* and *Addyston Pipe* defendants—although their version of the rule of reason had been uniformly rejected by the Court.²¹²

205. See *id.* at 158-59.

206. *Id.* at 44.

207. *Id.* at 43-44.

208. *Chicago Bd. of Trade*, 246 U.S. at 239-40. Whether inadvertently or purposefully, Brandeis failed to note the rule’s effect on service competition among grain brokers, which may have been substantial. The defendants admitted that the purpose of the call rule was “to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago.” *Id.* at 237. It is probable that these “four or five” obtained most of this trade by staying open later, and dealing by telephone or telegraph rather than by mail. They compensated themselves by paying country dealers a slightly lower price than that reached during the earlier call session. The call rule, by forcing all members to pay the price for grain reached in the call session, made this sort of trading less profitable.

209. *Id.* at 240-41.

210. R. BORK, *supra* note 37, at 44-45.

211. *Chicago Bd. of Trade*, 246 U.S. at 241.

212. See *supra* notes 168 and 170 and text accompanying notes 143-52.

The level of judicial discretion and doctrinal indeterminacy in anti-trust took a quantum leap in *Chicago Board of Trade*. Under Brandeis's classic formulation, the rule of reason does little more than direct trial courts to do their best to achieve the "right" result. Under this standard, no defense can be ruled out so long as it is presented as some effort to right the wrongs of society. Significantly, Brandeis never quoted the statute's words as a source of guidance. Indeed, his formulation actually directed subsequent courts away from both the words of and the congressional purposes behind section 1.²¹³

The damage done by *Chicago Board of Trade*, like that done by *Standard Oil*, was not immediately apparent. While the rule of reason became even more formless, judges continued to temper their discretion in early cases by following the results of precedents.²¹⁴ One more step was required to create the constitutional Sherman Act: Brandeis's approach had to be applied to a case in which the facts were confusing enough to obscure the appearance of a blatant break with precedent, but clear enough to reveal that the Court had assumed the power to determine the rules without serious regard for stare decisis or Congressional intent. That case was *Appalachian Coals*.

5. Appalachian Coals

Chief Justice Hughes's opinion in *Appalachian Coals, Inc. v. United States*²¹⁵ applied Brandeis's discretionary rule of reason to a cartel that was thinly disguised as a joint selling agency.²¹⁶ Although the defendants denied any intent to achieve monopoly control,²¹⁷ their intent to raise market prices was evident. Three things gave this away: their admitted purpose "to eliminate abnormal, deceptive and destructive trade practices"²¹⁸ resulting from industry overcapacity, their total ban

213. See *supra* text accompanying notes 199-201.

214. The Second Circuit attempted to apply the open-ended *Chicago Bd. of Trade* approach in a cartel price-fixing case, but was rebuffed by the Supreme Court in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). That case reaffirmed the per se rule against clear-cut cartel practices, which the Court had followed since *Trans-Missouri*, *Joint Traffic*, and *Addyston Pipe*, see *supra* text accompanying notes 143-64, and clearly indicated that lower courts were not to apply the protracted balancing inquiry of *Chicago Bd. of Trade* to such easy cases.

215. 288 U.S. 344 (1933).

216. Taft's analysis enables the court to pierce the disguise. While a joint selling agency could engender productive joint activity, this agency's requirement that each participant refrain from sales outside the agency was not reasonably related to any productive purpose. It was instead designed to enable the agency to control the sales of its participants.

217. The defendants alleged that their primary purposes were to increase sales and output "through better methods of distribution, intensive advertising and research," to "achieve economies in marketing," and to "eliminate abnormal, deceptive, and destructive trade practices." *Appalachian Coals*, 288 U.S. at 359.

218. *Id.*

on sales outside the common selling agency,²¹⁹ and the fact that the plan was to take effect only if seventy percent of the coal producers in the area joined.²²⁰ Their admission speaks for itself. The seventy-percent requirement and the sales ban had nothing to do with the sales agency's claimed efficiencies; they were directed solely at controlling output and prices.

Hughes, like Brandeis, began by downplaying the need for a statutory standard in Sherman Act cases. To be a "charter of freedom," the Act necessarily had the "generality and adaptability" that had been "found to be desirable in constitutional provisions." Its restrictions could not be "mechanical or artificial." Instead, its "general phrases," when "interpreted to attain its fundamental objects," imposed only the "essential standard of reasonableness."²²¹

The Court was left with the difficult task of determining whether the defendants' actions were among the "reasonable measures" it believed the Act permitted.²²² Hughes's solution was the same as Brandeis's: the court must bury itself in the facts and make a subjective judgment of legality. A consideration of the "particular conditions and purposes" is required "in each case," including the "economic conditions peculiar" to the industry, the prior "practices which have obtained," the "nature of defendant's plan," the "reasons which led to its adoption," and the "probable consequences" of its operation.²²³

Hughes then demonstrated the adaptability of this constitutional view of the Sherman Act. Because the defendants had a reasonable goal and lacked "the power to fix monopoly prices," their scheme was legitimate.²²⁴ Hughes did not quarrel with the trial court's finding that defendants could "affect" market prices by "rais[ing] them to a higher level than would otherwise obtain."²²⁵ However, as long as this control was not "monopolistic," Hughes would not condemn the scheme "where the change [in market conditions] would be in mitigation of recognized evils"²²⁶

Nowhere did Hughes say how a judge could distinguish a "monopolistic" from a "fair" effect on prices. Nor did he explain how a judge could distinguish the "abuses" arising out of "destructive competition" from the evasion of the laws of supply and demand that lies behind all

219. *Id.* at 358. See *supra* note 216.

220. *Appalachian Coals*, 288 U.S. at 365. The 70% figure was set "because it was agreed that the organization would not be effective without this degree of control." *Id.* The members also agreed on a maximum participation figure of 80%, *id.*, presumably on the advice of counsel that 80% dangerously approached a monopoly share of the market.

221. *Id.* at 359-60.

222. *Id.*

223. *Id.* at 361.

224. *Id.* at 372-73.

225. *Id.* at 373.

226. *Id.* at 374.

cartel schemes. The answer, one supposes, must lie in each judge's own view of the "essential standard of reasonableness."

With this opinion, the Court added the last remaining element for the establishment of the constitutional Sherman Act. By applying Brandeis's subjective approach to what was obviously a producers' cartel designed to shore up prices during the Depression, the Court demonstrated that neither precedent nor original legislative intent governed Sherman Act cases. What did govern was the Supreme Court's view of the public interest.

6. *The New Deal Court to the Present*

In *Appalachian Coals* the Court used the constitutional approach to the Sherman Act to contract the Act's scope at a time when belief in competition was low and the country was experimenting with various forms of collective action to escape the Depression.²²⁷ When these experiments failed to end the Depression, the New Dealers turned to other measures, including a new wave of antitrust prosecutions.²²⁸ The Roosevelt Administration thereafter succeeded in persuading the Supreme Court, now staffed by Roosevelt appointees,²²⁹ to jettison the permissive approach of *Appalachian Coals* toward cartels.²³⁰

On the other hand, the Roosevelt Court retained the constitutional approach to the Sherman Act. Ironically, the Court employed this approach to expand Sherman Act liability far beyond the condemnation of cartels and monopolistic mergers envisioned by the 1890 Congress. The 1890 Congress's basic policy choices to permit joint productive combinations short of monopoly size and single-firm monopolies achieved through superior efficiency²³¹ were now disregarded.²³² The constitutional adaptability of the Act served as a charter for the New Deal Justices to substitute their own policy choices for those of the 1890 Congress.

Relying on a mixture of populistic distrust of big business and pre-

227. See R. POSNER & F. EASTERBROOK, *ANTITRUST* 126 (2d ed. 1981).

228. *Id.* at 127; see also E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 383-471 (1966) (implementation of aggressive antitrust policies after National Recovery Act approach was unsuccessful); Rowe, *Decline of Antitrust*, *supra* note 9, at 1520-21 (same).

229. President Roosevelt appointed eight new Justices between 1937 and 1943. C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947*, at 9 (1948).

230. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). This case held that all efforts to "affect" price levels are per se illegal regardless of the defendants' purpose, market power, or actual affect on prices. *Id.* at 223-24 & n.59.

231. See *supra* text accompanying notes 100 and 116.

232. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945) (membership policies of productive combination of newspapers short of monopoly size violate the Sherman Act); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (single firm monopoly through internal growth without predation violates act).

vailing oligopoly theories,²³³ the Supreme Court accepted the invitation of Thurman Arnold's Antitrust Division to use the Act to regulate the economy.²³⁴ With this "change of emphasis from a negative (literally 'anti-trust') approach to a positive ('maintaining competition') aim,"²³⁵ the switch to the constitutional approach was complete. Decisions since the 1940's have been based not on legislative intent or any other statutory foundation, but on economic and social policy judgments accepted by reigning Supreme Court majorities.²³⁶

B. *At Sea: The Prevailing Mode of Sherman Act Adjudication*

1. *The Three Faces of Antitrust*

The standardless delegation theory has given the Supreme Court a split personality in antitrust cases, one reminiscent of that of the heroine in *The Three Faces of Eve*.²³⁷ In approaching these cases, the Court has also worn three faces; that is, it has assumed three different and conflicting roles.

The first face is the familiar one of a court of law. In this personality, the Supreme Court purports to follow precedent, acting as if antitrust law were a coherent body of congressionally-set legal principles. The Court assumed this face in *United States v. Topco Associates, Inc.*,²³⁸ where it invoked the per se rule against naked cartels to condemn exclusive marketing territories used by a joint venture of small grocers, in the face of trial court findings that the exclusivity was necessary to the joint venture's success.²³⁹ Although it did not disagree with these find-

233. See Rowe, *Decline of Antitrust*, *supra* note 9, at 1520-21.

234. See Hofstadter, *supra* note 93, at 194-95, 231-32, 235-36; Rowe, *Decline of Antitrust*, *supra* note 9, at 1521. Hofstadter suggests that the institutionalizing of the Antitrust Division during this period, and the concomitant creation of a permanent specialist defense bar, guaranteed the continuing viability of the antitrust legal establishment. Hofstadter, *supra*, at 236 ("it is not our way to liquidate an industry in which so many have a stake"); accord, Reich, *The Antitrust Industry*, 68 GEO. L.J. 1053 (1980).

235. A. NEALE & D. GOYDER, *ANTITRUST LAWS OF THE U.S.A.* 17 (3d ed. 1985).

236. Representative of this trend was the Warren Court's preoccupation with vertical restraints; the Court developed harsh rules of illegality in the interest of perceived "little guy" distributors. See generally Kauper, *The Warren Court*, *supra* note 11 (Warren Court's antitrust decisions emphasized preservation of equal economic opportunity and uncoerced, fully independent decisionmaking without regard to economic costs of furthering these values); Kauper, *The Burger Court*, *supra* note 11, at 2-4 (same).

While the Burger Court has cut back on some of the Warren Court's novel precedents, it has not abandoned the constitutional approach. Its decisions are as unguided by statutory construction as were the Warren Court's, and indeed those of all Courts since around 1940. In fact, they lack any common rationale whatsoever. See, e.g., Hutchinson, *Antitrust 1984: Five Decisions in Search of A Theory*, 1984 SUP. CT. REV. 69, 147 ("perhaps the most important message of the 1984 cases lies in the freedom with which this Court manipulates the law").

237. C. THIGPEN & H. CLECKLEY, *THE THREE FACES OF EVE* (1957).

238. 405 U.S. 596 (1972).

239. *Id.* at 605-06 & n.8 (citing district court opinion, 319 F. Supp. 1031, 1043 (N.D. Ill. 1970)).

ings,²⁴⁰ the Court held that the case was controlled by precedent so well settled that only amendatory legislation could validate the defendants' restraints.²⁴¹ The Court explicitly advocated adhering to hard and fast legal rules rather than "rambl[ing] through the wilds of economic theory in order to maintain a flexible approach."²⁴²

"Rambling through the wilds of economic theory" is exactly what the Court does in its second personality, that of an economic regulatory commission.²⁴³ In this role, it seems to emulate the Federal Trade Commission,²⁴⁴ but without the benefit of any institutional economic expertise and without any political checks, such as the congressional oversight and budget hearings that restrain that agency.²⁴⁵ Confident in its economic-regulatory-agency persona, the Court has often maintained that economic judgments must enter into antitrust cases. Otherwise, as it intoned in *Continental T.V., Inc. v. GTE Sylvania Inc.*,²⁴⁶ "antitrust policy . . . would lack any objective benchmarks."²⁴⁷

No source provides "objective benchmarks" to govern the Court in its third and dominant Sherman Act personality, that of lawgiver. Here the Court assumes the same policymaking role it does in substantive due process cases, legislating on the basis of the Justices' own policy preferences. The most forthright statement of this role was provided by Learned Hand in his trial court opinion in *United States v. Associated Press*.²⁴⁸ After summarizing a cluster of cases, Hand stated:

[T]he injury imposed upon the public was found to outweigh the benefit to the combination, and the law forbade it. We can find no more definite guide than that. Certainly such a function is ordinarily "legislative"; for in a legislature the conflicting interests find their respective representa-

240. *Id.* at 609.

241. *Id.* at 608, 611-12. Chief Justice Burger's dissent demonstrated that the majority's precedents did not necessarily dictate this result. *Id.* at 615-19 (Burger, C.J., dissenting).

242. 405 U.S. at 609-10 n.10; see also *id.* at 609-10 (expressing Court's inability to examine economic problems meaningfully).

243. *United States v. Container Corp. of America*, 393 U.S. 333 (1969), is perhaps the most famous example of this personality. The Court held that the mere exchange of price information, which was freely available in other markets, unduly affected prices in the corrugated container industry in the Southeast. *Id.* at 336-38. In reaching this conclusion, the Court apparently misapplied economic theories regarding oligopoly. See L. SULLIVAN, *supra* note 155, at 270-73 (unlikely that price exchange in *Container Corp.* was made for anticompetitive purposes or had that effect).

244. See generally 1 ABA ANTITRUST SECTION, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: THE ROLE OF SECTION 5 OF THE FTC ACT IN ANTITRUST LAW 20-25 (Monograph No. 5, 1981).

245. See generally W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 103-26 (7th ed. 1979); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 43-50 (1985).

246. 433 U.S. 36 (1977).

247. *Id.* at 53 n.21.

248. 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

tion, or in any event can make their political power felt, as they cannot upon a court. . . . But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference.²⁴⁹

Examples of the Court's assumption of this role abound. The *Appalachian Coals* Court wore just such a lawgiving face in permitting cartelization designed to mitigate the "evils" of the marketplace.²⁵⁰ Similarly, the Warren Court decided antitrust cases under the same egalitarian value system it employed in constitutional law cases.²⁵¹ In *Albrecht v. Herald Co.*,²⁵² for example, the Court conceded the inaccuracy of the theory underlying the per se rule against manufacturer-set minimum resale prices, namely that resale price maintenance cannot be distinguished from dealer-cartel price fixing.²⁵³ The majority nevertheless extended the rule to manufacturer-imposed maximum resale prices on the ground that all resale price agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."²⁵⁴ This was an economic value call if there ever was one.

Sometimes the Supreme Court can stay within a single antitrust personality throughout a case. More often it cannot. It has issued many decisions in which at least two of its antitrust personalities struggle for dominance. A prime example is Justice Stevens's majority opinion in *Jefferson Parish Hospital District No. 2 v. Hyde*,²⁵⁵ which takes what could be termed a Jekyll and Hyde approach to tying doctrine.²⁵⁶ Overwhelming academic arguments that tie-ins are not naked restraints undercut the original justification for the per se rule in tying cases,²⁵⁷ and

249. *Id.* at 370. Judge Hand went on to assert:

The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.

Id. As Bork has noted, Judge Hand's claim of authority "to do good as the judge sees the good, with no more guidance than that public injury is to be weighed against private benefit on scales that are not described, or rather described merely as the judge's 'preference'" is "staggering in its scope, for, as described by Hand, it is the power to do everything Congress could do under the Commerce clause in any case that falls within a conventional antitrust category." R. BORK, *supra* note 37, at 53. Hand's claimed common law basis for this "ordinarily 'legislative' function does not bear examination either, for the law of torts was not built through a process as unconfined as that. . . ." *Id.*

250. See *supra* text accompanying notes 216-26.

251. See Kauper, *The Warren Court*, *supra* note 11, at 332-34.

252. 390 U.S. 145 (1968).

253. *Id.* at 151 n.7.

254. *Id.* at 152 (footnote omitted) (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)).

255. 104 S. Ct. 1551 (1984).

256. Professor Hutchinson has termed this opinion "a textbook example of rhetoric run amok." Hutchinson, *supra* note 236, at 112.

257. See *infra* note 620. The Court expressed the rationale behind the per se rule against tying

were adopted by a forceful four-Justice concurrence. The majority nevertheless attempted to maintain its court of law face, insisting that its hands were tied by stare decisis.²⁵⁸ In applying these tying precedents to the case, however, the majority switched to its regulatory personality. Prior Supreme Court decisions had established a presumption of market power over the tying product if the tying product was patented, copyrighted, or otherwise unique.²⁵⁹ The court of appeals in *Hyde* had based its presumption of market power on a similar finding that "market imperfections in the health care industry . . . lead patients . . . [to] tend to choose hospitals by location rather than price or quality . . ."²⁶⁰ Specifically, the court reasoned that the defendant's hospital offered a unique product because of its proximity to patients in its section of Jefferson Parish, Louisiana, as evidenced by the fact that "nearly one-third of the patients from the entire East Jefferson area" selected it. This gave it the market power required to invoke the per se rule.²⁶¹

Stevens, acting as the Court's economist, stated that such consumer indifference to price or quality could not create the degree of market power that would "forc[e] purchases that would not otherwise be made," the evil the per se rule was designed to remedy.²⁶² There was thus no basis for the appellate court's conclusion that the defendant could deprive any patient of the anesthesiologist of his (or his surgeon's) choice. Indeed, the record was devoid of "evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice."²⁶³

Yet equally cogent objections could have been made to discredit the market power presumptions derived in the patent, copyright, and other

arrangements in *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949) ("tying agreements serve hardly any purpose beyond the suppression of competition.").

258. "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Hyde*, 104 S. Ct. at 1556 (footnote omitted). Justice Stevens also claimed that the passage of § 3 of the Clayton Act, which applies to tying arrangements involving goods, supported the per se rule, *id.* at 1557 & n.15, despite the fact that § 3 condemns only those ties which "may . . . substantially lessen competition or tend to create a monopoly." 15 U.S.C. § 14 (1973). The legislative history of § 3 confirms what its language suggests, that it was a compromise measure which effectively left the law of tie-ins unchanged from what it was under the Sherman Act. *See infra* note 622.

259. *Hyde*, 104 S. Ct. at 1560-61. Proof of some form of market power over the tying product is necessary to invoke the per se rule. *Id.* at 1558-59.

260. *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286, 290 (5th Cir. 1982).

261. *Id.* at 290-91. The "market imperfections" cited included the fact that an insurance company often pays hospital bills, removing the patient's incentive to compare costs. The court also noted that patients typically lack information concerning health care quality. *Id.* at 290.

262. *Hyde*, 104 S. Ct. at 1566-67.

263. *Id.* at 1568 (footnote omitted).

uniqueness cases²⁶⁴ that Stevens, in his role of judge, cited with approval in his precedent-based plea to retain the tying per se rule.²⁶⁵ Indeed, if economic analysis were to be applied consistently to tying doctrine, the per se approach would have to be discarded altogether, for it is clear that at least some tie-ins are output-increasing arrangements which "make consumers better off."²⁶⁶ The *Hyde* majority's refusal to consider this basic economic objection to the tying per se rule,²⁶⁷ while employing economic analysis to find the rule inapplicable to the specific dispute, gives its opinion a distinctly split personality.²⁶⁸

Hyde does not stand alone in evidencing a split personality.²⁶⁹ In fact, the Court on occasion exhibits all three personalities in a single opinion, as it did in *National Collegiate Athletic Association v. Board of Regents*, the college football television case.²⁷⁰ First, the Court, again speaking through Justice Stevens, relied on precedent to defend its use of

264. H. HOVENKAMP, *supra* note 2, at 156, 218-19.

265. See *supra* notes 257-59 and accompanying text.

266. H. HOVENKAMP, *supra* note 2, at 222.

267. See *supra* note 258 and accompanying text.

268. As Professor Hutchinson has observed, the opinion is "hard to summarize" because it "strains so hard to preserve the per se rule and at the same time to adopt a sophisticated market analysis of the arrangement in question." Hutchinson, *supra* note 236, at 130. It is hard to quarrel with her conclusion that:

Two forces seem to be at work in the *Hyde* majority, as the concurring opinion from Justice Brennan hints. It is probable that Brennan and Marshall would have been far happier with a *Northern Pacific*-style restatement of the rule against tie-ins. . . . Stevens wants to have things both ways: . . . he has extolled the virtues of per se rules and has reiterated their usefulness in ringing tones . . . [and] he has plunged into rule-of-reason fact-by-fact analysis with a vengeance. Stevens, White and Blackmun have shown favor toward a greater role for economic analysis in antitrust cases, but they do not want to take the final step away from the rules of the 1950s and 1960s. It is an odd way to respect precedent, however, when teachings are followed in name and rejected in reality.

Id. at 135.

269. Another recent example is Justice Powell's opinion for a unanimous Court in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464 (1984), in which "[u]nlike Solomon, Powell tried in earnest to cut the baby in half." Hutchinson, *supra* note 236, at 118. Powell the judge recognized that precedent established two important legal distinctions as crucial in all vertical restraint cases: independent versus concerted action and price versus nonprice restraints. Powell the economist criticized both distinctions as lacking real substance. Instead of overruling the cases which established these internally incoherent doctrines, however, Powell announced a new evidentiary standard for finding agreement in vertical cases. The standard purportedly guards against mischaracterization of lawful unilateral nonprice restrictions as per se illegal resale price agreements. *Monsanto*, 104 S. Ct. at 1469-71. Powell's application of the new standard, however, undercut this stated purpose. Although evidence of resale price agreement had been extremely thin at trial, Powell upheld the jury's finding of such an agreement under the standard. *Calvini & Berg, Resale Price Maintenance After Monsanto: A Doctrine Still at War With Itself*, 1984 DUKE L.J. 1163, 1193-97. As these authors note, the "Court's opinion is, in this respect, schizophrenic." *Id.* at 1197; see also *id.* at 1199 ("To permit weak evidence to suffice, as the Court did in *Monsanto*, is implicitly to undercut the Court's explicit discussion of the propriety of manufacturer action predicated upon dealer complaints. . . . *Monsanto* is a decision at war with itself.").

270. 104 S. Ct. 2948 (1984). For a more complete analysis of this case, see *infra* text accompanying notes 515-26, 530-48, and 569-75.

the rule of reason rather than per se analysis.²⁷¹ Next, it bolstered this defense with citations to economic writings,²⁷² and purported to analyze the NCAA television plan in terms of its economic effects.²⁷³ Finally, while these judicial and regulatory personalities appear to govern the opinion, the third, legislative personality, was actually in control. Its influence is apparent near the opinion's end, where Stevens in a remarkable dictum blessed such NCAA restraints as its limitations on the recruitment and payment of college athletes as "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive."²⁷⁴ No facts about the economic effects of those practices were actually before the Court, and lower courts had approved them on the noneconomic ground that the preservation of amateurism is socially desirable.²⁷⁵ This dictum is thus a clear message to lower courts that they may continue to approve the NCAA's other rules without undertaking any serious economic analysis.

That the real basis for the decision in *NCAA* was an ad hoc social policy judgment is also suggested by the last section of the opinion, which acknowledges the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports," which it "needs ample latitude to play." While this role was "entirely consistent with the goals of the Sherman Act," the NCAA's television plan had "restricted rather than enhanced the place of college athletics in the Nation's life."²⁷⁶ In other words, according to the Court the NCAA is basically good; it just went too far in this case. But how is one to tell what is "too far" in the next case? *NCAA* sends mixed signals as to when economic analysis should be applied. Worse, even its purported economic analysis seems guided by an underlying political bias in favor of the little guys. As Hutchinson has noted, Stevens's opinion, while "full of the words of economic analysis," never dealt with Justice White's objection that the proper measure of output was total viewership purchased by advertisers, not the number of games delivered to viewers, who after all watch for free.²⁷⁷ Rather, Stevens focused on the injuries of these viewers and of small, local stations, the little guys of the televised sports business.²⁷⁸

In sum, because one never knows which of the Court's three personalities will dominate the next decision, the law under the constitutional Sherman Act is hopelessly indeterminate.

271. *NCAA*, 104 S. Ct. at 2960-62.

272. *Id.* at 2961 n.24.

273. *Id.* at 2962-70.

274. *Id.* at 2969.

275. See *infra* note 568.

276. *NCAA*, 104 S. Ct. at 2971.

277. Hutchinson, *supra* note 236, at 139-40.

278. *Id.* at 140-41.

2. *The Failure of the Present Per Se/Rule of Reason Regime*

In large measure to reduce the costs of the prevailing standardless delegation theory,²⁷⁹ the Court created a set of per se rules which summarily proscribed certain business practices.²⁸⁰ Although adopted as a substandard to the rule of reason,²⁸¹ the per se approach dominated Sherman Act litigation for three decades,²⁸² and eventually eclipsed the rule.²⁸³ Most modern cases have thus turned on the question of characterization,²⁸⁴ that is, whether the defendant's conduct could be characterized as that prohibited by one of the per se rules.

Because they are not based on a coherent and commonly accepted conceptual rationale, however, the per se rules have not ended the uncertainty of antitrust litigation. The Court has formed these rules in the same "three faces of antitrust" manner just described. In some instances the Court has relied on precedent,²⁸⁵ in others on economic analysis,²⁸⁶ and yet in others on its own social views.²⁸⁷

Without a stable statutory basis, the per se rules have not withstood changing ideological currents. With the ascendancy of the economic approach to antitrust, most of the per se rules have come under increas-

279. The rationale behind the per se rules was certainty. This engenders surer law enforcement, guidance to business, and simplified litigation. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1982). In theory, there is little countervailing cost because the per se rules proscribe only those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Thus, the theory goes, little is lost in foregoing judicial inquiry into the business context of any particular restraint covered by one of the per se rules. Practice, however, has not coincided with the theory. See *infra* text accompanying notes 505-22, 579-87, 597-616.

280. The Supreme Court still employs the per se rules. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613, 2617 (1985) (concerted refusals to deal); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1556-61 (1984) (tying); *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1469 (1984) (vertical price fixing); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1982) (horizontal price fixing).

281. See *NCAA v. Board of Regents*, 104 S. Ct. 2948, 2962 (1984); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 689-92 (1978).

282. See *Hutchinson*, *supra* note 236, at 99-100.

283. In 1977, Posner "invited" his readers "to compile a list of cases of which it may fairly be said that the Rule of Reason was the determinate legal standard. The list will be a short one." Posner, *supra* note 199, at 14. The rule of reason in fact became "little more than a euphemism for nonliability" in the cases in which it was applied. *Id.*

284. *Hutchinson*, *supra* note 236, at 100.

285. *United States v. Topco Associates*, 405 U.S. 596 (1972) (court relies on past cases to support per se rule against all market divisions, whether such divisions constitute naked or ancillary restraints). See *supra* text accompanying notes 238-43.

286. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-59 (1977) (applies economic analysis to overturn per se rule against manufacturer-imposed territorial restrictions on dealers) *overruling* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

287. *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968) (applies per se price fixing rule to maximum prices based on perceived social value of freedom to set prices). See *supra* text accompanying notes 276-78.

ing attack.²⁸⁸ Only the rules against cartel activities have escaped serious challenge.²⁸⁹ These activities seldom, if ever, produce any beneficial productive efficiencies, and are invariably designed to restrict output.²⁹⁰ The other per se rules proscribe business practices which, at worst, have both output restrictive and productive effects, and in many cases have only the latter.²⁹¹ Business and academic criticism of these rules has brought their vitality into question, and has induced courts to characterize behavior that once fell under the per se rules as falling outside their scope.²⁹²

288. Academic criticism of the various per se rules, urging either their entire abolition or a reduction in their scope, has been voluminous. For representative criticisms of the per se rule against manufacturer-imposed customer and territorial restrictions on dealers, see Handler, *The Twentieth Annual Antitrust Review—1967*, 53 VA. L. REV. 1667, 1680-89 (1967) reprinted in 1 M. HANDLER, *supra* note 190, at 727-37; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 283-99 (1975); see also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-48 & n.13 (1977) (recognizing weight of scholarly opinion against per se rule for vertical restrictions and citing representative criticisms).

For representative criticisms of the per se rule against manufacturer-imposed resale prices, see R. BORK, *supra* note 37, at 280-98; Easterbrook, *Vertical Arrangements*, *supra* note 9, at 140-43, 146-56; Liebel, 1983 *Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, 31 UCLA L. REV. 384 (1983); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 8-14 (1981).

For representative criticisms of the scope of the per se rule against horizontal market division, see R. BORK, *supra* note 37, at 263-79; Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 COLUM. L. REV. 415, 417-23 (1973), reprinted in 2 M. HANDLER, *supra* note 190, at 998-1007.

For representative criticisms of the scope of the per se rule against horizontal price agreements, see R. BORK, *supra* note 37, at 263-79; Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706 (1983).

For representative criticisms of the per se rule against tying arrangements, see R. BORK, *supra* note 37, at 365-81; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 171-83 (1976); Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235 (1980).

For representative criticisms of the scope of the per se rule against concerted refusals to deal, see R. BORK, *supra* note 37, at 330-44; R. POSNER, *supra*, at 207-210; Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979).

These academic criticisms were followed by Supreme Court cases modifying the per se rules. See *infra* notes 292-98 and accompanying text; see also *infra* note 300 (request by Solicitor General in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1469 n.7 (1984) that Supreme Court reconsider per se rule against resale price fixing); *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1569-74 (1984) (O'Connor, J., concurring, arguing for abolition of tying per se rule).

289. The only cases relaxing the per se rule against horizontal price setting have involved productive joint ventures that clearly were not cartels. See *infra* text accompanying notes 513-22. Even the Chicago school commentators who have questioned the per se rules support the continued per se prohibition of cartel activities. See, e.g., R. BORK, *supra* note 37, at 267-69; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 24-25, 39 (1976); Easterbrook, *supra* note 183, at 3. But see *infra* text accompanying notes 314-15.

290. R. BORK, *supra* note 37, at 267-68.

291. Easterbrook, *supra* note 183, at 6-8, 10.

292. The Supreme Court conceded as much in *GTE Sylvania*. The Court cited lower court resistance to the per se rule against manufacturer-imposed customer and territorial restrictions as one reason for its reexamination of the rule. 433 U.S. at 48-49 & n.14. It even conceded the truth of

Since the 1970's, the Court has abolished the per se rule against vertically imposed dealer territories,²⁹³ and has modified the rules concerning horizontal price fixing,²⁹⁴ concerted refusal to deal,²⁹⁵ and tying.²⁹⁶ Moreover, it has proclaimed the return of the rule of reason, previously regarded "as little more than a euphemism for nonliability,"²⁹⁷ as "the standard traditionally applied for the majority of anticompetitive practices challenged under section 1 of the Act."²⁹⁸

The Court, however, has not produced coherent antitrust doctrine during this time. As I discuss in Part IV below, the doctrines are more inconsistent now than ever. Professor Kauper has noted that this is to be expected as long as there remain differences of economic opinion over, for example, the economic effects of tying when used as a price discrimination device.²⁹⁹ In such cases, the old per se rules have escaped with only minor modifications.³⁰⁰

3. *The Permanent Indeterminacy of Doctrine Without a Workable Statutory Standard*

Current doctrines, with the exception of the per se rules against naked cartel price fixing and market division, are inherently inconsistent and unstable. One seldom can predict which legal principles will apply to a new practice. In addition, the trend in recent years has been to throw hard cases to juries, untrained in either business or economics, who must apply rule of reason standards that almost surely are beyond their grasp.³⁰¹ In Part IV, I contrast this doctrinal disarray with the

one commentator's observation that "many courts 'have struggled to distinguish or limit *Schwinn* [which applied the rule in this context] in ways that are a tribute to judicial ingenuity.'" *Id.* at 48 n.14 (quoting Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 272 (1975)).

293. *GTE Sylvania*, 433 U.S. at 58-59.

294. *NCAA v. Board of Regents*, 104 S. Ct. 2948, 2960-62 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8-10, 16-24 (1979). See *infra* notes 513-22 and accompanying text.

295. *Northwest Wholesale Stationers*, 105 S. Ct. 2613, 2618-21.

296. *Hyde*, 104 S. Ct. at 1558-61. See *supra* text accompanying notes 255-68; *infra* notes 597-616 and accompanying text.

297. See *supra* note 283.

298. *GTE Sylvania*, 433 U.S. at 59.

299. Kauper, *The Burger Court*, *supra* note 11, at 11-12.

300. The two prime examples are the per se rules against tying arrangements and resale price maintenance. While some commentators believe the *Hyde* case virtually eliminated the tying per se rule, the rule's demise, like Mark Twain's, has in fact been greatly exaggerated. See *infra* note 599. The Court declined the opportunity to reexamine the resale price maintenance rule in *Monsanto*, 104 S. Ct. at 1469 n.7 (1984), despite urging by the Justice Department. Although *Monsanto's* reformulation of the evidentiary standard for a finding of agreement on resale prices purportedly made imposition of liability more difficult, *id.* at 1470-71, the Court nonetheless upheld a \$10,500,000 verdict based on very flimsy evidence. *Id.* at 1471-72. See Calvini & Berg, *supra* note 269, at 1193-97.

301. See Hutchinson, *supra* note 236, at 141, 145. Hutchinson notes that the Court's inability to assume a consistent antitrust personality prompts it to throw

ordered system of law that could have been achieved by adherence to a workable statutory standard such as that Taft proposed.

My point throughout Part II has been that the ability to predict results in specific cases requires such a settled statutory standard, one which provides an operational test of legality. If the Sherman Act is as lacking in substance as the conventional wisdom holds, a unitary, operational section 1 standard can only result from a common judicial view on microeconomic policy questions. But this is not possible in a pluralistic society. Section 1 cases raise policy questions that involve political trade-offs³⁰² on which there is no consensus.³⁰³

Current debate focuses on whether the proper goal of Sherman Act cases is economic efficiency alone³⁰⁴ or a balance of efficiency and polit-

the messier cases to the jury. As long as the relative weight of all the evidence is hidden within the jury room, no one can complain that competitor foreclosure in a given case played a greater role than considerations of economic efficiency. One can only say that it should not have been a jury issue, or that the jury's discretion should have been confined to make the relative weights fixed from case to case.

Id. at 141. Jury ignorance may not matter if Judge Easterbrook's recent description of rule of reason cases is correct. In these cases, a challenged practice may tend both to restrict output by reducing rivalry among the defendants, yet at the same time tend to increase it by lowering costs. Thus

[a] court could try to conduct a full inquiry into the economic costs and benefits of a particular business practice in the setting in which it has been used. But it is fantastic to suppose that judges and juries could make such an evaluation. The welfare implications of most forms of business conduct are beyond our ken.

Easterbrook, *supra* note 183, at 11. For there often "is no 'right' balance between cooperation and competition." *Id.* at 3.

302. In *Appalachian Coals*, for example, the Court faced the dilemma of producers being driven to ruin by the precipitous fall in the demand for coal during the Depression, while consumers enjoyed an overall increase in welfare resulting from the same lower prices which caused the ruin of less efficient producers. The Court used the "generality and adaptability" it found "desirable" in the Sherman Act to favor producers over consumers. *Appalachian Coals*, 288 U.S. at 360. This was in line with the Depression-era economic policies. See R. POSNER & F. EASTERBROOK, *supra* note 227, at 126 (explaining case by citing Depression-era loss of faith in competition and New Deal policy encouraging cartels). A scant seven years later a different majority of the Court, reflecting the New Deal's disenchantment with the NRA experiment, held a less pernicious cartel practice criminal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

303. The shifting views of different Supreme Court majorities explain the Court's notorious changes of position in Sherman Act cases. They explain why the Court took fifty years to establish finally that cartel price fixing is per se illegal. This problem is apparent in comparing *Appalachian Coals*, 288 U.S. at 359-60 (rule of reason applied to price fix) with *Socony-Vacuum*, 310 U.S. at 218 (per se illegal). The *Socony-Vacuum* opinion attempted to distinguish *Appalachian Coals* as involving a producers' agreement which was not designed to fix prices, nor shown to have that actual or necessary effect. *Socony-Vacuum*, 310 U.S. at 214-16. This distinction is singularly unpersuasive, for the "facts displayed an unmistakable intention by the producers to eliminate competition and stabilize prices." Bork, *supra* note 179, at 823. Numerous commentators have recognized that the *Appalachian Coals* analysis of cartel agreements did not survive *Socony-Vacuum*. See, e.g., A. NEALE & D. GOYDER, *supra* note 190, at 42; L. SULLIVAN, *supra* note 155, at 183-86. As Professor Kauper has shown, the shifting views of the various Court majorities also explain how the Warren Court's preoccupation with freedom of small traders resulted in *Schwinn's* per se prohibition of non-price vertical restraints, while the Burger Court's concern with economic efficiency led to *Sylvania's* restoration of the rule of reason in this area. Kauper, *The Burger Court*, *supra* note 11, at 2-4, 11-12.

304. See generally *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social*

ical values. Such values include "a fear that excessive concentration of economic power will breed antidemocratic political pressures and . . . a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all."³⁰⁵ Continued division on this question precludes consistent Sherman Act rules. Moreover, even the temporary triumph of one of those competing policy views cannot guarantee a permanent solution. A constitutional Sherman Act permits judges to change rules in accord with new ideas, and to disregard the views of their predecessors.

Moreover, neither viewpoint in this debate can supply operational antitrust standards. As Judge Bork has shown, political values inevitably involve antitrust judges in legislative balancing, for which there is no judicially manageable standard.³⁰⁶ On the other hand, a concept so general and adaptable as economic efficiency also cannot produce consistent results in litigation.

For an example of the latter problem, consider Bork's definition of competition as a term of art for any situation "in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."³⁰⁷ Conversely, he would define "monopoly" and "restraint of trade" as situations in which consumer welfare could be so improved. One guilty of monopolizing or using unfair methods of competition would thus have used practices inimical to consumer welfare.³⁰⁸ The weakness of this approach is evident: these generalizations would justify virtually any exercise of judicial power, if the judge could

Goals of Antitrust Policy, 125 U. PA. L. REV. 1182 (1977) (varying views on whether economic efficiency should be sole goal of antitrust). For leading expositions of the economics-only approach, see 1 P. AREEDA & D. TURNER, *supra* note 8, at 7-31 (economic efficiency is paramount goal of antitrust laws); R. BORK, *supra* note 37, at 50-89 (same); R. POSNER, *supra* note 289, at 8-22 (1976) (same). For expositions of the opposing view, see Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORN. L. REV. 1140 (1981) (arguing for consideration of social and political goals, in addition to economic efficiency, in antitrust cases); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?* 125 U. PA. L. REV. 1214 (1977) (same); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979), reprinted in ANTITRUST LAW, *supra* note 15, at 190 (same).

305. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979), reprinted in ANTITRUST LAW, *supra* note 15, at 165. Antitrust courts have used such noneconomic values to excuse restraints, as the Supreme Court did in *Chicago Bd. of Trade and Appalachian Coals*. See *supra* text accompanying notes 197-226. Courts also have used them to condemn restraints, as did the Warren Court in its vertical restraint cases. See Kauper, *The Burger Court*, *supra* note 11, at 3-4 (discussing *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)). While in recent opinions the Supreme Court has indicated its preference for a discussion of economic efficiency, see, e.g., *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977), its performance in other cases has diluted that preference. See *supra* text accompanying notes 270-78 (*NCAA* opinion). See also *infra* text accompanying notes 456-67 (extension of antitrust into municipal government activities forces courts to consider local governments' political judgments restricting competition).

306. R. BORK, *supra* note 37, at 72-89.

307. *Id.* at 61.

308. *Id.*

apply them in a credible welfare economics argument.³⁰⁹

It is perhaps unfair to single out this particularly open-ended formulation because Bork himself does not appear to take it literally.³¹⁰ Perhaps more representative of the "economic approach" is Liebeler's statement that a practice should be considered "illegal only if it is likely to reduce efficiency by increasing the ability of market participants to restrict output . . . (market power)." The rule of reason is best employed as an attempt "to balance the gains from increased efficiency against the losses from increased market power."³¹¹

On its face, the economic approach is an improvement over the multi-valued social/political approach. Using economic analysis, one can focus the inquiry on a single question to develop a unitary standard. Such a standard permits internally consistent antitrust rules for analysis of the likely output restrictive and efficiency-creating effects of particular practices.³¹²

309. For example, the recent decision to alter the formula for Coca-Cola could have been an unfair trade practice, if a court found that more consumers preferred the old formula, and net welfare would thus be increased by requiring the Coca-Cola Company to reinstate it. If this seems farfetched, a recent article argues that for American companies better to meet foreign competition, questions of antitrust law and policy should, at least in part, be resolved by determining whether the proposed answers to those questions have the effect of forcing manufacturers to compete through product quality and innovation. More importantly, courts should scrutinize claims of "economic efficiency" which are currently used to justify restraints on trade. Courts should determine whether these restraints actually lead to enhanced product quality and performance or whether they merely boost short-run profits by encouraging firms to compete through marketing, false product differentiation and dealership networks.

Gerla, *Competition on the Merits — A Sound Industrial Policy for Antitrust Law*, 36 U. FLA. L. REV. 553, 554-55 (1984). Professor Gerla admits that his proposal "calls for the government, through the antitrust laws, to induce firms to adopt its preferred business strategy" and, ironically, protect anti-trust violators from themselves. Yet, he continues, such government oversight "is an almost inevitable consequence of the role of economic efficiency in the antitrust laws." *Id.* at 589.

310. He limits its implications by stressing the impossibility of assessing actual welfare economics implications in most cases. He argues that courts thus must make general rules based on a rigorous price theory analysis, with the benefit of the doubt going to private decisionmaking. R. BORK, *supra* note 37, at 122-29, 133. Bork further limits the implications of his formulation by confining his analysis to practices traditionally tested by the antitrust laws, *see id.* at 134-401, and by adopting a version of Taft's methodology, *see id.* at 136, 263-98, 344. Notwithstanding this moderation, the courts' discretion under Bork's "consumer welfare" standard is extremely broad, as indicated by the very language of his formulation. *See supra* text accompanying note 308. *See also infra* text accompanying notes 496-98.

311. Liebeler, *Comments*, 28 J. L. & ECON. 335, 335-36 (1985) (Liebeler's responses to papers presented at *Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution*, 28 J.L. & ECON. 245 (1985)) [hereinafter cited as *Comments*]. Like Bork, Liebeler accepts Taft's distinction between naked and ancillary restraints and considers naked restraints per se unlawful. *Id.* at 336. He does not restrict himself, however, to Taft's definition of a productive business transaction, on the ground that "Taft's formulation is too narrow to encompass all efficiency-creating arrangements." *Id.* at 339; *see also* Liebeler, Book Review, 66 CALIF. L. REV. 1317, 1328-33 (1978) (rule of reason should be applied when arrangement could increase efficiency).

312. This is true of both Bork's and Liebeler's approaches. *See* R. BORK, *supra* note 37, at 134-401; W. LIEBELER, *ANTITRUST ADVISER* (2d ed. Supp. 1984); Liebeler, 1983 *Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, 31

But the validity of these rules turns on the validity of their underlying economic analysis. Proponents of the economic approach continue to disagree on the economic effects of business practices.³¹³ Consider the antitrust rule which commands the most support from the various economic schools: the per se rule against naked price fixing. Bork argues that the per se condemnation of all naked restraints is justifiable because such restraints can only restrict production.³¹⁴ But not everyone agrees. George Bittlingmayer and Lester Telser have raised the possibility that in some industries characterized by high fixed costs, a competitive equilibrium is impossible, and that "explicit cartelization, tacit collusion, and horizontal merger can be viewed, in many instances, as the noncompetitive arrangements that the firms in an industry must necessarily adopt."³¹⁵ As Liebeler concedes, if Bittlingmayer and Telser are correct, the economic approach would require that some cartel schemes be allowed and that the most fundamental component of Bork's scheme, the per se prohibition of cartel price fixing, be abandoned.³¹⁶

UCLA L. REV. 384 (1983); Liebeler, *Intrabrand "Cartels" Under GTE Sylvania*, 30 UCLA L. REV. 1 (1982) [hereinafter cited as *Intrabrand "Cartels"*]. The Areeda and Turner treatise is a similar high quality undertaking on an even more ambitious scale, employing structuralist Harvard school economics. See generally P. AREEDA & D. TURNER, *supra* note 8.

313. Recent scholarship indicates that these debates will continue into the future. The dispute over the welfare effects of resale price maintenance continues. Compare Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U.L. REV. 736 (1984) (identifying efficiencies produced by vertical price restraints) with Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983 (1985) (arguing that vertical restrictions induce provision of services which reduce consumer welfare in markets for established products) and Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints*, 1981 DUKE L.J. 417 (skeptical of "services" rationale for imposing vertical price restraints; asserts they are imposed to uphold wholesale prices). Despite Posner's claims that "Harvard school" antitrust economists have given up the leverage theory of tie-ins, which posits that they are devices to use monopoly power in one market to monopolize another, Posner, *supra* note 15, at 934, reprinted in ANTITRUST LAW AND ECONOMICS 17, 26 (O. Williamson ed. 1980), a recent article by a Harvard professor argues that "leverage must be taken seriously . . ." Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 516 (1985).

There also remains considerable disagreement over the proper method of measuring market power. See *infra* note 547. The debates over the alleged phenomenon of predatory pricing are so divisive that even Chicago school adherents disagree with each other. Compare R. Bork, *supra* note 37, at 144-55 and Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981) (strategic predatory pricing unlikely to be profitable) with Posner, *supra*, at 939-40, reprinted in ANTITRUST LAW, *supra*, at 31-32 (strategic predatory pricing possible). Finally, Posner concedes that the Harvard and Chicago school adherents continue to disagree on the most important issue of all: "the significance of concentration and the wisdom of a policy of deconcentration." *Id.* at 944, reprinted in ANTITRUST LAW, *supra*, at 36.

314. R. BORK, *supra* note 37, at 267-69.

315. Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case*, 25 J.L. & ECON. 201, 203 (1982). As the title suggests, Bittlingmayer believes that a competitive equilibrium was not possible in the industry under scrutiny in *Addyston Pipe*. See also Telser, *Cooperation, Competition, and Efficiency*, 28 J.L. & ECON. 271 (1985) (competition requires cooperation to obtain efficiency).

316. Liebeler states:

C. *Shipwreck: The Costs of the Prevailing Mode of
Sherman Act Adjudication*

1. "Big Case" Litigation

In 1979 the National Commission for the Review of Antitrust Laws and Procedures reiterated the familiar refrain "that, on the average, antitrust cases take longer to litigate than other civil litigation; that some antitrust cases absorb enormous resources and time; and that undue delay is a serious problem in a significant number of complex antitrust cases."³¹⁷

There are many perceived causes of the big case. Commentators have cited the "failure of some judges to manage and control complex antitrust litigation. . . ."³¹⁸ This "absence of strong judicial control," they contend, has led to "dilatatory or overly litigious conduct by counsel."³¹⁹ Finally, they have argued that the Federal Rules of Civil Procedure have compounded the problem with their liberal pleading and discovery provisions.³²⁰

A variety of panels, commissions, and committees of the federal judiciary and the antitrust bar have struggled to find ways to resolve antitrust cases expeditiously and inexpensively.³²¹ Their proposed remedies

It is more than a bit disturbing to be told that the case that laid the basic groundwork for the economic approach to antitrust involved conditions such that competition could not have existed. But if the Telser-Bittlingmayer analysis survives, then we had better believe it. If we come finally to accept this dismal story, we must face the task of revising our formulation of the ancillary restraints doctrine to take that view into account.

Liebeler, *Comments, supra* note 311, at 338-39. He concedes that indeterminacy would result: "The unhappy performance of antitrust courts and enforcement agencies with a much simpler doctrine suggests that our institutions would not handle well the questions Lester Telser now raises." *Id.* at 339.

317. *Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 521 (1979) (footnote omitted) [hereinafter cited as *Report*]. This problem is not limited to § 2 cases; § 1 litigation has provided its share of big cases. See, e.g., *United States v. Morgan*, 118 F. Supp. 621, 828 (S.D.N.Y. 1953) (309 day trial over 2 1/2 years with 23,962 pages of transcript and 20,474 pages of exhibits); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 367 (1967) (70 day trial).

318. *Report, supra* note 317, at 522.

319. *Id.*

320. *Id.*

321. See, e.g., *Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases*, A.B.A. SEC. ANTITRUST (1954); A.B.A. Sec. Antitrust, *Streamlining the Big Case*, 13 ANTITRUST L.J. 183 (1958); *Judicial Conference of the United States, Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); *Basic Procedure in Conduct of Big Cases Under Sherman Antitrust Act*, 1951 N.Y. ST. B.A. ANTITRUST L. SYMP. 13 [hereinafter cited as 1951 SYMPOSIUM]; *Workshop I: Techniques for Effective Pretrial and Trial of Antitrust Cases*, 1982 N.Y. ST. B.A. ANTITRUST L. SYMP. 43 [hereinafter cited as *Workshop I*]; *Proceedings of the Seminar on Practice and Procedure under the Federal Rules of Civil Procedure*, 28 F.R.D. 37 (1960); *Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 319 (1958); *Proceedings of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957); *Report, supra* note 317; REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS pt. 8, at 362-66 (1955); Report of the Judicial Conference of the United States on Procedures in Anti-trust and Other Protracted Cases, 13

for the problem have matched the perceived causes. The conclusions of President Carter's National Commission for the Review of Antitrust Laws and Procedures are typical. The commission prescribed active "judicial management and control,"³²² recommending tight time limits for pretrial proceedings,³²³ early definition of factual issues,³²⁴ limitations on discovery,³²⁵ shortening of trial proofs,³²⁶ and sanctions and other disincentives for dilatory behavior.³²⁷ Similarly, the Federal Judicial Center has proposed consolidated multidistrict litigation.³²⁸

Despite those studies, and the adoption of some of their recommendations,³²⁹ the problem persists. A 1976 article on the subject was aptly subtitled "25 Years of Sisyphean Labor."³³⁰ A major portion of the annual New York State Bar Association's 1951 antitrust symposium involved basic procedure for conducting big cases under the Sherman Act.³³¹ The same issue consumed a major part of its 1982 symposium, thirty-one years later.³³²

Although these studies occasionally have recognized that substantive antitrust rules might be part of the problem, and that "clarifying and simplifying the law" might be part of its solution,³³³ none has recommended any serious effort in that direction. Yet the disarray of Sherman Act doctrine is the primary cause of the big-case problem, and simplifying and clarifying the law is its only realistic solution. Posner and Easterbrook put it well:

When the stakes of a case are substantial, and no one knows what considerations are dispositive, then everything becomes relevant. No stone can be left unturned with safety. The less certain the rule, the greater the number of cases that must be litigated; only the opinion of a judge is authoritative guidance on the legality of a business practice. Clearer rules produce compliance without litigation. Moreover, once litigation begins, the uncertainty in the rules reduces the likelihood of settlement.

F.R.D. 62 (1951); *The Impact of the Electrical Antitrust Cases upon Federal Civil Procedure*, 39 F.R.D. 495 (1965); *Symposium on Antitrust Class Actions*, 41 ANTITRUST L.J. 221 (1972); *Workshop IV: Handling the Big Case*, 45 ANTITRUST L.J. 215 (1973). See also Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 1-5 (1976) (surveys recommendations made through 1976).

322. *Report*, *supra* note 317, at 526.

323. *Id.* at 534-43.

324. *Id.* at 558-76.

325. *Id.* at 544-57.

326. *Id.* at 590-92.

327. *Id.* at 577-89.

328. MANUAL FOR COMPLEX LITIGATION §§ 5.00-5.40 (1981); 28 U.S.C. § 1407 (1982) (allowing consolidated pretrial proceedings).

329. Withrow & Larm, *supra* note 321, at 4-5.

330. *Id.* at 1.

331. See 1951 SYMPOSIUM, *supra* note 321, at 13-22.

332. See *Workshop I*, *supra* note 321, at 43-84.

333. *Report*, *supra* note 317, at 525 n.6 (separate statement of Commissioner Fox).

The greater the uncertainty about the rule, the more likely the parties are to disagree about their chances of prevailing. The greater the disagreement about prospects, the less likely settlement becomes.³³⁴

Their prescription is equally apt: "no single change could do as much to improve the litigation process as the articulation of rules that are at once economically efficient and lead to outcomes that can be predicted once the parties learn a few facts that are readily susceptible of proof."³³⁵

The standardless, constitutional Sherman Act cannot produce such rules; the statutory approach, implemented by Taft's analysis, can. Implementation of Taft's analysis would reduce the number of cases that go to trial, as more predictable outcomes lead to more settlements. It also would reduce the complexity of those cases that are tried, as the analysis focuses the inquiry in most cases to "a few facts that are readily susceptible of proof."

2. *Interference with Business Planning and Efficiency*

Perhaps the most obvious cost of section 1's indeterminacy is the difficulty it creates for planning joint productive activity with competitors or distributors. Antitrust lawyers are notoriously unable to give businessmen predictions of potential liability. Instead, such antitrust counselors typically speak of vague probabilities and reasonable risks when asked to review proposed business schemes.³³⁶

The massive increase in private suits seeking treble damages in the last two decades³³⁷ has greatly magnified the threat posed to business planners by this uncertainty in the law. The damage exposure from such suits can be especially high in class actions. Moreover, because there is no right to contribution from codefendants,³³⁸ who might settle or escape suit altogether, a defendant who goes to trial faces a potentially catastrophic verdict.³³⁹

The rational response of many businesses to this legal climate is to

334. R. POSNER AND F. EASTERBROOK, *supra* note 227, at 597.

335. *Id.*

336. Recent congressional action on joint research ventures underscores the point. See National Cooperative Research Act of 1984, 15 U.S.C.A. §§ 4301-4305 (West Supp. 1985). Despite claims that the antitrust laws posed no barrier to joint research, Congress concluded that business's perception was different, and that new laws to remove the perceived threat of arbitrary per se liability were necessary to encourage joint research. See S. REP. NO. 427, 98th Cong., 2d Sess. 2-3, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3105, 3106-07; H.R. REP. NO. 1044, 98th Cong., 2d Sess. 8-9, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3131, 3133.

337. In 1960, 228 private actions were filed; the number filed in 1980 was 1,457. TRADE REGULATION, *supra* note 180, at 129.

338. *Texas Indus. v. Radcliff Materials*, 451 U.S. 630 (1981).

339. See *New Approaches to Antitrust Damages: The Alternatives to Mandatory Trebling*, 39 BUS. LAW. 1089, 1094-95 (1984) (remarks of Griffin Bell).

forego some joint production schemes altogether. While it is difficult to generalize without empirical data, many businesses are probably deterred from efficient joint ventures with competitors or distributors. This is not merely an injury to business. As the 1890 Congress recognized, chilling these "combinations in aid of production" diminishes societal wealth as well.³⁴⁰

3. *Damage to the Rule of Law*

Philosophers and jurists continue to debate the meaning of law. Holmes's definition of the law as "[t]he prophecies of what the courts will do in fact"³⁴¹ is inadequate as a complete answer, but apt for those who must obey the law on a daily basis—and for those who counsel them. From the standpoint of these participants in the legal system, the rule of law is displaced by the arbitrary rule of judges and juries when the law becomes unpredictable.

With certain exceptions such as cartel price fixing and market division, section 1 case outcomes are notoriously hard to predict.³⁴² As the Supreme Court conceded in *United States v. United States Gypsum Co.*,³⁴³ "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."³⁴⁴ As a result, liability for such behavior turns on the ad hoc decisions of judges and juries who typically are unfamiliar with both economics and business.

The ideal of predictable and consistent application of law cannot, of course, be perfectly achieved in practice. Society often must accept a degree of uncertainty in order to regulate dangerous activities that are difficult to define. In these instances a balance must be struck between the values of predictability and fair warning to those regulated, on one hand, and of the perceived public interest protected by the regulation, on the other. In *United States Gypsum*, the Court recognized that this balance typically turns on the nature of the sanction imposed.³⁴⁵ Where criminal prohibitions are invoked, for example, the requirement of fair warning predominates, and the law must precisely identify the conduct proscribed.³⁴⁶

Areeda and Turner argue persuasively that the law should require a sliding scale of precision in the definition of offenses, based on the sanc-

340. See *supra* text accompanying notes 106-12.

341. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

342. See generally *infra* text accompanying notes 505-22, 530-48, 565-75, 579-90, 597-616.

343. 438 U.S. 422 (1978) (reversing criminal conviction based on rule of reason offense).

344. *Id.* at 440-41.

345. *Id.* at 438-43.

346. *Id.* at 441-42 & n.17.

tions they trigger.³⁴⁷ Criminal offenses should require the most precise definition, while Justice Department suits for injunctive relief should require the least.³⁴⁸ Liability for monetary damages, particularly treble damages, should require an intermediate degree of precision.³⁴⁹ Judge Posner would go further, arguing "that a statute that provides for civil penalties comparable in severity to typical criminal sanctions should be interpreted as narrowly as a criminal statute covering the same subject matter. In antitrust cases, therefore, treble damages should be awarded only where there would be criminal liability."³⁵⁰

Yet section 1 on its face imposes a uniform standard of liability, regardless of the penalty to be imposed.³⁵¹ The courts so interpreted the statute until 1978, when *United States Gypsum* imposed an intent requirement for non-per se criminal offenses.³⁵² Prior to that time, the Justice Department ordinarily restricted criminal prosecutions to clear cases of price fixing to avoid the indeterminacy of the Sherman Act's standards.³⁵³ On the other hand, that same indeterminacy occasionally enabled the Department to veer from this policy, and bring a suit, such as *United States Gypsum*, where the imposition of liability created harsh, and arguably unconstitutional results.³⁵⁴

Courts have failed to distinguish between substantive standards for injunctive relief and treble damages, despite the fact that two-thirds of a treble damage verdict is punitive, and is thus conceptually little different from a fine.³⁵⁵ The *United States Gypsum* opinion implies,³⁵⁶ and Areeda and Turner and Posner expressly argue,³⁵⁷ that subjecting defendants to these penalties in borderline cases unduly sacrifices the goals of precision and fair notice to the perceived need for flexible antitrust standards. The result is an unacceptably high cost to the rule of law.

347. 2 P. AREEDA & D. TURNER, *supra* note 8, §§ 308-313.

348. *Id.* § 313a.

349. *Id.* § 311.

350. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 281 (1982).

351. See *United States Gypsum*, 438 U.S. at 474 (Stevens, J., concurring in part and dissenting in part).

352. *Id.* at 435-46.

353. See *id.* at 439-40 (Justice Department policy); see also P. AREEDA, *supra* note 7, ¶ 154(b); TRADE REGULATION, *supra* note 180, at 139.

354. Other examples of criminal prosecutions of arguably lawful practices are *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1947) (sustaining per se liability when *Appalachian Coals* arguably made defendants' conduct subject to rule of reason); *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949) (sustaining conviction for using vertical integration to compete with smaller, nonintegrated stores).

355. P. AREEDA, *supra* note 7, § 154(b); Posner, *supra* note 350, at 281.

356. 438 U.S. at 434-46 (requiring purpose or knowledge for conviction in non-per se cases).

357. P. AREEDA, *supra* note 7, § 154(b); Posner, *supra* note 350, at 281.

4. *Damage to the Judicial Function in Statutory Cases*

Because the constitutional mode of Sherman Act adjudication requires courts to make basic policy choices without statutory guidance,³⁵⁸ it forces them into the political branches' legislative domain.³⁵⁹ With few exceptions, this sort of judicial lawmaking is fundamentally illegitimate.³⁶⁰ According to the Supreme Court itself, because federal judges "are not part of either political branch of the Government," they may not "reconcile competing political interests . . . on the basis of [their] personal policy preferences."³⁶¹ Instead, the courts must respect the nonconstitutional policy choices of the other branches.³⁶²

Clearly the "demarcation between 'statutory interpretation' . . . on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenu-

358. See generally *supra* text accompanying notes 238-316.

359. See generally Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 12-27 (1985). The Constitution provides for the sharing of the lawmaking function between the executive and legislative branches. See, e.g., U.S. CONST. art. I, § 7, cl. 2 (presidential veto). The Supreme Court has permitted Congress to delegate legislative power to executive agencies, as long as the enabling statute sets forth an intelligible principle to guide the agency. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935).

360. Of course, the Court has primary jurisdiction over interpreting the Constitution. Federal common law, on the other hand, is limited to selected areas such as boundary disputes among states, admiralty, international relations and the rights and obligations of the United States where a uniform, federal policy is necessary but Congress has not provided one. See *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640-41 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-14 (1981); see also 19 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4514 (1982) ("there is a 'federal common law,' even if not a 'general federal common law'"). Even in those areas, "[n]othing . . . suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable." *City of Milwaukee*, 451 U.S. at 313-14. Rather, "[f]ederal common law is a 'necessary expedient'" which is superceded once Congress does address the matter. *Id.* at 314 (quoting *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976)).

361. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (unanimous decision).

362. The Court has stated:

federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

The Court has espoused this doctrine in a number of different contexts. See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 646-47 (1981) (antitrust); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-14 (1981) (nuisance); *Northwest Airlines v. Transport Workers of Am.*, 451 U.S. 77, 97-98 (1981) (Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act); *Diamond v. Chakrabarty*, 447 U.S. 303, 317-18 (1980) (patent); *TVA v. Hill*, 437 U.S. 153, 194-95 (1978) (Endangered Species Act of 1973).

ates.”³⁶³ This, however, does not negate the traditional rule of separation of powers. In interpreting statutes, the courts are restricted by their duty to search for and abide by the legislature’s basic policy choices. They are further restrained by the doctrine that statutory interpretation creates precedent that, unlike common law or constitutional precedent, cannot be altered, absent certain compelling reasons.³⁶⁴

The distinction between limited judicial lawmaking incident to statutory interpretation and lawmaking by the political branches is more than a mere difference of degree; it is a difference of kind. As Felix Frankfurter advised Hugo Black shortly after the latter joined the Supreme Court:

the problem is not whether the judges make the law, but when and how much, [sic] Holmes put it in his highbrow way, that “they can do so only interstitially: they are confined from molar to molecular motions.” I used to say to my students that legislatures make law wholesale, judges retail.³⁶⁵

The constitutional mode of Sherman Act adjudication is not the “retail” interstitial lawmaking described by Holmes and Frankfurter. It has exceeded the boundaries of defining and applying statutory terms. Consequently, the Act has no settled meaning. The resulting series of decisions “reconcil[ing] competing political interests . . . on the basis of the judges’ personal policy preferences”³⁶⁶ has unconstitutionally encroached upon the legislative sphere.³⁶⁷

363. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770 (2d ed. 1973).

364. See E. LEVI, *supra* note 41 at 32-33, 54-57. This doctrine assumes that settled precedent is determinate. Where it is not, the logic behind the doctrine does not apply. See *infra* text accompanying notes 374-75.

A major reason for overturning a settled statutory construction is unconstitutionality. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 17-18 (1842)).

365. J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 67 (1975). The statement of Justice Holmes is found in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (Holmes, J., dissenting). In it he describes the proper “legislative” role of judges in common law and statutory cases.

366. *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

367. “Noninterpretivist” commentators deny that standardless delegation of Congress’s lawmaking power is fundamentally unconstitutional. Some commentators have argued that Congress may make standardless delegations of legislative power to the courts. See, e.g., Merrill, *supra* note 312, at 40-46. The Supreme Court apparently shares this view. See, e.g., *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) (“Congress has given the courts the power to develop substantive law” of antitrust); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (same, under 1947 Labor Management Relations Act § 301(a), 29 U.S.C. § 301(a) (1982)).

This notion is unsound under both democratic and constitutional theory. First, because article I has a built-in bias against legislation, see *supra* text accompanying note 33, judicial “laws” which would have been opposed by a majority, once imposed, cannot be repealed where minority interests or mere legislative inertia are strong enough to prevent amendatory legislation. Consequently,

III SALVAGE OPERATION: A STATUTORY APPROACH TO SECTION 1

A. *Why Taft's Analysis Should Be Adopted*

Can anything be done at this late date to restore the statute? Something can, and should, be done. Taft's *Addyston Pipe* opinion provides the right starting point for a viable construction of section 1. By adhering to Taft's analysis, the courts could build an internally consistent,

judicial legislation not only bypasses the article I process, but also in many cases thwarts the majority will.

Dean Calabresi has even argued that courts should be permitted to update "obsolete" statutes, much as they alter common law doctrines to meet perceived new conditions and ideas, without any claim that this revision was authorized by the legislature. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2, 82-83, 163-66 (1982). This idea is implicit in the notion of a constitutional Sherman Act. Cf. 1 R. AREEDA & D. TURNER, *supra* note 8, § 106; Baxter, *supra* note 2, § 2.4.

Dean Calabresi's noninterpretivist approach to the Sherman Act not only suffers the same infirmities as does the standardless delegation approach, but, like noninterpretivist construction of the Constitution, cannot even claim a justification from the intent of the provision's framers. Yet, many of the arguments for noninterpretivist decisionmaking apply only in the constitutional context, and cannot justify this form of noninterpretivist statutory construction. Specifically, some argue that certain issues implicate values so fundamental (although not expressly found in the constitutional text) that their resolution cannot be left to the ordinary, unprincipled resolution of the political process. Basic, fundamental principles must be the source of their resolution. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 91-145 (1982). Whatever these fundamental values are, however, no one has ever claimed that they are implicated by antitrust issues. Economic regulation is not an appropriate subject for judicial lawmaking because it involves nonfundamental value judgments over which reasonable persons may differ. These judgments are best left to political resolution, on the basis of votes rather than principles.

Second, the Supreme Court has held that Congress may not transfer its article I lawmaking powers to administrative agencies through standardless delegations of rulemaking authority. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). While no statute has been invalidated for excessive delegation since the *Schechter* and *Panama Refining* cases, the Court has reaffirmed the doctrine by expressly adopting narrow statutory constructions to avoid the vice of undue delegation. See, e.g., *Industrial Union Dep't. v. American Petroleum Inst.*, 488 U.S. 607, 645-46 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-44 (1974).

A more recent Supreme Court decision that the legislative veto is forbidden by article I because it permits legislative acts which are not presented to the President as required by article I, § 7, cl. 2, supports the rationale behind the nondelegation doctrine. *INS v. Chadha*, 462 U.S. 919, 951-58 (1983). As Justice White recognized in his *Chadha* dissent, the Court's disapproval of the legislative veto is difficult to square with a permissive approach to expansive delegation of lawmaking authority, as both practices involve "action with the effect of legislation." *Id.* at 984-87, 989 (White, J., dissenting); see also Merrill, *supra*, at 21 n.86 (same).

If standardless delegation of legislative authority to agencies are violations of article I, so must be similarly unguided delegation to the courts. Overbroad delegations to courts are at least as inconsistent with the article I process as are those to agencies. And they are even more inconsistent with democratic theory, as agencies are at least subject to political controls by the President and Congress, as courts are not. *Id.* at 41 n.162. Accordingly, there are substantial arguments in favor of Bork's conclusion "that Congress cannot delegate to the judiciary the basic political decisions of the society." R. Bork, *supra* note 37, at 83.

operational antitrust law. Judges could fill the gaps in his framework through case-by-case, interstitial lawmaking, a process that Sherman himself approved in his statement on the judicial role in Sherman Act cases.³⁶⁸ For these reasons I will use Taft's methodology as the basis for a detailed decisional framework for resolving all section 1 cases.

Before moving to the details of my proposal, however, it is appropriate to address the most likely objections that may be raised to the adoption of Taft's framework—admittedly a drastic change in Sherman Act doctrine. As I have indicated above, my proposal must overcome the objection that the doctrine of *stare decisis* precludes overruling the established construction of the Sherman Act. Others may object that the Act should be construed to further what they consider desirable social and political goals.³⁶⁹ Finally, some advocates of the economic approach may defend the traditional enabling act thesis on the ground that it permits the courts to revise antitrust doctrine to keep up with advances in economic science.³⁷⁰

At first glance, the argument stressing the binding power of precedent would seem a serious barrier to overruling the constitutional construction of the Sherman Act. The better and accepted policy is to leave a settled statutory construction undisturbed, even if erroneous.³⁷¹ But, as I noted earlier, statutory precedent should not stand when it either creates confusion and, consequently, does not create reliance interests,³⁷² or trenches upon constitutional values.³⁷³

Both of these exceptions apply to the constitutional Sherman Act and mandate its replacement with a new construction that can produce reasonably determinate legal rules. The Supreme Court simply has not followed precedent in antitrust cases. Sherman Act doctrine is notoriously subject to judicial revision.³⁷⁴ Indeed, the impermanence of Sherman Act doctrine is central to the standardless, constitutional approach. That approach inevitably disdains the usual rule of adherence to precedent; otherwise, interpretation of the Act could not retain the "generality and adaptability comparable to that found to be desirable in constitutional provisions".³⁷⁵

A few examples establish the point. The *per se* rule against tying

368. See *supra* note 124 and accompanying text.

369. See *supra* notes 304-05 and accompanying text.

370. See *supra* notes 17-19 and accompanying text.

371. See *supra* text accompanying notes 137-39.

372. See *supra* text accompanying note 140.

373. See *supra* text accompanying note 141.

374. Easterbrook, *Vertical Arrangements*, *supra* note 9, at 137 (summarizing Supreme Court's doctrinal reverses in Sherman Act cases).

375. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

arrangements has been a staple of antitrust law since 1947.³⁷⁶ Nonetheless, both the rule's content and its continued viability are in doubt. According to some commentators,³⁷⁷ the Court eviscerated the rule in *Jefferson Parish Hospital District No. 2 v. Hyde*.³⁷⁸ Moreover, four Justices in *Hyde* argued that the per se rule should be replaced with a full-blown rule of reason approach.³⁷⁹ A change of one vote and the tying per se rule would vanish altogether.

The current status of the per se rule against vertical price fixing, which dates back to 1911,³⁸⁰ is equally unstable. On its face, the rule is clear enough, yet the rule's application to particular cases remains very uncertain, owing to the Court's inability to balance the commands of the rule against the manufacturer's right to select customers on publicly announced terms,³⁸¹ and to the lack of any real economic difference between vertical price and nonprice restraints.³⁸² Here too, the rule's continued viability is uncertain. In *Monsanto Co. v. Spray-Rite Corp.*,³⁸³ the Court avoided the government's invitation to reexamine the rule, perhaps because the Justices could not agree on a correct resolution.³⁸⁴

376. The Court established the tying per se rule in *International Salt Co. v. United States*, 332 U.S. 392 (1947) (invalidating lease requirement that lessees of patented salt machine purchase salt requirements from lessor so long as lessor met market price). Since then it has adhered to the per se approach in tying cases. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1556-57 & n.14 (1984) (collecting cases holding tying per se unlawful).

377. See *infra* note 599. Others disagree, as do I. See Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1050 (1985) (*Hyde* "majority opinion primarily focused on identifying the 'certain' tying arrangements that are subject to the per se rule"); see *infra* note 599.

378. 104 S. Ct. 1551 (1984).

379. *Id.* at 1569 (O'Connor, J., with Burger, C.J., and Powell and Rehnquist, JJ., concurring).

380. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (contract terms specifying prices at which purchasing wholesalers and retailers would resell product held invalid).

381. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the Court held that the Sherman Act did not restrict "the long recognized right" of a nonregulated businessman "freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." *Id.* at 307. In *Colgate* the manufacturer had announced its intention to refuse to deal with anyone who did not adhere to the manufacturer's specified retail prices. *Id.* at 305-06. The Supreme Court has acknowledged the difficulty of applying to actual cases the distinction between a lawful exercise of the *Colgate* right to refuse to deal with distributors who do not adhere to a manufacturer's resale price policy, and an unlawful implicit agreement between the two to maintain resale prices. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1470 (1984). Commentators agree. See, e.g., Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania Way Out?*, 67 VA. L. REV. 1457, 1471-88 (1981) (arguing that there is no basis for distinguishing between *Dr. Miles* and *Colgate*, and that both should be overruled).

382. The Supreme Court also has acknowledged this point. *Monsanto*, 104 S. Ct. at 1470. See also Hutchinson, *supra* note 236, at 114-15 (noting theoretical difficulty of distinguishing price from nonprice restrictions that have a price effect, as well as vertical agreement to fix prices from unilateral announcement by manufacturer of selling price).

383. 104 S. Ct. 1464 (1984).

384. *Id.* at 1469 n.7 (declining to reconsider resale price maintenance per se rule). Justice White

Only the per se rules against horizontal price fixing and market division are certain to remain in their present form. Yet even their application remains unclear. While they will apply to clear-cut cartel activities,³⁸⁵ their application to ancillary, productive business activities is completely uncertain.³⁸⁶

As the above discussion indicates, the only areas of antitrust law that are well-defined concern the prohibition of naked cartel price fixing and market division. Taft's system would preserve both doctrines. Indeed, *Addyston Pipe* itself employed a per se analysis to condemn a cartel scheme employing naked price fixing and market division.³⁸⁷

Adoption of Taft's methodology would give the Act, for the first time, a settled and operational content that would enable private parties to rely on Sherman Act precedents. The Taftian analytic framework would become a settled construction not to be disturbed by subsequent decisions. By settling on this framework, the courts would finally place the onus of reformulating Sherman Act doctrine back on the political branches, where it belongs.³⁸⁸

In sum, the adoption of Taft's rules, as implemented through my proposal, would increase certainty and thus serve the very policies that underlie the rule against revising a settled statutory construction. Viewed in context, the objection that precedent precludes its adoption rings hollow.³⁸⁹

did not participate. *Id.* at 1473. Of the eight remaining Justices, four had voted to overrule the tying per se rule in *Hyde*, see *Hyde*, 104 S. Ct. at 1569-70 (Burger, C.J., and O'Connor, Powell, and Rehnquist, JJ.), and four had opted for its retention. *Id.* at 1556-58 (Stevens, Blackmun, Brennan, and Marshall, JJ.). If the *Hyde* voting lines had held in *Monsanto*, the result would have been a 4-4 deadlock over the retention of the *Dr. Miles* doctrine, leading to a decision to decline to reconsider *Dr. Miles*.

385. See *infra* notes 505, 513 and accompanying text.

386. See *infra* notes 505, 513-22 and accompanying text. At least formally, there is no confusion as to the legality of ancillary market division arrangements; the Court has ruled them per se illegal. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608-12 (1972). But because there is no real economic distinction between horizontal price setting and market division agreements, the Court's wavering over ancillary price restraints, see *infra* text accompanying notes 513-22, suggests that in an appropriate case it might relax the *Topco* rule. This would especially be true if the Court takes seriously its own statement that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977).

387. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); see also R. Bork, *supra* note 37, at 26-27, 30 (*Addyston Pipe* applied a per se rule to naked price fixing and market division); L. Sullivan, *supra* note 155, at 170-71 (*Addyston Pipe* is precursor of modern per se rule).

388. See *supra* text accompanying note 137.

389. If recent events are any guide, those who will raise this objection are likely to be more concerned with preserving particular precedents rather than the principle of precedent itself. Devotees of the social-political school of antitrust, for example, have recently used precedent in defense of the per se rules against resale price maintenance and tying. *Hyde*, 104 S. Ct. at 1569 (Brennan & Marshall, JJ., concurring); *Monsanto*, 104 S. Ct. at 1473 (Brennan, J., concurring). It is

The argument that a constitutional Sherman Act is necessary to promote social and political goals also fails. As I noted in Part II, the courts simply have no authority to impose any particular social and political agenda in the guise of construing statutes.³⁹⁰ Perhaps social benefits would flow from a law that prohibited more than the original Sherman Act did. The political branches remain free to decree such a law—if its proponents can overcome article I's bias against legislation.³⁹¹

Arguments for retention of the economic regulatory commission approach are equally unpersuasive. The 1890 Congress did not ask the courts to guarantee national economic performance. In any event, many commentators might agree that a return to Taft's proposal would promote superior economic performance. Taft's approach, as amplified by my proposal, does not differ significantly from the proposals put forward by the Chicago school, especially by Bork.³⁹² The principal, and principled, difference is that my proposal comes from the Act and not from my own economic analysis. The Chicago school approach may require alteration of antitrust rules with changing economic beliefs;³⁹³ my approach affirmatively discourages such change.

Finally, implementation of Taft's methodology would not banish the use of economics and economic reasoning from all section 1 cases. No doctrine can—or should—do that. The Act regulates economic activity, and requires judges to use economics. But judges should only make judgments with the framework of the 1890 Congress's policy choices. These policy choices are reflected in the common law doctrines that Taft applied to the Act in *Addyston Pipe*. Those doctrines focus the economic inquiry on a limited set of questions and impose liability only if those questions receive certain answers.

Such an approach does not preclude the use of economic analysis to better understand, and thus more faithfully apply, the rationale behind

not their weapon of choice; they would prefer to do battle with the freewheeling social policy sword they wielded in the halcyon days of the Warren Court. See Kauper, *The "Warren Court," supra* note 11 (Warren Court decided antitrust cases treating autonomy of individual firms as end in itself, regardless of economic consequences); Kauper, *The Burger Court, supra* note 11, at 2-4 (same). The Burger Court's lack of sympathy for social arguments in antitrust cases has left these advocates unarmed against the attacks of the economic approach philistines. Like Sampson, who found himself in similar straits when set upon unexpectedly by the original Philistines, these advocates have been forced to scour the ground for whatever might prove handy as a weapon. Sampson found the jawbone of an ass, *Judges* 15:14-17; the social-political antitrusters found precedent.

390. See *supra* text accompanying notes 358-67.

391. See *supra* note 33 and accompanying text.

392. Bork also advocates use of the naked/ancillary distinction as a touchstone for liability in § 1 cases. Bork, *supra* note 37, at 136, 263-98, 332-38.

393. For example, Liebeler notes that new learning may undermine the per se rule against cartel price fixing. If so, he argues, the rule must be changed. See *supra* note 311. I disagree. If the pursuit of superior efficiency collides with the prohibitions of the 1890 Act, relief must come from Congress.

the 1890 Congress's act. In the next section, I present an updated and expanded version of Taft's methodology as a suggested vehicle for such analysis, so that the courts may return to a statutory approach to the Sherman Act.

B. The Proposed Rules

I propose the following four-step analysis, described in more detail below, for all section 1 cases:

1. Determine whether there is a contract, combination, or conspiracy in restraint of trade. If there is none, either because the plaintiff cannot prove an agreement, or because the defendants' agreement is not in restraint of trade, there is no violation. If there is a contract, combination or conspiracy to restrain trade, proceed to the second step.

2. Determine whether the challenged restraint is naked or arguably ancillary to a productive business transaction. Restraints that are imposed solely to restrict output, as well as those imposed only to carry out noneconomic social purposes, are naked for Sherman Act purposes. A restraint that accompanies a productive transaction and bears an arguable relation to furthering it may be ancillary. If naked, the restraint is per se illegal. If potentially ancillary, the restraint must be judged under the third step.

3. Determine whether the restraint is reasonably related to furtherance of a productive business transaction. The restraint need not be the "least restrictive" or even a "necessary" means of achieving the productive purpose. It need only be a rational means of providing incentives for, or removing disincentives against, furthering the transaction or protecting its fruits. In particular, a restraint is not unreasonable if alternatives, although possibly less restrictive, might also be less effective or more costly. The burden of proof in step three remains on the plaintiff, since businesses should not be subjected to post hoc and often uninformed second-guessing by lawyers, judges and juries, who typically are untrained in either business or economics. If the restraint is reasonably related to the productive transaction, it will be lawful unless it also gives the defendants monopoly power. If there is a colorable argument that it produces such power, it must be assessed under the fourth step.

4. Determine whether the restraint, while reasonably ancillary, nevertheless gives defendants monopoly power. Section 2 standards will apply to define the relevant product and geographic markets. In most cases this step will not be reached, because defendants manifestly will lack monopoly power. Even if defendants *do* have monopoly power, the restraint is not unlawful unless it is a significant *cause* of the defendants' *acquisition or retention* of monopoly power. If it is, the restraint is illegal. Otherwise, the restraint is lawful.

Finally, under this proposed interpretation, the Act would not apply to restraints imposed by local governments and by "true nonprofits," defined as nonprofit organizations not controlled by for-profit entities.

1. Step One: Is There a Contract, Combination, or Conspiracy in Restraint of Trade?

Under this proposal, the plaintiff bears the burden of establishing a contract, combination, or conspiracy that actually restrains trade. The courts have long recognized that section 1 requires concerted action.³⁹⁴ They have not always recognized, however, that it also requires such action to be a "restraint of trade" in the common law sense. Indeed, courts have never formulated a general definition of a contract, combination, or conspiracy in restraint of trade, and consequently have condemned practices which do not restrain trade, as that concept is properly interpreted.³⁹⁵

It is essential to define which restraints of trade are subject to the Act, to avoid Brandeis's truism that all contracts inherently restrain trade. So they do. But the common law did not regard a mere sales contract as one in restraint of trade.³⁹⁶ More was required. The extra element was that at least one of the parties surrendered its unilateral right to decide whether, and on what terms, it would deal with third parties.³⁹⁷

394. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740-41 (1984); *Monsanto*, 104 S. Ct. at 1469.

395. See *infra* text accompanying notes 524-28.

396. In fact, I have found no common law case where a plaintiff even *challenged* a mere contract of sale as a restraint of trade.

397. The term "restraint of trade" first applied only to stipulations not to compete in certain ways, with certain parties, or in certain areas. Such stipulations appeared in contracts for the sale or lease of a property or business, or in connection with the entering into or ending of an employment relation or partnership. See 1 E. KINTNER, *supra* note 29, at § 2.4; H. THORELLI, *supra* note 7, at 17. For example, in *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711), the case in which the modern "rule of reason" for ancillary restraints has its origin, the lessor of a bakery breached his covenant not to open a competing bakery in the same parish during the term of the lease. The court held the covenant enforceable. *Id.* at 197, 24 Eng. Rep. at 352. Other cases involving covenants not to compete are *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 13 N.E. 419 (1887) (holding enforceable covenant not to compete over a 99-year term and in all but two states); *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, 1894 A.C. 535 (holding enforceable 25-year term covenant not to compete anywhere). For an example of a covenant not to use property in competition with the seller, see *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1874). For a case enforcing restrictions on a retiring partner, see *Lange v. Werk*, 2 Ohio St. 519 (1853). For an agreement by members of an association not to compete with the firm, see *Matthews v. Associated Press*, 136 N.Y. 333, 32 N.E. 981 (1893). For an agreement by an employee not to compete with his employer after the term of service, see *Hitchcock v. Coker*, 6 Adol. & E. 438, 112 Eng. Rep. 167 (Ex. Ch. 1837). For authorities collecting examples of the above ancillary restraints, see *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); 1 E. KINTNER, *supra*, § 2.6, at 55 n.68. The term "contract in restraint of trade" also came to refer to agreements between buyers and sellers of goods which restricted the freedom of either to deal with

This surrender went beyond the limitation inherent in any contract of sale that the seller not peddle the purchased goods to another. Thus if *A* merely agrees to sell *X* to *B*, there is no contract in restraint of trade, despite the fact that his contract with *B* "restrains" him from selling the same *X* to *C*. But if *A* agrees with *B* not to sell *Y*, which is not subject to a prior contract of sale, to *C*, or to sell *Y* to *C* only on terms agreed upon with *B*, that contract is in restraint of trade.

A cartel is a classic example of such an agreement.³⁹⁸ In a cartel, the members agree to deal with suppliers or customers only on certain specified terms. The so-called loose combinations of Sherman's day were thus combinations and conspiracies in restraint of trade.³⁹⁹

Another type of combination in restraint of trade is the economic integration of competitors whereby each ceases all or part of its present or future independent production, as did the tight combinations of Sherman's era. A merger is one example.⁴⁰⁰ The classic trust is another.⁴⁰¹ In both cases, the members of the combination abandon their independent identities to combine in joint production and sales.

A partial integration may, but need not, be a combination in

third parties. These included contracts by which the seller agreed to sell exclusively to the buyer, by which the buyer agreed to purchase only from the seller, and by which the buyer agreed to resell the products only at minimum resale prices. See 1 E. KINTNER, *supra* note 29, § 2.6, at 55 n.68 (collecting cases), § 3.9.

In time the term "contract in restraint of trade" came to cover cartel arrangements, which courts more precisely referred to as "combinations to suppress competition." See A. EDDY, *THE LAW OF COMBINATIONS* 779, 785 (1901), *quoted in* 1 E. KINTNER, *supra* note 29, § 3.3, at 83 n.44.

The common denominator of all these arrangements is that at least one of the parties restricts its unilateral freedom to deal with third parties. This comports with the definition of restraint of trade I use in the text.

398. W. LETWIN, *supra* note 29, at 48-49; H. THORELLI, *supra* note 7, at 20, 27-29, 39.

399. 1 E. KINTNER, *supra* note 29, §§ 3.4-3.8; H. THORELLI, *supra* note 7, at 41-48 & n.136 (collecting cases holding restraints invalid), 48 n.144 (collecting cases holding restraints valid). For examples of cases refusing to enforce cartel agreements because of the common law policy against "combinations in restraint of trade," see *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887) (holding void market division agreement between two gas companies); *Craft v. McConoughy*, 79 Ill. 346 (1875) (holding void agreement of grain dealers); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880) (holding void agreement among salt manufacturers to delegate pricing authority to an association of their members).

400. 1 E. KINTNER, *supra* note 29, at §§ 3.14-3.15; H. THORELLI, *supra* note 7, at 48-50. For representative cases in which corporate consolidations were deemed combinations in restraint of trade, see *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 41 N.E. 188 (1895) (invalidating consolidation of trust into corporation); *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N.E. 798 (1889) (holding consolidation activities ultra vires); *Richardson v. Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889) (holding illegal formation of corporation for purpose of acquiring other corporations); see also 1 E. KINTNER, *supra*, § 3.13, at 113 n.223 (collecting cases).

401. 1 E. KINTNER, *supra* note 29, § 3.11; H. THORELLI, *supra* note 7, at 48-49, 79-82. For representative cases condemning the "trusts" as unlawful combinations in restraint of trade, see *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N.W. 155 (1890); *People v. North River Sugar Refining Co.*, 3 N.Y.S. 401 (Cir. Ct.), *aff'd*, 7 N.Y.S. 406 (Sup. Ct. 1889), *aff'd*, 121 N.Y. 582, 24 N.E. 834 (1890); *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892).

restraint of trade. If the members give up independent production of that which they formerly produced or could produce in the near future by themselves, it is such a combination. If they do not, when the joint product is one that they cannot make by themselves, the joint activity is not a combination in restraint of trade, as the term is here defined.⁴⁰²

These definitions are required by the common law language of section 1. That language refers to the common law restraint of trade cases, which all involved contracts, combinations or conspiracies that limited the parties' rights to make unilateral business decisions respecting third parties, or that eliminated competition between former or potential competitors.

2. Step Two: Is the Restraint Naked or Ancillary?

The distinction between naked and ancillary restraints has been urged by Taft, Bork, and others as the touchstone for per se condemnation.⁴⁰³ Implementation of this step requires defining which restraints are ancillary to a productive business transaction, and distinguishing such restraints from naked restraints.

a. Ancillary Restraints

A productive business transaction is one that increases societal wealth. For purposes of this analysis, two basic types of transactions are relevant. The first is the voluntary exchange.⁴⁰⁴ The second is team production which enables participants to produce more together than they could working apart.⁴⁰⁵

The common law typically validated restraints that furthered one of these two basic types of business transactions. In *Addyston Pipe*, Taft

402. None of the cases cited *supra* at notes 400-01 involved a consolidation to produce a product which the parties had not previously made. A definition of combination in restraint of trade that included such consolidations would cover most corporations and partnerships. Under such a broad definition, for example, the Ford Motor Company would be a combination in restraint of trade simply because it is a union of thousands of independent stockholders, despite the fact that no individual shareholder had himself ever been in the automobile business. The common law definition was not this broad. Common law cases all involved competition among business units, not the mere existence of those units.

403. R. BORK, *supra* note 37, at 263-70; Liebler, *Intrabrand "Cartels," supra* note 312, at 17-18. Both Bork and Liebler adopt Taft's test because of its utility as a proxy for an efficiency criterion, not because it incorporates the American majority common law cited by Sherman. See R. BORK, *supra*, at 267; Liebler, *supra*, at 17.

404. Under such an exchange, wealth is created when *A* voluntarily gives *X* to *B* in return for *Y*. Both parties are now better off. *A* values *Y* more than *X*, while *B* values *Y* less. See generally A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, & CONTROL* ch. 3 (3d ed. 1983).

405. See generally *id.* at chs. 7-9. Team production typically takes place within a single business firm, but it need not. For example, separate firms may cooperate in a joint venture.

summarized the types of ancillary restraints that would be considered lawful. They were those

agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service.⁴⁰⁶

Each of these restraints either removes a disincentive to the sale of a business or property (the first and fourth) or facilitates team production through a partnership (the second and third) or employer-employee relationship (the fifth). Both types of restraints provide positive incentives for investment of time, money, and effort by creating property rights that protect these investments from expropriation.

Without such ancillary restrictions, the goodwill of a going business, for example, would be difficult if not impossible to transfer to a buyer. The seller's ability to expropriate the goodwill by opening a competing business across the street would be a powerful disincentive to the transaction. At a minimum, the seller's inability to guarantee the transfer would make the goodwill less valuable, and diminish his incentive to preserve its full value until retirement.

Similarly, without the agreement of a partner not to compete with the partnership, she may expropriate the firm's best business opportunities, or fail to give the partnership her best efforts. In economic terms, the restraint helps to effectuate the integration of the partners into a firm.⁴⁰⁷

406. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

407. This is very clearly explained in R. BORK, *supra* note 37, at 265-67. In his *Addyston Pipe* opinion Taft indicated that the common law permitted reasonably ancillary restraints because they furthered voluntary exchanges and team production. His discussion of why the common law's original refusal to enforce any restraints of trade came to be relaxed corresponds to the economic analysis of ancillary restraints in the text:

After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, *as an incentive to industry and honest dealing in trade*, that, after a man had built up a business with an extensive good will, he should be able to *sell his business and good will* to the best advantage, and he *could not do so unless he could bind himself* by an enforceable contract *not to engage in the same business* in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, *when two men became partners* in a business, *although their union might reduce competition*, this effect was *only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community*. Restrictions in the articles of partnership upon

This latter type of restraint is critical for antitrust analysis. Many restrictive agreements effectuate a partial integration of economic entities, allowing separate business units to produce cooperatively. Almost all vertical restraints are of this nature. Manufacturers often restrict dealers by contract, as they would their employees, in order to market their goods more effectively. While forward integration into marketing would produce the same results, the use of contract may be far less expensive.⁴⁰⁸

Horizontal restraints can also aid partial integration.⁴⁰⁹ In *United States v. Topco Associates, Inc.*,⁴¹⁰ for example, a joint purchasing agency facilitated the production of private label goods by granting members exclusive rights to the label and its attendant goodwill. Others, who had not joined the agency, could not expropriate this jointly produced asset.⁴¹¹ Larger chains, which make their own private label goods, may achieve the same exclusive right to the goodwill created in their labels simply by declining to license their trademarks.⁴¹²

the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only *securing the seller against an increase of competition of his own creating*. Such an exception was *necessary to promote the free purchase and sale of property*. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.

85 F. at 280-81 (emphasis added).

408. See generally Butler & Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics and Organization Theory*, 32 EMORY L.J. 1009, 1057-65 (1983). See also Easterbrook, *Vertical Arrangements*, *supra* note 9, at 145-53 (discussing procompetitive effects of tying arrangements and restrictive dealing).

409. See generally R. BORK, *supra* note 37, at 263-74, 430-40.

410. 405 U.S. 596 (1972).

411. See R. BORK, *supra* note 37, at 274-76.

412. Intangibles and services also can be produced jointly. For example, the American Society of Composers, Authors and Publishers produces blanket copyright license rights (an intangible) which it markets (a service) to performers. See *infra* note 516. Through trade associations, industry competitors can jointly produce business information for use in planning, an intangible which organized exchanges and government agencies produce in other industries. See Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187, 1194-95 (1979). Companies also produce information for use by purchasers. For example, some industry groups, such as the American Dairy Association, advertise to encourage consumer use of their members' products generally. Standard-setting bodies also undertake joint efforts to produce information valuable to consumers. For example, accreditation of law schools by the American Association of Law Schools and the American Bar Association identifies for prospective law students those schools which meet specified minimum standards, thus reducing students' search costs.

b. Naked Restraints

A naked restraint, by contrast, furthers neither exchanges of property nor joint production. Its effect is exactly the opposite: to inhibit productive output. Such a restraint is employed to restrict individual firms' freedom to deal with third parties, for the sole purpose of raising prices and reducing output.

The most typical naked restraints, collusive cartel price fixing and market division, reduce output by ending competition among the cartel members. Other naked restraints limit competition from outsiders. Naked boycotts have this effect.⁴¹³ Similarly, a single firm may threaten to refuse to deal with customers or suppliers, and thereby extract from them an agreement not to deal with that firm's rival. Because this exclusionary restraint acts only to restrict output, it is also naked.⁴¹⁴

Purported social policy justifications for a restraint⁴¹⁵ cannot change its naked character. There are two reasons for this. First, neither the Act nor its legislative history provides any justification for restraints other than the protection of productive transactions.⁴¹⁶ Second, there is no principled way for courts to pick and choose among asserted social purposes for restricting output without usurping Congress's basic policymaking function.⁴¹⁷

c. The Utility of the Distinction Between Naked and Ancillary Restraints

There are three prime virtues of the naked/ancillary distinction. First, it is derived from the particular common law doctrines that the

413. See, e.g., *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (conspiracy violative of § 1 inferred from circulation of report among retail dealers listing wholesalers who sell direct to consumers where natural result is that dealers will cease trade with such wholesalers); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904) (§ 1 violation for manufacturers and dealers to buy and sell only among members).

414. Cf. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding illegal under § 2 of Sherman Act newspaper publisher's refusal to accept local advertising from advertiser on rival radio station). The one predatory practice case cited by Sherman involved Standard Oil's extraction of preferential treatment from railroads. Not only did Standard get a lower rate for itself, it also obtained the railroad's promise that it would charge Standard's competitors a higher rate prescribed by Standard and rebate to Standard a portion of the higher price charged. *Handy v. Cleveland & M.R. Co.*, 31 F. 689, 692 (C.C.S.D. Ohio 1887), cited in 21 CONG. REC. 2457 (1890) (Statement of Senator Sherman), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 117-18. This agreement coerced from the railroad by Standard would be an unlawful naked restraint of trade under this proposal.

415. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 684-85 & n.7 (1978) (defendants asserted ban on competitive bidding promoted safe engineering).

416. See *supra* text accompanying notes 106-09.

417. Under this proposal, self-regulation by true non-profits would not be subject to the Act at all. See *infra* text accompanying notes 470-75.

Fifty-first Congress agreed to federalize.⁴¹⁸ Second, the test furthers the policy goals of that Congress by attacking restraints that restrict output, yet encouraging those in aid of production. Third, the per se rule of illegality for naked restraints provides the benefits claimed under the current per se rules without the problems of characterization inherent in those rules.

These advantages support replacing today's per se rules, with their talismanic emphasis on the specific form of a restraint, with a unitary per se rule against naked restraints of all varieties. This step would go far toward bringing certainty and consistency into the law.

3. Step Three: Is the Restraint Reasonably Ancillary?

The third step is the only actual "reasonableness" inquiry under my proposal. As Taft proposed in *Addyston Pipe*, the court should determine whether an ancillary restraint is reasonably calculated to further the productive purpose which purportedly justifies it.⁴¹⁹ This inquiry enables courts to detect cartel arrangements that are disguised as productive ventures. For example, if the *Appalachian Coals* Court had asked whether the defendants reasonably could have intended that the restriction on sales outside their joint selling agency would achieve marketing efficiencies, the court would have recognized that the agency's real purpose was to fix prices.⁴²⁰ Exclusivity could not contribute to better marketing, but it would prevent a member from undercutting the cartel price set by the agency.

This is not a formless inquiry. Modern economic analysis explains how restraints may reduce disincentives to the sale of assets and reduce the frictions which inhibit cooperative production of goods and services.⁴²¹ Restrictive agreements may also allow for the advantages of single-firm integration while avoiding some of its costs.⁴²² For example, to the extent that a franchise contract gives the franchisor control over the franchisee that is functionally indistinguishable from the control it would have had over a company-owned outlet, the contract should be considered reasonably ancillary to a joint productive purpose.⁴²³

418. See *Addyston Pipe*, 85 F. at 280-90 (use of naked/ancillary distinction to decide American majority common law cases); see also 1 E. KINTNER, *supra* note 29, § 3.3 at 85-86 (same). The argument that the 1890 Congress intended to federalize the American majority common law of restraint of trade is discussed *supra* text accompanying notes 64-91.

419. 85 F. at 282-83.

420. See R. POSNER & F. EASTERBROOK, *supra* note 227, at 125 (use of exclusive sales agency as cartel enforcement device).

421. See *supra* notes 404-12 and accompanying text.

422. See, e.g., Butler & Baysinger, *supra* note 408, at 1057-65, 1084-99 (characterizing vertical restraints as methods of partial vertical integration).

423. The Fifth Circuit used this rationale to hold a vertically imposed restraint valid in *Red*

It is appropriate to consider what guidance the law may already provide. In the 1831 English case of *Horner v. Graves*,⁴²⁴ the court originated the traditional common law test for judging whether an ancillary restraint is sufficiently related to its productive purpose. The inquiry focused on "whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public."⁴²⁵ In the abstract, this test seems easy enough: just place the challenged restraint beside its claimed productive function, and see if the latter squares with the former. In many cases, the test *would* be easy.⁴²⁶ The restriction in *Appalachian Coals* on sales outside the joint selling agency,⁴²⁷ for example, was clearly unreasonable. It may not have been a naked restraint, but surely it was clad in no more than a string bikini. By contrast, the five-year term of the covenant not to compete in *Mitchel v. Reynolds*⁴²⁸ was obviously well-tailored to protect only the underlying transaction, the five-year lease of the promisor's bake shop.

The uncertain results of the traditional test in other cases, however, makes it an inappropriate vehicle for application of step three. For example, in *United States v. Arnold, Schwinn & Co.*,⁴²⁹ was it really necessary for the defendant to eliminate all competition among the wholesalers of its bicycles,⁴³⁰ or would a less restrictive measure, such as assigning them areas of primary responsibility, have sufficed? The traditional test does not tell trial judges and juries how to resolve such questions. As the court in *Horner v. Graves*⁴³¹ itself admitted, "no certain precise boundary can be laid down, within which the restraint would be reasonable and beyond which, excessive."⁴³²

This uncertainty would frustrate the 1890 Congress's basic policy choice to permit and encourage combinations in aid of production.⁴³³ A firm like Schwinn could never know in advance of litigation whether an

Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1006-07 (5th Cir. 1981). See also Liebel, *Intrabrand "Cartels," supra* note 312, at 30 n.85.

424. 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831).

425. *Id.* at 743, 131 Eng. Rep. at 287.

426. Indeed, several commentators find vertical cases so easy that they would skip any reasonableness test and make all vertical restraints per se legal. See, e.g., R. BORK, *supra* note 37, at 297; Easterbrook, *Vertical Arrangements, supra* note 9, at 135-36 (1984); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981). But see Easterbrook, *supra*, at 168-69 (apparently backing off from proposal).

427. See *supra* text accompanying notes 216-20.

428. 1 P.Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

429. 388 U.S. 365 (1967).

430. *Id.* at 365, 370-71 (describing distribution system), 380-82 (upholding reasonableness of restraints when Schwinn retained title to bicycles).

431. 7 Bing. 735, 131 Eng. Rep. 284 (1831).

432. *Id.* at 743-44, 131 Eng. Rep. at 287.

433. See *supra* text accompanying notes 106-09.

ancillary restraint, adopted in good faith to improve its productivity, might lead to treble damage liability. The test would thus inhibit such measures. In sum, the uncertainty of the traditional test, while not as severe as that of the the current regime, would damage the rule-of-law values that support replacing the regime with my proposal.

Nor does the "least restrictive alternative" standard, first proposed by Donald Turner⁴³⁴ and apparently approved by some courts,⁴³⁵ provide a suitable analysis. In theory, the standard appears promising. A court would approve of none but the least restrictive method of furthering a productive transaction.⁴³⁶ Furthermore, the standard appears at first glance to give more guidance than the traditional common law test.

In practice, however, the "least restrictive" standard is even less suitable than that of the common law for implementing the policy choices of the 1890 Congress. First, it may not be clear to a business planner which of several alternatives is really the least restrictive. Second, even where an alternative is clearly less restrictive, there may be serious doubt whether it is sufficient for its appointed task, or is the least costly choice. Finally, there is no guarantee that an antitrust court's ex post facto judgment will concur with the planners' judgment.⁴³⁷

What the well-advised business planner will know with certainty before the fact is that the law provides no margin for error—even if made in good faith—and that the penalty for misjudging a future antitrust jury's reaction to a proposed restraint is treble damages. The resulting

434. See Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 59, 64 (1958); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 699 (1962). Other writers support this view. See Note, *Restricted Channels of Distributions Under the Sherman Act*, 75 HARV. L. REV. 795, 823-32 (1962); Case Note, 88 HARV. L. REV. 636, 638 (1975).

435. See *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 947 (5th Cir. 1975) (dictum); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (dictum); see also *White Motor Co. v. United States*, 372 U.S. 253, 271-72 (1963) (Brennan, J., concurring).

436. As Taft put it in *Addyston Pipe*, an overbroad restraint "oppresses the covenantor, without any corresponding benefit to the covenantee," and also "tends to a monopoly," both of which are characteristic traits of naked restraints. 85 F. at 282.

437. As Judge Aldisert has noted, the "least restrictive" test would force entrepreneurs to be "guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade," and would place nonbusiness judges and juries "in the position of second-guessing business judgments as to what arrangements would or would not provide 'adequate' protection for legitimate commercial interests." *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249-50 (3d Cir. 1975). For these reasons the *American Motor Inns* court expressly rejected the use of the "least restrictive alternative" test in § 1 rule of reason cases. *Id.* at 1248-50. For other critiques of this test, see 1 M. HANDLER, *supra* note 190, at 705-08; Pitofsky, *supra* note 199, at 36-37. The "least restrictive alternative" approach is also discussed in *Vertical Restrictions Limiting Intra-brand Competition*, 1977 A.B.A. SEC. ANTITRUST 58-60 (Monogram No. 2, 1977).

chilling effect on ancillary restraints would be inconsistent with the 1890 Congress's choice in favor of combinations in aid of production.

In lieu of these unsuitable tests, I propose that the plaintiff be required to overcome a presumption that an ancillary restraint is reasonably related to its alleged productive purpose. This presumption could be overcome only if the plaintiff successfully bears the burden of demonstrating either that the challenged restraint is not a good faith attempt to achieve a productive purpose, that is, that the restraint was in fact designed to restrict output, or that the restraint is grossly overrestrictive so that the defendant, in light of the facts available at the imposition of the restraint, could not rationally have believed it was reasonably related to the productive purpose.⁴³⁸ Thus, step three would condemn only those restraints that are clearly excessive.

This test would better serve the rule of law and fidelity to the enacting Congress's intent—rationales that underlie this Article's methodology. It would allow business planners to proceed with the assurance that their good faith judgments would not be subjected to punitive, treble damage sanctions merely because a judicial factfinder decides after the fact that a different restriction would have been either more efficient or less restrictive. This presumption would also avoid compromising the enacting Congress's other basic policy choice: to proscribe combinations devised to reduce output and raise price.⁴³⁹ Such combinations are either cartel arrangements or monopolistic mergers.⁴⁴⁰ The former would be condemned under step two or step three; the latter would be prohibited under step four.

4. *Step Four: Monopoly Power as a Result of an Ancillary Restraint?*

This step is related to Taft's third test for assessing consolidations approaching monopoly size, but does not follow his suggestion that legality turn on proof of "the actual intent to monopolize."⁴⁴¹ Instead, the test under this proposal is whether the challenged restraint, even if reasonably ancillary to production, significantly aids the creation or preservation of monopoly power, defined under section 2 standards. Taft's intent test is inappropriate because the intent to gain a "monopoly" generally is indistinguishable from the legitimate desire to get all the busi-

438. This proposed test is modeled after the "business judgment rule" in corporate law, under which directors can be held liable for good faith decisions only if they are grossly negligent. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1094-101 (1968).

439. See *supra* text accompanying notes 100-05, 110-12.

440. The American majority rule cases cited by Sherman condemned these two practices. See *supra* notes 115 (monopolistic mergers), 123 (cartels) and accompanying text.

441. *Addyston Pipe*, 85 F. at 291.

ness one can. The illicit intent to gain market control was readily apparent in the trust and monopolistic merger cases of the 1880's and 1890's cited by Taft.⁴⁴² The combinations that were defendants in those cases either were composed of most or all of the former competitors in the business or had the express purpose of buying their competitors out.⁴⁴³ In modern cases, the purposes of defendants are not likely to be so readily apparent. The objective test proposed here thus will be easier to administer than Taft's intent test.⁴⁴⁴

In most section 1 cases this should not be more than a momentary inquiry. As Easterbrook points out, in some cases "it is obvious on even the briefest inquiry that a firm has no power."⁴⁴⁵ It will be clear to many plaintiffs, who continue to bear the burden of proof, that their cases must therefore be based on the argument that the challenged restraint fails step two or three. Even where defendants arguably possess significant power over price, the plaintiff must prove that the power flows in significant part from the challenged restraint. That is, the plaintiff must demonstrate that the defendants' market power derives from the fact that the restraint has eliminated their prior competition, and not from the superiority of the defendants' joint product.⁴⁴⁶ This requirement should filter

442. See *id.* (Taft's citations).

443. For example, both Taft and Sherman cited *Richardson v. Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889). See *Addyston Pipe*, 85 F. at 291; 21 CONG. REC. 2458 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29, at 118 (Sherman cites case as *Richardson v. Alger*). The *Richardson* court noted that the monopolistic purpose of the defendant company was "openly and boldly avowed," appearing not only from "its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on," but also in the very testimony of General Alger, one of its principals, who "himself avers it, and settles its character beyond question." 77 Mich. at 657, 43 N.W. at 1110. Taft also cited *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, 486, 41 N.E. 188, 200-01 (1895) ("No one who intelligently considers the scheme of this trust . . . can for a moment doubt that it was designed to be, and was in fact, a combination in restraint of trade . . . organized for the purpose of getting control of the manufacture and sale of all distillery products") and *People ex rel. Peabody v. Chicago Gas Trust*, 130 Ill. 268, 292, 22 N.E. 798, 802 (1889) (upon its organization, defendant purchased control of all four gas companies serving Chicago, which "shows that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.") *Addyston Pipe*, 85 F. at 291.

444. I explain why this fourth step is necessary to effectuate the basic policy choice of the 1890 Congress to proscribe even efficient combinations that attain monopoly power *infra* at text accompanying notes 448-49. This objective "monopoly power from the restraint" test not only is more operational but also better serves congressional policy choices than does the "monopolistic intent" test which Taft gleaned from the common law cases. The 1890 Congress wished to halt the actual attainment of monopoly power by any combination, while also preserving all productive combinations short of monopoly size. See *supra* text accompanying notes 100-15. Because of the difficulty of distinguishing between the unlawful intent to acquire a monopoly or suppress competition, and the lawful intent to get more business with a superior joint product, Taft's intent test would obscure the line drawn by the 1890 Congress. The objective test would provide a more precise tool, and thus better define and preserve that line.

445. Easterbrook, *supra* note 183, at 22.

446. If, for example, the defendants collectively had less than a monopoly share of the market

out most joint ventures, whose monopoly power arguably results from consumer preference for their jointly-produced product—a preference that may result from the product's uniqueness or superiority.⁴⁴⁷

The hard cases under step four will be those where the challenged restraint seemingly creates a monopoly position. In these limited cases, the difficulties connected with market power issues will be present. It is true that step four may proscribe some monopoly practices that are efficient. Nevertheless, strict application of the step is necessary to realize the 1890 Congress's policy choice of forbidding all restraints creating monopoly power, even if they simultaneously lower production costs.⁴⁴⁸ The common law cases against monopolistic mergers cited by Sherman underscore this point.⁴⁴⁹

This approach avoids the difficult and uncertain task of case-by-case weighing of a challenged restraint's output restrictive and productive effects.⁴⁵⁰ As Bork notes, courts cannot judge the tradeoff between output restriction and efficiency creation in horizontal merger cases with any acceptable degree of accuracy or at any acceptable cost.⁴⁵¹ The best alternative is thus a rule for all cases,⁴⁵² which the 1890 Congress itself created by prohibiting combinations to obtain monopoly power, regardless of their possible productivity gains.⁴⁵³

The last minute addition of section 2 by the Judiciary Committee supports the employment of section 2 market power standards in implementing step four. Congress intended sections 1 and 2 to complement each other, with the latter filling in any gaps left by the former.⁴⁵⁴ Most of the early cases against tight and loose combinations alike were brought under both sections.⁴⁵⁵ Thus the degree of market power that section 2

before their joint production, any increase in their collective shares thereafter would be due to the superior efficiency of the venture, rather than its ancillary restraints. See R. BORK, *supra* note 37, at 192-94 (market position achieved by internal growth must be due to firm's efficiency), 223 (same analysis where growth follows integration of former competitors).

447. This was surely true of the blanket licenses created by ASCAP and BMI, the defendants in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979), because the licensing agreements involved did not restrain third parties from putting together competing copyright license packages. See *infra* notes 524-26 and accompanying text. The court of appeals recognized this on remand. 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

448. See *supra* text accompanying notes 114-15.

449. See *supra* note 115 and accompanying text.

450. See *infra* notes 536-49 and accompanying text.

451. R. BORK, *supra* note 37, at 129. See also Easterbrook, *supra* note 183, at 2, 11.

452. R. BORK, *supra* note 37, at 129.

453. See *supra* text accompanying notes 114-115.

454. Chief Justice White recognized this in his *Standard Oil* opinion. See *Standard Oil v. United States*, 221 U.S. 1, 60-61 (1911).

455. See, e.g., *United States v. United States Steel Corp.*, 251 U.S. 417, 436 (1920); *United States v. American Tobacco Co.*, 221 U.S. 106, 142 (1911); *Standard Oil*, 221 U.S. at 42-43; *Northern Sec. Co. v. United States*, 193 U.S. 197, 320 (1904); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 300-01 (1897); *Addyston Pipe*, 85 F. at 278.

proscribes is also the degree of inmarket power that Congress intended section 1 to prevent.

5. *Limitations on Coverage of the Act*

a. *Local Governments*

In *Parker v. Brown*,⁴⁵⁶ the Supreme Court held that the Sherman Act did not apply to state actions. Nearly forty years later, in *Community Communications Co. v. City of Boulder*,⁴⁵⁷ the Court held that actions taken by local governments are not included in the *Parker* exemption unless such actions are specifically authorized by state law.⁴⁵⁸

Under my proposal, *City of Boulder* cannot stand. There is no evidence that any member of the 1890 Congress understood the Sherman Act to apply to *any* government action, federal, state, or local. The Act was a response to the activities of private businesses, specifically the trusts, and not to regulations or governmentally induced monopolization.⁴⁵⁹ Nor did the common law federalized by the Act prohibit government activities.⁴⁶⁰

Although the phrase "state action exemption" has come into common judicial parlance,⁴⁶¹ it is incorrect to say that the *Parker* Court exempted activities which would otherwise have been covered by the Act. Rather, the Court declined to extend the Act's coverage to a range of activities that it found qualitatively different from those that the Act was intended to regulate. *Parker* sensitively considered "the purpose, the subject matter, the context and the legislative history of the statute" to decide that the Act did not preempt contrary state laws.⁴⁶² That inquiry revealed "no suggestion of a purpose to restrain state action in the Act's legislative history."⁴⁶³ Instead, the Act's purpose to suppress restraints "by individuals and corporations, abundantly appears from its legislative history."⁴⁶⁴ Consequently, "in view of the [Act's] words and history, it must be taken to be a prohibition of individual and not state action."⁴⁶⁵

The same arguments apply to local governments. First, there is no

456. 317 U.S. 341 (1943).

457. 455 U.S. 40 (1982).

458. In October, 1984, Congress enacted the Local Government Antitrust Act, Pub. L. No. 98-544, 98 Stat. 2750, codified at 15 U.S.C. §§ 34-36 (Supp. 1986), which prohibited antitrust plaintiffs from recovering monetary damages "from any local government, or official or employee thereof acting in an official capacity." *Id.*, § 3, 15 U.S.C. § 35. The Act did not prohibit injunctive relief in Sherman Act cases against local governments. *Id.*

459. See W. LETWIN, *supra* note 29, at 53-99; H. THORELLI *supra* note 7, at chs. 2-3.

460. H. THORELLI, *supra* note 7, at 52.

461. See, e.g., *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1715 (1985).

462. *Parker*, 317 U.S. at 351.

463. *Id.*

464. *Id.*

465. *Id.* at 352.

indication that the 1890 Congress intended to cover the activities of local governments. The fact that government activities do not fall within the common law meaning of the Act's terms strongly indicates this. Even if one were to consider these terms vague enough to reach such activities, there is simply nothing on the legislative record to indicate that Congress intended the terms to stretch this far. A legislative decision of such significance would have to be expressly considered and stated by Congress. Yet the *Boulder* Court made no reference to the history, or lack thereof, on this issue.

A second reason for not applying the Act to local government restraints and monopolies is the lack of manageable judicial standards for deciding antitrust cases against local regulators. Although the *City of Boulder* majority suggested that noneconomic values could play a role in applying the Act to localities, the Court did not indicate which such values could be considered, or what weight they should be given.⁴⁶⁶ This absence of standards has the inevitable effect of forcing courts to review local regulations on the basis of vague notions of social good, and thus throws them into a forbidden legislative role.⁴⁶⁷

b. *Noncommercial Activities*

The Supreme Court's application of the Sherman Act to noncommercial activities, most recently in *NCAA v. Board of Regents*,⁴⁶⁸ has also overextended the Act. In *Apex Hosiery Co. v. Leader*⁴⁶⁹ Justice Stone's careful review of the legislative history of the Act revealed that the statute, "enacted in the era of 'trusts' and of 'combinations' of businesses and of capital," sought the "prevention of restraints to free competition in business and commercial transactions."⁴⁷⁰ The negative implication of this statement is that noncommercial activities were not intended to be covered by the Act.

Section 4 of the Federal Trade Commission Act bolsters this

466. 455 U.S. at 56 n.20.

467. See Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 735 n.102 (1986) ("uncertainty will continue to reign until the Supreme Court explicates the substantive antitrust review that applies to policies that fail to qualify for *Parker* immunity").

468. 104 S. Ct. 2948 (1984).

469. 310 U.S. 469 (1940).

470. *Id.* at 492-93. The Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), is not inconsistent with *Apex Hosiery*. *Goldfarb* held that price fixing by lawyers and members of other "learned professions" is subject to Sherman Act scrutiny. As the *Goldfarb* Court recognized, professionals are engaged in commercial, business activities. *Id.* at 787-88. There is thus no viable economic distinction between price fixing by lawyers and other providers of services. That the Act must cover professionals, however, need not mandate its coverage of truly noncommercial activities. The activities carried out by nonprofit organizations are qualitatively different from ordinary business activities in a way that those of doctors and lawyers are not. Nonprofit colleges and hospitals, for example, while charging for their services, have different motivations than do even similar institutions operated for profit.

assumption about the 1890 Congress's attitude toward nonprofit entities. Its coverage of "corporations" includes only those "organized to carry on business for [their] own profit or that of [their] members."⁴⁷¹ The exclusion of nonprofit entities indicates that legislators in the formative era of antitrust felt nonprofit activities were not a part of the evil addressed.⁴⁷²

Noncoverage would permit groups such as educational accrediting bodies, whose main purposes are noneconomic and which promote social purposes generally approved by society, to regulate themselves unimpeded by antitrust worries. Coverage, by contrast, has engendered judicial reluctance strictly to apply the rule of reason to nonprofit activities. Instead, courts have muddled the rule with either explicit⁴⁷³ or implicit⁴⁷⁴ consideration of social values. This proposal does not include in its definition of nonprofit enterprises those organized by for-profit entities to carry on activities for its members. This is consistent with the FTC's inclusion in its definition of corporation only those organizations that carry on business for the profit of their members.⁴⁷⁵ Thus, the Act would continue to cover trade associations and professional societies. Nonprofit hospitals, churches, and colleges, on the other hand, would be outside Sherman Act coverage.

C. *How This Proposal Differs from Those of Bork and Clark*

Judge Bork and Nolan Clark also have developed statutory-based methodologies for resolving Sherman Act cases.⁴⁷⁶ In many ways, their proposals resemble mine. They agree that the judiciary should not make social policy, but should only implement the policy choices made by Congress.⁴⁷⁷ Both emphasize the need for operational legal standards to limit judicial discretion and to provide an acceptable degree of certainty

471. 15 U.S.C. § 44 (1982).

472. See *supra* note 62.

473. The lower courts have taken this approach in ruling upon NCAA regulations. See *infra* note 568. See also Gulland, Byne & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, 52 *FORD L. REV.* 717, 725-27 (1984). Although some may be skeptical about the NCAA's noncommercial goals, many take them seriously. *Id.* at 721-22; *NCAA*, 104 S.Ct. at 2971-73, 2977-79 (White, J., joined by Rehnquist, J., dissenting) (arguing that NCAA television plan's noneconomic benefits justify its anticompetitive effects).

474. This was the Supreme Court's approach in *NCAA*. See *infra* notes 569-75 and accompanying text.

475. See 15 U.S.C. § 44 (1982); see also *American Medical Association v. FTC*, 638 F.2d 443, 447-49 (2d Cir. 1980), *aff'd*, 455 U.S. 676 (1982)(per curiam)(4-4 opinion) (AMA not exempt from FTC jurisdiction because activities carried on for profit of members).

476. R. BORK, *supra* note 37; Clark, *supra* note 29.

477. R. BORK, *supra* note 37, at 79-80, 82-83; Clark, *supra* note 29, at 1134-35.

in the law.⁴⁷⁸ Both refer to the statutory language and legislative history of the Act.⁴⁷⁹ Finally, many cases would be resolved similarly under any of the three proposals.⁴⁸⁰ This section will focus on how my proposal differs from theirs.

1. *Bork's Proposal*

Bork argues that the Fifty-first Congress intended the Sherman Act to be a consumer welfare prescription.⁴⁸¹ He supports this assertion with Sherman's statement that his bill would proscribe only those combinations that restrict output, and have no productive effects.⁴⁸² He also cites the specific "rules of law forseen in the debates—against cartel agreements, monopolistic mergers, and predatory business practices,"⁴⁸³ and the decision to permit "even complete monopoly . . . if it was gained and maintained only by superior efficiency,"⁴⁸⁴ in support of his thesis.

Although Bork refers to Sherman's common law cases,⁴⁸⁵ he denies that the common law provides a workable Sherman Act doctrine. He asserts that the common law that Sherman cited was "an artificial construct, made up for the occasion out of a careful selection of a few recent decisions from different jurisdictions, plus a liberal admixture of the senators' own policy prescriptions" which held "full sway nowhere but in the debates of the Fifty-first Congress."⁴⁸⁶

Bork argues that Congress left the courts free to "frame subsidiary rules" to its own specific prohibitions, so long as those rules were "con-

478. R. BORK, *supra* note 37, at 73-89; Bork, *supra* note 303, at 829-47; Clark, *supra* note 29, at 1131-33, 1183-84.

479. See R. BORK, *supra* note 37, 19-21, 56-66; Clark, *supra* note 29, at 1139-46.

480. Compare *infra* text accompanying notes 523 (horizontal restraints per se illegal under my proposal only where not ancillary to productive transaction), 550-52 (ancillary horizontal restraints lawful as long as rationally related to productive transaction and not creating monopoly power), 593-94 (most vertical restraints lawful as rationally related to joint production), 617-23 (most tying arrangements upheld as reasonably ancillary) with R. BORK, *supra* note 37, at 262-79 (naked horizontal restraints should be per se illegal; reasonably ancillary ones should be lawful); 280-97 (all vertical restraints benefit consumers, and thus all should be legal) 331-44 (only naked boycotts should be per se illegal; boycotts reasonably ancillary to productive purpose should be lawful), 365-81 (efficient tying arrangements should be legal) and Clark, *supra* note 29, at 1160-61 (all vertical restraints should be lawful), 1161-62 (horizontal price fixing and market division should be prohibited unless defendants can demonstrate lack of market power or efficiencies from integration), 1163-64 (joint ventures should be lawful unless they create monopoly power), 1164-65 (boycott in support of cartel should be unlawful), 1165-66 (other horizontal agreements should be unlawful if disguised cartels).

481. R. BORK, *supra* note 37, at 61-66.

482. *Id.* at 61-62; Bork, *supra* note 29, at 14-21. Bork asserts that other supporters of the Act also professed this purpose. *Id.* at 17-21.

483. R. BORK, *supra* note 37, at 62. See also Bork, *supra* note 29, at 21-26.

484. R. BORK, *supra* note 37, at 62. See also Bork, *supra* note 29, at 26-31.

485. Bork, *supra* note 29, at 22, 25 & n.54.

486. R. BORK, *supra* note 37, at 20.

fined by the policy of advancing consumer welfare."⁴⁸⁷ This delegation "calls for those rules, and only those rules, that can be justified in terms of price theory."⁴⁸⁸

These rules are not immutable. Rather, they "are alterable as economic analysis progresses."⁴⁸⁹ In fact, the courts "are free to revise not only prior judge-made rules but, it would seem, rules contemplated by Congress." Consequently, the Sherman Act, "[i]n terms of 'law' . . . tells judges very little," but imposes on the judge "the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process."⁴⁹⁰

More specifically, Bork argues that the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."⁴⁹¹ Bork employs Chicago school price theory to translate this proposition into specific rules. He would proscribe horizontal mergers that create very large market shares and naked cartel restraints,⁴⁹² but he would permit "agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary . . . to an integration of productive economic activity," including all distributional restraints.⁴⁹³

I agree with Bork's argument that the 1890 Congress sought to distinguish combinations formed to achieve power over output from combinations in aid of production.⁴⁹⁴ I also agree with most of his specific proposals, especially his framework for distinguishing per se unlawful naked restraints from ancillary restraints, which require more in-depth analysis under his approach.⁴⁹⁵

I cannot agree, however, that the 1890 Congress adopted Bork's "consumer welfare standard," or that it delegated to the courts the duty to distinguish, based on their own economic reasoning, "between combinations that are lawful because they create efficiency and those that are unlawful because they restrict output."⁴⁹⁶ The fact that the 1890 Con-

487. *Id.*

488. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985).

489. Bork, *supra* note 29, at 47.

490. *Id.* at 48.

491. R. BORK, *supra* note 37, at 91.

492. *Id.* at 405-06.

493. *Id.* at 406.

494. Compare text accompanying notes 100-23 (1890 Congress intended to prohibit combinations to achieve power over output, that is, cartels and monopolistic mergers, but not productive combinations that lack monopoly power) with R. BORK, *supra* note 37, at 61-63 (same) and Bork, *supra* note 29, at 11 (same).

495. See *supra* note 310.

496. R. BORK, *supra* note 37, at 63.

gress founded section 1's core distinction on productivity does not justify a conclusion that it therefore delegated authority to the courts to make any policy judgment that they might deem efficient.

Moreover, such delegations would frustrate both the doctrinal consistency and the judicial restraint Bork seeks to promote.⁴⁹⁷ Under either a consumer welfare or general efficiency standard, courts would need to adhere to Bork's proposed rules only so long as they agree with his economic conclusions. It is unlikely that judges ever will come to any agreement over the basic economic questions raised by section 1, much less that they will all come to agree with Bork.⁴⁹⁸

My proposals, by contrast, do not depend upon a judicial consensus on economics, and thus are not subject to change with new economic thinking by the judiciary. To be sure, economic concepts are relevant, but only insofar as they suggest responses to the questions posed by steps two, three, and four. They cannot serve as a basis for adopting other methodologies. This is the key difference between rules based on statute and those based on economic analysis. The methodologies of this Article remain intact until changed by Congress, even if courts and commentators later come to believe that their alteration would be efficient or otherwise preferable.

2. *Clark's Proposal*

In his recent article, Clark cogently argues that the 1890 Congress delegated a limited task to the judiciary in section 1 cases: to proscribe agreements among competitors to restrict output. Clark refers to this prohibited activity as "cartelization,"⁴⁹⁹ and proposes a structured economic inquiry for detecting such activity.⁵⁰⁰

The ultimate question for the courts under Clark's proposal is appropriately narrow, a focus that is supported by my analysis of the 1890 Congress's intent. Nevertheless, the proposal has two defects. First, it would require courts to make difficult economic judgments too often. Many cases would turn on whether defendants possessed market power.⁵⁰¹ Other cases would focus on whether the defendants' actions

497. See *supra* text accompanying notes 306-16. Clark has made the same point. See Clark, *supra* note 29, at 1134, 1167-70.

498. See *supra* note 313 and accompanying text.

499. Clark, *supra* note 29, at 1126. Clark includes in this term the attempt to achieve monopoly control through tight combinations, i.e., trusts and corporate consolidations, as well as the loose combinations we think of today as cartels. *Id.* at 1162-63. He notes that the term "trust" was used in 1890 to refer to both loose and tight combinations. *Id.* at 1137-38.

500. *Id.* at 1151-70.

501. *Id.* at 1156-58. Clark proposes alternative approaches to naked horizontal restraints. Under the first alternative, defendants would escape liability by showing that they lack market power. *Id.* at 1158. Under the second alternative, this defense would not be available. *Id.* Although the defense of no market power makes sense conceptually, it presents severe difficulties for

had the necessary tendency of reducing output. This inquiry would be necessary where defendants claim that their partial integration enabled them to "achieve efficiencies resulting in increased . . . output."⁵⁰² While far narrower and much more structured than the economic inquiries permitted in traditional rule of reason cases, Clark's cartelization standard still requires nonspecialist factfinders to decide difficult economic issues.⁵⁰³

Second, Clark's proposal does not use the common law as a means for interpreting the statute. Instead, as under Bork's proposal, the courts must answer a particular economic inquiry without statutory direction. This approach is inconsistent with the Fifty-first Congress's decision to federalize the common law to effect its intent.⁵⁰⁴

IV

BACK ON COURSE: THE CONSTITUTIONAL AND STATUTORY APPROACHES COMPARED

This Part compares the analysis of particular practices under current doctrine with that under the methodology proposed in this Article. It demonstrates that the proposed analysis, unlike current doctrine, would in fact produce determinate results which are consistent with the basic policy choices of the 1890 Congress.

judicial administration. First, defining markets and judging parties' power within them is quite difficult. *See supra* text accompanying note 180. Second, and more fundamentally, the concept of market power is elusive. Market power is not something that "monopolists" have and all others lack. Instead, most sellers, especially those of differentiated products, have some degree of power over output and price. There is a continuum from no power at all, as with the proverbial price-taking wheat farmer of the competitive model, to the monopoly power possessed by the sole seller of a basic commodity. A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, & CONTROL* 237-39 (3d ed. 1983).

502. *Id.* at 1161; *see also id.* at 1159-60 (arguing that § 1 violations should require proof of intent or proof that output restriction is a "necessary tendency" of the challenged agreement).

503. My proposal also involves economic determinations, but it simplifies them for noneconomist factfinders. The naked/ancillary and reasonably ancillary inquiries of my steps two and three explore the tendency of the challenged arrangement to reduce output without any countervailing productive effects. These questions are simple and direct. Step four, which inquires whether defendants obtain market power from a reasonably ancillary restraint, is more difficult to apply. However, because a plaintiff will only raise this point if he believes he can carry the burden of proving it after having already failed to prevail on steps two and three, it is not likely to arise often in actual cases. *See supra* text accompanying notes 445-47. Under Clark's proposal, once a plaintiff shows that a practice necessarily tends to restrict output, the burden falls on the defendants to rebut the plaintiff's *prima facie* case by demonstrating cost savings or lack of market power or both. *See Clark, supra* note 29, at 1161-62. Placing such a burden of proof on defendants would encourage plaintiffs to bring more doubtful cases. In addition, it is likely that defendants would normally raise the "no market power" defense.

504. *See supra* text accompanying notes 64-69.

A. Joint Activities by Competitors

The current section 1 doctrine of horizontal restraints is indeterminate in three respects. First, the per se rules against cartel price fixing, market division, and boycott arrangements have created confusing problems of characterization. Second, the Supreme Court has yet to set forth a clearly defined, operational rule of reason for resolving non-per se cases. Third, the Court has not determined finally whether horizontal restraints are permissible to achieve beneficial noneconomic goals that many perceive to be beneficial. As shown below, my proposal avoids all three of these problems.

1. Per Se Illegality

a. Under the Current Rules

The form of a challenged restraint currently determines whether it should be characterized as per se illegal or judged under the rule of reason. A horizontal market division, for example, is per se illegal regardless of any procompetitive justification proffered for it.⁵⁰⁵ Certain other practices, however, have not been so easy to characterize.

i. *Boycotts.* The treatment of boycotts is problematic. As the

505. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606-12 (1972). Most of the lower courts have adhered strictly to *Topco*'s wholesale per se condemnation of even market divisions ancillary to a productive function. *See, e.g., Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 7-11 (1st Cir. 1979) *cert. denied*, 446 U.S. 983 (1980) (contract restrictions amounting to territorial allocations); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 826-31 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (rights of first refusal, exclusive manufacturing licenses, and other otherwise lawful provisions of licensing agreement held per se violation when their combined effect was horizontal market allocation); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1242-44 (3d Cir. 1975) (franchise agreement giving franchisees power to determine whether potential competitor could enter agreement illegal per se, although ancillary to otherwise lawful exclusive dealing agreement). *But see General Leaseways, Inc. v. National Trust Leasing Ass'n*, 744 F.2d 588, 593-96 (7th Cir. 1984) (Posner, J.) (questioning continued viability of *Topco* per se rule).

Some professional sports leagues employ player drafts, devices by which member teams divide among themselves the exclusive right to recruit particular graduating college or high school players. These draft schemes are a classic example of market division. The participating teams, which otherwise would compete in the market for players' services, use the draft to divide the players among themselves, with the result that each drafted player may deal with only one league member. Unless there is a competing league which does not participate in the draft, the drafting team is put into a monopsony position in negotiating with the drafted player. The courts have failed to recognize the direct applicability of the *Topco* per se rule under these circumstances, and have instead characterized the practices as boycotts rather than divisions of markets. *See, e.g., Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

A court did recognize the market division issue in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982). There, a racetrack owner challenged its own lease of its facility to a competitor, urging that a provision of the lease allocating racing dates between the two was a per se illegal market division. Although the agreement obviously did divide the market for this facility between the two, the Ninth Circuit refused to apply *Topco*, noting that to do so would render impossible the use of the track by more than one operator. *Id.* at 821-22.

Supreme Court recently noted in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*,⁵⁰⁶ “[e]xactly what types of boycott activity fall within the forbidden category is far from certain.”⁵⁰⁷ The Court even quoted with approval Professor Sullivan’s comment that there “is more confusion about the scope of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine.”⁵⁰⁸

Unfortunately, the *Pacific Stationery* opinion fails to state “exactly what types of activity fall within the forbidden category.” The Court indicated that boycotts “generally” were per se illegal where they involved (1) naked restraints (2) by firms possessing “a dominant position in the relevant market” that (3) “cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete.”⁵⁰⁹ Under this standard, the plaintiff’s claim that its expulsion from the defendants’ wholesale purchasing cooperative should be considered per se illegal failed. According to the Court, the expulsion was based on a rule that related to the cooperative’s effective operation, and the plaintiff had not shown that “the cooperative possesses market power or exclusive access to an element essential to effective competition.”⁵¹⁰

Although the Court’s standard narrows the boycott per se rule somewhat simply by providing a framework for analysis, the Court undercut the test by providing that all of its elements need not be satisfied to sustain per se treatment.⁵¹¹ Thus a boycott constituting a naked restraint might be per se illegal without any showing of anticompetitive effects. Likewise, a court might—or might not—condemn a refusal to deal which deprived a plaintiff of an essential “facility,” without regard to the group’s reason for doing so.

ii. *Horizontal Price Setting.* A naked price restraint, one having no procompetitive justification, is clearly illegal per se.⁵¹² If it is ancillary, however, its treatment is uncertain under current Supreme Court precedent. The Court has had three recent opportunities to consider such ancillary practices: *Broadcast Music, Inc. v. Columbia Broadcasting System Inc.*,⁵¹³ *Arizona v. Maricopa County Medical Society*,⁵¹⁴ and *NCAA v. Board of Regents*.⁵¹⁵ In each case, competitors produced and priced a package product composed of their individual products. None could

506. 105 S. Ct. 2613 (1985).

507. *Id.* at 2619.

508. *Id.* (quoting L. SULLIVAN, *supra* note 155, at 229-30).

509. *Pacific Stationery*, 105 S. Ct. at 2619-20.

510. *Id.* at 2620-21.

511. *Id.* at 2620.

512. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

513. *Id.*

514. 457 U.S. 332 (1982).

515. 104 S. Ct. 2948 (1984).

produce or price the package separately.⁵¹⁶ The plaintiffs in each case challenged the joint pricing as unlawful price fixing, despite the fact that this practice was necessary if the package was to be produced at all.⁵¹⁷ Incredibly, the Court held the *Maricopa* program illegal per se, but found the *NCAA* and *Broadcast Music* activities subject to rule of reason analysis.⁵¹⁸

Some commentators have suggested that the Court has developed a new technique in these cases for making the per se/rule of reason charac-

516. ASCAP and BMI, the defendants in *Broadcast Music*, produced a blanket license under which a licensee was entitled to perform any of the thousands of compositions in the defendants' repertoires without negotiating separate copyright licenses with composers. *Broadcast Music*, 441 U.S. at 4-6.

The two "foundations for medical care" in *Maricopa* produced a medical services package product which they sold to insurers, which in turn used it to offer complete prepaid medical coverage to insureds, who could, within wide limits, select their own physicians. Each foundation member agreed to treat insureds for an agreed maximum price, and to accept the foundation's judgment on disputes. This scheme enabled the insurers to control their total payments, and thus made the prepaid coverage possible. *Maricopa*, 457 U.S. at 339-42, 351-52; see also *id.* at 358-59 (Powell, J., dissenting).

The NCAA's television plan provided a similar package. Under their contracts with the NCAA, each television network obtained the right to broadcast any college football game during the upcoming season for a set fee. The NCAA contracts ensured each network that it could televise at least its second choice game each weekend as the season progressed. *NCAA*, 104 S. Ct. at 2956-57.

517. *Broadcast Music*, 441 U.S. at 6; *Maricopa*, 457 U.S. at 336; *NCAA*, 104 S. Ct. at 2957-58. No single composer, doctor or college could produce or price the packages at issue.

518. In his majority opinion in *Maricopa*, Justice Stevens asserted that, unlike *Broadcast Music*, the case did not involve a partial integration of activities to produce a common product. Stevens conceded that "[i]f a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper." *Maricopa*, 457 U.S. at 357. But "complete medical coverage for a flat fee" is precisely what the defendant foundations' contracts with insurance companies did make possible. The only distinctions between Stevens's hypothetical clinic and the actual arrangements in *Maricopa* are (1) a clinic partnership might, but need not be, a complete rather than partial integration of cooperating doctors, and (2) a clinic would be integrated vertically, since it would perform itself the underwriting and marketing functions undertaken by the insurers in *Maricopa*. In sum, Stevens's focus on the degree of integration among doctors created a distinction without economic significance.

NCAA is equally difficult to distinguish from *Maricopa*. The efficiencies created by the *NCAA* plan were weaker than those in *Broadcast Music*. As the Court recognized, the *NCAA* contract did not grant the same, complete blanket license granted by ASCAP. Instead, like the *Maricopa* Foundation's contracts with insurers, the *NCAA* set the price and defined the basic terms of individual contracts between the networks and the colleges. *NCAA*, 104 S. Ct. at 2967. It is true that in both *NCAA* and *Maricopa* the overarching contract eliminated the need for multiple price negotiations and ensured the availability of the individual product or service on short notice. Yet the costs of such additional transactions would be considerably lower for a handful of televised college games, particularly in relation to the total costs and revenues involved, than for the thousands of doctor-patient transactions involved in *Maricopa*. Indeed, as the majority opinion noted, the district court found that "NCAA football could be marketed just as effectively without the television plan." *Id.* (footnote omitted). By contrast, as Justice Powell's *Maricopa* dissent pointed out, the *Maricopa* foundation plans apparently did achieve substantial efficiencies, as evidenced by the fact that "seven insurers willingly have chosen to contract out to the foundations the task of developing maximum fee schedules." *Maricopa*, 457 U.S. at 361 (Powell, J., dissenting).

terization. According to this theory, the trial court is to take a "quick look" or make a "facial" examination of the challenged conduct to determine its probable net effect. If the conduct's probable tendency to restrict output clearly outweighs its probable procompetitive efficiencies, as the Court supposedly found in *Maricopa*, it should fall within the per se category. If not, the court must undertake a full-blown rule of reason analysis.⁵¹⁹

If this is the Court's new approach,⁵²⁰ its application in *Maricopa* demonstrates that it cannot produce predictable results. The majority's apparent conclusion—that the probable effect of the restraint at issue was to restrict output—was by no means necessarily correct. At least two competent economists have disagreed over the *Maricopa* scheme's likely economic effects.⁵²¹ I believe that the practices at issue in that case probably had no output-restrictive effects at all, and that they certainly were less restrictive than those of the NCAA.⁵²² The point is that the "quick look" approach cannot produce consistent results because it does not specify a particular method of economic analysis. In hard cases, any of several economic models might be employed, as they have been by students of *Maricopa*. Inconsistent results will inevitably flow from this approach.

519. See Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se — Rule of Reason Distinction*, 60 WASH. L. REV. 1 (1984); see also Hutchinson, *supra* note 236, at 143-45 (scope of per se rules contracted; Court is looking to competitive consequences of challenged conduct rather than its label under per se rules); Note, *The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason*, 55 ST. JOHN'S L. REV. 729, 752-58 (1981) ("facial unreasonableness" proposed as intermediate level of analysis focusing on justifications for trade practices rather than their competitive effects, as analyzed under the per se inquiry).

520. The Antitrust Division of the Justice Department has urged that it should be. See Brunet, *supra* note 519, at 20 n. 123.

521. Compare Leffler, *Arizona v. Maricopa County Medical Society: Maximum-Price Agreements in Markets with Insured Buyers*, 2 SUP. CT. ECON. REV. 187, 201-02 (1983) (harmful: price discrimination in favor of insured patients increases demand for physicians' services, leading to increased costs for all patients as maximum fee levels rise in response to higher demand levels) with Comment, *Physician Maximum Fee Reimbursement Agreements: Arizona v. Maricopa County Medical Society*, 31 EMORY L.J. 913, 946-62 (1982) (beneficial: reduces incentive of physicians to charge higher fees and perform unnecessary services where insured patient is indifferent to costs reimbursed by insurer) (law student author is Ph. D. economist). Judges Posner and Easterbrook also have made economic analyses of the case, which differ not only from each other but also from the analyses cited above. Compare Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 894-900 (1981) (beneficial: method for low-price physicians to identify themselves to insurers, reduce transaction costs, and agree to share risks with insurers) with Vogel v. American Soc'y of Appraisers, 744 F.2d 598, 604 (7th Cir. 1984) (Posner, J.) (possibly harmful: may have been scheme to facilitate explicit or tacit minimum price fixing by exchange of price and cost data). Professor Leffler casts doubt on Judge Posner's theory. See Leffler, *supra*, at 194-95 (facts do not support collusion facilitation theory). He apparently would agree with my point that a "quick look" involves more than simple economic analysis. See *id.* at 189 (analysis "requires a complex economic theory to reach what are ultimately ambiguous answers").

522. See *infra* text accompanying notes 524-26.

b. *Under This Proposal*

Under my proposal, the per se concept would take the operational form of step two's summary condemnation of all naked restraints. More generally, the proposal's naked/ancillary restraint analysis would produce consistently reasonable results.

i. *Joint Production of New Products.* The joint purchasing arrangement in *Topco* would not have suffered summary condemnation as a per se violation, but rather would have come under steps three and four, a principled type of rule of reason analysis. The challenged practices in *Broadcast Music*, *Maricopa*, and *NCAA*, even if found to be restraints under step one,⁵²³ would have passed step two and escaped summary condemnation. So would all boycotts that have some connection with joint productive activity. Only those restraints that bear no relation to productive, output-increasing activities would be condemned summarily. Overall, the result would be an operational, internally consistent harmonization of per se and non-per se analysis.

Even before reaching step two, however, step one would have required dismissal of *Broadcast Music* and *Maricopa*, and would have better focused the inquiry in *NCAA*. In none of the three cases was the joint packaging agreement at issue a restraint of trade. None of the defendant groups merged the formerly competitive activities of its members. Instead, each group was able to offer a new service that its members were incapable of producing independently.⁵²⁴ The joint pricing agreements alone did not restrict any individual member's sale of its own products and services outside the collectively produced package.⁵²⁵ Thus, the additional NCAA rule forbidding member schools from selling broadcast rights outside the association was the only restraint of trade involved in all three cases.

Dismissal of the *Broadcast Music* and *Maricopa* cases and narrowing of the *NCAA* inquiry would have been proper. No purpose was served by further analysis of the joint pricing arrangements. In each case, someone had to price the package if it was to be sold at all. The joint pricing could not restrain output, as long as the members remained free to sell their individual products and services to others. The package arrangements could only increase total output. The additional restraint in *NCAA*, on

523. See *infra* text accompanying notes 524-26.

524. See *supra* note 517 and accompanying text.

525. The *Broadcast Music* district court found that individual composers and publishers would deal with performers outside the blanket license, should any performer seek to purchase performance rights directly from them. 400 F. Supp. 737, 779 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd*, 441 U.S. 1 (1979). Individual physicians participating in the *Maricopa* and *Pima Foundations* were free to serve patients who did not purchase from insurers which dealt with the foundations. See *Maricopa*, 457 U.S. at 341.

the other hand, apparently did affect the televising of college football.⁵²⁶ Step one would have highlighted it for analysis.

ii. *Data Exchanges.* Step one also would clarify information exchange cases. An agreement to exchange information, without more, is not an agreement restraining trade. It does not preclude any participant from producing and pricing its own products as it wishes. While a party to the exchange *may* adapt its output and price decisions to the market conditions the exchange reveals, its decisions remain unilateral to the same extent as the decisions of businesses that use publicly produced market information for the same purpose.⁵²⁷

The exchange of data, of course, could add weight to an argument that the parties have *in addition* agreed to restrain output and raise prices. The details of particular data exchange plans would be relevant here only as evidence tending to prove the existence or facilitation of classic cartel agreements.⁵²⁸ This approach is superior to the current treatment of data exchanges as a special category of restraints governed by obscurely understood precedents.⁵²⁹

2. Rule of Reason Analysis

a. Current Law: NCAA's Unanswered Questions

Unlike previous Supreme Court pronouncements, *NCAA* provides some guidance for determining whether a challenged practice is one that promotes or suppresses competition, the traditional test of legality in rule of reason cases.⁵³⁰ First, the Court held that the plaintiff must establish

526. See Hutchinson, *supra* note 236, at 107 n.118.

527. A trade association's data exchange program informs members of the prices customers are willing to pay and those at which sellers are willing to sell. As Judge Posner has pointed out, this information causes a narrower dispersion of asking prices as sellers adapt their pricing and production decisions to their improved knowledge of market conditions. Posner, *supra* note 412, at 1194-97.

528. Step one would comport with Posner's suggestion that information exchanges should be only evidence of an underlying price-fixing agreement, and not dispositive in themselves. *Id.* at 1197-98.

529. The leading precedents are *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). As one recent commentator has observed, these opinions "are often confusing and inconsistent, lacking any reference to the economic theory underlying the antitrust laws." France, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55, 55 (1983). See also Posner, *supra* note 412, at 1197 (*Gypsum* opinion "suggests that the Court lacks a sure grasp of the fundamental economics of the [data exchange] issue. The current legal status of competitive exchanges of price information is uncertain.").

530. The Court formulated the traditional test in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it . . . may suppress or even destroy competition"). Brandeis's approach in that case is discussed *supra* at text accompanying notes 197-214.

The Court restated the test in *National Soc'y of Professional Eng'rs v. United States*, 435 U.S.

the likelihood that some anticompetitive effects will result from the challenged practice. The plaintiff must demonstrate (1) but for its alleged procompetitive justifications, the practice would be a per se offense, (2) the practice has actually had output-restrictive effects, or (3) the practice gives the defendant market power.⁵³¹ Second, the Court confirmed that a challenged restraint may promote competition by increasing "productive efficiency," that is, by either reducing costs, increasing quality, or both.⁵³² Third, the Court's specific analysis of the NCAA's proffered efficiency justifications suggests that there must be some reasonable relation between the alleged efficiency justifications advanced by the defendant and the challenged restraint.⁵³³ While a reasonable relation must be shown, the Court did not indicate whether the challenged restraint must be the least restrictive means of achieving the claimed efficiency.⁵³⁴ Finally, the opinion indicates that once the plaintiff establishes restrictive effects on output, either by proof or presumption, the defendants bear the burden of establishing efficiency justifications.⁵³⁵

Unfortunately, the *NCAA* opinion left open more important questions than it answered. Most significantly, the Court failed expressly to

679, 691 (1978). *Professional Engineers* also provided guidance by rejecting the idea that "social justifications" could be affirmative defenses for challenged restraints. *Id.* at 693-96. The case thus reformulated Brandeis's methodology as well as his words.

531. The Court deemed the NCAA television plan's price and output restraints to have anticompetitive effects which required "some competitive justification even in the absence of a detailed market analysis." *NCAA*, 104 S. Ct. at 2965 (footnote omitted). See Hutchinson, *supra* note 236, at 111. In addition, the district court had found that "if [NCAA] member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights." 104 S. Ct. at 2963 (footnote omitted). The district court buttressed these findings by holding that college football telecasts are a separate product market, distinct from professional football telecasts, other sporting events or other television programming, so that there was no reasonable substitute to check the NCAA's exercise of its market power over college football broadcasting. *Id.* at 2966-67.

532. The NCAA claimed that its television plan restraints increased productive efficiency in both ways. First, it claimed that the plan reduced costs by assisting in the marketing of broadcast rights. *NCAA*, 104 S. Ct. at 2967. Although holding that this "efficiency" justification was not supported by the record, *id.* at 2968, Justice Stevens's evaluation of this contention indicates that proof of "procompetitive efficiencies" could be placed in the rule of reason balance. Second, the NCAA argued that the television plan's restraints helped produce closer football games, a more desirable product, by maintaining a competitive balance among amateur athletic teams. *Id.* at 2969. While the Court again rejected the NCAA's factual predicate for this productive efficiency defense, it accepted its legal sufficiency. *Id.*

533. Both of the NCAA's efficiency justifications fell for this reason. The restriction on sales outside the NCAA's plan bore no relation to the creation of any marketing efficiencies. *Id.* at 2967-68. Nor was the television plan "even arguably tailored" to bring about competitive equality on the playing field. *Id.* at 2969-70.

534. Several lower courts and commentators have applied a "least restrictive means" test to challenged restraints. Others have not, agreeing with Dean Pitofsky that businessmen should not be subjected to this kind of second guessing by plaintiff's lawyers and lay fact finders. See *supra* note 437.

535. *NCAA*, 104 S. Ct. at 2967-70. See Hutchinson, *supra* note 236, at 111.

state that procompetitive and anticompetitive effects should be balanced against each other. Instead, it cited language from *National Society of Professional Engineers v. United States* that suggested that challenged restraints necessarily produce only one effect or the other.⁵³⁶ In fact, ancillary restraints may have both effects.⁵³⁷ Only by balancing those expected effects could a court determine "whether or not the challenged restraint enhances competition," the "essential inquiry" under *NCAA*.⁵³⁸ Although *NCAA*'s actual assessment of output restrictive effects and procompetitive efficiencies does suggest such a balancing approach, the Court never explicitly adopts this methodology.⁵³⁹

Moreover, even assuming that the opinion implies a balancing test, it fails to explain how to assign relative weights to the two effects. In theory, Oliver Williamson's welfare tradeoff model, under which the dead weight welfare loss from a restraint is compared to its achieved efficiencies,⁵⁴⁰ could be used to resolve all cases. In practice its use could resolve some. Often the two effects are obviously disproportionate, as the majority apparently found in *NCAA*.⁵⁴¹ In other cases, the balance would clearly favor legality, as, for example, when the defendants clearly lack the market power necessary to restrain output.⁵⁴²

In close cases, however, Williamson's model would be inadequate. As Bork has shown, that model "merely illustrates a relationship; it does not quantify it."⁵⁴³ In close cases, *NCAA* provides little guidance. It provides neither a methodology for case-by-case weighing of restrictive and efficiency effects, nor a set of rules with which to avoid such a case-by-case inquiry.⁵⁴⁴ Moreover, even if judges could agree on a method, the ad hoc balancing suggested by *NCAA* could not produce predictable results.⁵⁴⁵ Take, for example, the determination of a chal-

536. *NCAA*, 104 S. Ct. at 2962 (quoting *Professional Engineers*, 435 U.S. at 692).

537. For example, if the *NCAA* had been able to establish a reasonable relation between its television broadcasting restraints and their alleged productive efficiencies, the Court would have been faced with restraints having both effects.

538. 104 S. Ct. at 2962 (footnote omitted).

539. See Hutchinson, *supra* note 236, at 112 ("factbound analysis . . . of some parts of the plan as procompetitive and others as anticompetitive, took place outside any general framework").

540. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977). For a good brief summary of Williamson's model, see R. BORK, *supra* note 37, at 107-12.

541. 104 S. Ct. at 2962-70. The majority's conclusion is not beyond dispute. See 104 S. Ct. at 2974-77 (White, J., dissenting) (procompetitive effects of *NCAA* agreement may outweigh anticompetitive effects); see also Hutchinson, *supra* note 236, at 105-12.

542. See Easterbrook, *supra* note 183, at 20.

543. R. BORK, *supra* note 37, at 108.

544. See Hutchinson, *supra* note 236, at 112; see also *supra* text accompanying note 539.

545. As Professor Hutchinson has observed, even a truncated or structured rule of reason analysis of a practice's net effects depends on a judicial consensus as to the type of consequences that deserve to be labeled anticompetitive. But it is just that consensus that she believes is "lacking among the Justices, since their theoretical preferences appear to diverge at this time." Hutchinson,

lenged restraint's output-restrictive effect. The *NCAA* Court apparently assumed that market division and price fixing always result in a substantial restriction of output.⁵⁴⁶ But this is not necessarily so. While such practices do inherently *tend* to restrict output, the degree to which they actually do so varies with the degree of market power possessed by those employing them.

Thus, a true balancing test would require a market power analysis even more difficult than that now applied in monopolization and merger cases. Besides having to define the relevant market, the court would have to make a reasonably precise estimate of the degree of the defendants' power over price in that market. This task would strain the capacity of trial judges, as economists cannot agree even on a method of assessing a firm's actual power over price.⁵⁴⁷

Measurement of the efficiency of a challenged restraint also is probably beyond the capability of trial courts.⁵⁴⁸ Thus, in close rule of reason cases, the ad hoc balancing suggested by *NCAA* would require trial by econometrics, with the right answer beyond the rational decisionmaking powers of judges, juries, and probably even economists themselves.⁵⁴⁹

b. The Reasonableness Determination Under this Proposal

Under my proposal, restraints not summarily condemned under step two would receive a form of rule of reason analysis under steps three and four. This analysis⁵⁵⁰ would not, however, require the indeterminate inquiry that *NCAA* requires in close cases. The key inquiry in most cases would be step three: whether the ancillary restraint bears a reasonable relation to its claimed productive function, giving deference to good faith business judgment.

If the restraint bears such a relation, it would be lawful unless the plaintiff could make a step four showing that the restraint gives the defendants monopoly power under section 2 standards. Given the diffi-

supra note 236, at 145. I agree. This divergence of policy views is inevitable at this or any other time, unless and until economists disprove all but one possible system of antitrust economics.

546. 104 S. Ct. at 2965.

547. Compare Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (arguing for use of Lerner index, which measures the extent to which price exceeds marginal cost and suggesting specific applications to antitrust market power questions) with Pindyck, *The Measurement of Monopoly Power in Dynamic Markets*, 28 J. L. & ECON. 193 (1985) (criticizing use of Lerner index and other static measures as inadequate to gauge market power in dynamic markets).

548. R. BORK, *supra* note 37, at 126-28.

549. Other commentators have argued that courts cannot determine the "correct" balance of the two effects in close cases. See Easterbrook, *supra* note 183 at 11-12; Leffler, *Toward a Reasonable Rule of Reason*, 28 J.L. & ECON. 381, 381-83 (1985).

550. See *supra* notes 419-453 and accompanying text.

culty of proving monopoly power,⁵⁵¹ plaintiffs are unlikely to attempt this showing in most cases. Thus, most ancillary restraints would only be illegal if grossly overbroad, or if their relation to a legitimate business transaction were tenuous.

The function of step three is *not* to fine-tune the economy by regulating the proper mix of competition and integration in nonmonopolistic industries. As Bork, Easterbrook and others persuasively have argued, no one can do this with any degree of accuracy.⁵⁵² Step three's function is more limited: to ferret out cartel activities disguised as legitimate business transactions.

Only if the case were to go to step four would the court need to make a market power determination. Even here, the proposal is far simpler than the alternative of *NCAA*'s balancing approach. The court need only determine whether the challenged restraint gives the defendants monopoly power, as measured by the market power tests of section 2 cases. It need not go on, as apparently required by *NCAA*,⁵⁵³ to (1) measure the extent of such power, (2) measure the extent of countervailing productive efficiencies, and (3) weigh the two before reaching judgment. Thus, steps three and four would produce a simpler test that would more likely result in consistent results and reasonable litigation costs.

The reasonableness inquiry proposed here also is more likely to effectuate the policy choices of the 1890 Congress. That Congress delegated to the courts the task of drawing the line between unlawful combinations that restrict output and control prices, and lawful combinations in aid of production.⁵⁵⁴ Because all truly ancillary restraints are by definition in aid of production,⁵⁵⁵ they should be illegal only if they produce monopoly power under step four. Only with such power can defendants use these restraints to reduce output and control prices,⁵⁵⁶ the central harm the 1890 Congress feared.

If a restraint is naked or clearly overbroad, that is, if it fails steps two or three, a court can safely condemn it without a market power inquiry. In such cases these restraints cannot aid productive activities, but may well enable defendants to restrict output and control prices. Even if such restraints do no harm, they can do no good.⁵⁵⁷ Thus, summarily prohibiting them does not impinge upon the policy goals of the 1890 Congress. A market power inquiry is simply not worth the added uncertainty and expense.

551. See Easterbrook, *supra* note 183, at 23.

552. See R. BORK, *supra* note 37, at 123-29; Easterbrook, *supra* note 183, at 11-12.

553. See 104 S. Ct. at 2966-77; see also *supra* text accompanying notes 536-538.

554. See *supra* text accompanying notes 100-123.

555. See *supra* text accompanying notes 404-412.

556. Clark, *supra* note 29, at 1152, 1156; Easterbrook, *supra* note 183, at 20-21.

557. R. BORK, *supra* note 37, at 268-70; Easterbrook, *supra* note 183, at 17.

This is true, however, only so long as there is minimal risk of erroneously condemning reasonably ancillary restraints under steps two and three, and businesses and their legal advisors recognize this risk to be low.⁵⁵⁸ Otherwise, these steps would result in an uncertain application that might dissuade businesses from undertaking the beneficial restraints that the Fifty-first Congress wished to permit. These conditions thus make necessary the presumption of reasonableness under step three for restraints that pass step two, which I explained above.⁵⁵⁹

The reasonableness test of *NCAA*, by contrast, is quite likely to condemn harmless, and possibly productive, restraints. As previously noted, *NCAA* would condemn some restraints without requiring a showing of market power.⁵⁶⁰ In these cases, defendants bear the burden of demonstrating the restraint's business justifications, that is, both the necessity for its use and its effectiveness.⁵⁶¹ As one commentator has aptly observed, *NCAA* mandates "an approach under which defendants will find it hard to prevail."⁵⁶² Consequently, the *NCAA* approach will deter the creation of not only the output restrictive practices condemned by the 1890 Congress, but also the joint productive enterprises it favored.

NCAA's overdeterrence is consistent with the expansion of Sherman Act liability that began with the Roosevelt Court and has continued to the present.⁵⁶³ The proposal presented here, on the other hand, essentially would restrict Sherman Act liability to cartel activities and those modern-day practices that are analogous to the monopolistic mergers that triggered the Act's passage. This proposal, however, does not jettison the current approach merely to simplify Sherman Act doctrine. Rather, the simplification of doctrine is necessary to adhere to the policy choices of the 1890 Congress.⁵⁶⁴

3. *Restraints Imposed to Achieve Noneconomic Goals*

a. *The Current Uncertainty*

Defendants often attempt to justify output-restrictive restraints on the ground that they only regulate conduct in furtherance of some widely-approved social goal. The courts, because of their reluctance to strike down self-regulation that they perceive to be in the public interest, have upheld such restraints under two rationales. Many courts have held that activities so regulated do not fall within the "trade or commerce"

558. See *supra* text accompanying notes 336-339.

559. See *supra* text accompanying notes 419-440.

560. See *supra* text accompanying note 546.

561. *NCAA*, 104 S. Ct. at 2967-68 (necessity); 2969-70 (effectiveness). See Hutchinson, *supra* note 236, at 111.

562. Hutchinson, *supra* note 236, at 111.

563. See *supra* text accompanying notes 228-236.

564. See *supra* text accompanying notes 554-559.

threshold of section 1.⁵⁶⁵ Other courts, while applying the Act to such activities, have achieved the same result by accepting noneconomic arguments that the regulation restrained only undesirable competition.⁵⁶⁶ While pre-*NCAA* decisions apparently disapproved of both approaches,⁵⁶⁷ the lower courts often continue to ignore traditional anti-trust standards in assessing professional and educational self-regulatory restraints.⁵⁶⁸

The *NCAA* decision, if anything, added to the uncertainty by not squarely indicating whether social concerns are relevant to the validity of

565. The courts were especially likely to find the activities of professions to be different from ordinary business callings and not covered by § 1's proscriptions. *See, e.g.,* *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958). *See generally*, Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570, 571-92 (1975); Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities*, 82 YALE L.J. 313 (1972). Educational self-regulation, especially accreditation, was another "noncommercial" activity widely deemed beyond the scope of the Sherman Act's proscriptions. *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.* 432 F.2d 650, 654 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

566. *See infra* note 568.

567. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court held that there was no exception for the professions, using sweeping language which suggested that educational self-regulation also is subject to Sherman Act scrutiny. *Id.* at 786-88. *See also NCAA*, 104 S. Ct. at 2960 & n.22 ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities. . . ." (citing *Goldfarb*)). In *Professional Engineers*, the Court summarily rejected a professional association's attempted justification of its ethical canon against competitive bidding as promoting public safety, stating that the "purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest." 435 U.S. at 692. The Court thus apparently precluded nonefficiency defenses for restrictive self-regulation. Indeed, the Court stated that the defendant's attempt to justify its restriction "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

Taken together, the two opinions indicate that self-regulation which restrains trade is illegal unless it also promotes competition, that is, unless it has an efficiency justification. *See Professional Engineers*, 435 U.S. at 700-01 (Blackman, J., concurring in part). As Professor Handler has written, *Professional Engineers* "suggests that there is no balance to be struck if a professional canon suppresses rather than promotes competition. . . . The rule of reason provides no shelter for regulations which eliminate competition, however worthy may be their objectives." Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1369 (1978) (footnote omitted).

568. Typical is *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975), which upheld the NCAA's bar of the plaintiff from his college's ice hockey team, holding that any restrictive effect of the NCAA's eligibility rules was "merely the incidental result of the organization's pursuit of its legitimate goals." *Id.* at 304. The court characterized these goals as "to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions." *Id.* The lower courts have endorsed colleges' efforts "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975). Lower court opinions have continued to rely, at least in part, on these noneconomic "legitimate objectives" despite the apparent disapproval of this approach in *Professional Engineers*. *See, e.g.,* *Justice v. NCAA*, 577 F. Supp. 356, 382-83 (D. Ariz. 1983); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 610, 494-95 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984).

such restraints. To be sure, its language is generally consistent with the holding of *Professional Engineers* that only procompetitive justifications can save restrictive self-regulation.⁵⁶⁹ The Court expressly justified application of the rule of reason on the rationale that the NCAA's restrictions on televising enabled it to "market a particular brand of football."⁵⁷⁰ Significantly, however, Justice Stevens's majority opinion did not dispute—it merely ignored—the passage in Justice White's dissent that characterized the NCAA's regulatory program as essentially noneconomic.⁵⁷¹ Nor did it address White's argument that "neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote."⁵⁷² Moreover, the majority opinion cited approvingly the same lower court decisions relied upon by White. These cases had focused on the NCAA's noneconomic goals, as opposed to any procompetitive justifications for its conduct.⁵⁷³

More importantly, in dicta the majority approved some of the NCAA's other restrictive regulations—although not challenged in the case—without subjecting them to the competitive balancing given the television plan.⁵⁷⁴ The Court's willingness to bestow its imprimatur on these regulations suggests that it found these rules, unlike the television plan, to be reasonable examples of noneconomic regulation. This message appears between the lines of the Court's references to the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports," the necessity that it have "ample latitude to play that role," and the belief "that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics."⁵⁷⁵

It would not be surprising if the lower courts follow the Supreme Court's lead in self-regulation cases, creatively finding a permissible busi-

569. In fact, the Court rejected one NCAA justification, the protection of the live gate from televised competition, as "inconsistent with the basic policy of the Sherman Act." *NCAA*, 104 S. Ct. at 2969 (citing *Professional Engineers*, 435 U.S. at 696.)

570. *NCAA*, 104 S. Ct. at 2961. The Court characterized college football as a brand whose identification "with an academic tradition differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball." *Id.*

571. *Id.* at 2971-72 (White, J., dissenting) (quoting *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984)).

572. *NCAA*, 104 S.Ct. at 2978.

573. *Id.* at 2961 & n.24 (majority opinion); 2972 (White, J., concurring).

574. The Court opined that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams," specifically including regulations concerning "the eligibility of participants." *Id.* at 2969.

575. *Id.* at 2971.

ness justification for self-regulation that they really approve of for social reasons, and invoking the *Professional Engineers* "competitive impact only" rule for self-regulation they find unreasonable. This process cannot produce an internally consistent body of precedent or a determinate set of legal principles.

b. The Proposed Approach

Under my proposal, courts would assess self-regulation as the Supreme Court assessed the rule against competitive bidding in *Professional Engineers*. A professional or business group's restraint of trade is naked if unrelated to a productive business transaction. This is so regardless of the group's putative social goals for imposing it. As in *Professional Engineers*, nonproductive justifications would be irrelevant as a matter of law.⁵⁷⁶

The rationale behind this rule is simple. Courts cannot pick and choose among noneconomic policy arguments, permitting some and condemning others, without engaging in inappropriate legislative policymaking. Nor can courts achieve consistent results with such a process.

Self-regulation by true nonprofits, on the other hand, would not trigger scrutiny under the Act at all. Under my proposal the Act covers only commercial activities carried on for profit.⁵⁷⁷ The acts of educational accrediting bodies, for example, would be immune from antitrust challenge. This restriction of the Act's coverage comports with the intent of the 1890 Congress to act only against business practices, and would alleviate much of the incentive for courts to torture the rule of reason in the process of justifying those private social regulations of which they approve.

B. Vertical Restraints

1. The Current Approach

Because all manufacturer-imposed restraints accompany the team efforts of a manufacturer and a distributor to market the manufacturer's products, all such restraints are arguably ancillary to joint productive activity.⁵⁷⁸ The courts have not adopted this view. Rather, they have judged such restrictions under traditional per se and rule of reason standards, which has led to illogical and inconsistent results.

The most notorious example of this tendency is the Supreme Court's inconsistent treatment of price and nonprice vertical restraints. There is

576. *Professional Engineers*, 435 U.S. at 694-96.

577. See *supra* text accompanying notes 461-475.

578. Butler & Baysinger, *supra* note 408, at 1056-99 (vertical restraints used by manufacturer to achieve benefits of integrated distribution at less cost).

no difference in economic impact between the two, just as there is none between horizontal market division and price fixing.⁵⁷⁹ Nevertheless, the Court has attempted to draw lines. Resale price maintenance schemes are illegal per se.⁵⁸⁰ Originally, nonprice vertical restraints were judged under the rule of reason.⁵⁸¹ Later, the Court held them per se illegal when the goods were sold, and subject to the rule of reason when consigned.⁵⁸² Presently, the Court has returned to the rule of reason for all nonprice cases.⁵⁸³

The distinction between price and nonprice vertical restraints is often unclear. As the Supreme Court acknowledged in *Monsanto Co. v. Spray-Rite Service Corp.*,⁵⁸⁴ "judged from a distance, the conduct of the parties in the various situations can be indistinguishable. . . . [I]t is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in distributors' resale prices."⁵⁸⁵ As a result, despite *Monsanto's* purported tightening of the evidentiary standard for proving the existence of an agreement on resale prices,⁵⁸⁶ a manufacturer always runs the risk that a court will find that its vertical nonprice restrictions amount to an illegal price fixing scheme. This apparently happened in *Monsanto* itself.⁵⁸⁷

Even after a court classifies a distribution system's restrictions as nonprice restraints, their ultimate lawfulness remains uncertain. As Posner and Easterbrook have demonstrated, there simply is no agreed-

579. See R. BORK, *supra* note 37, at 280, 285, 288-98; Posner, *supra* note 426, at 8-14; Liebel, *supra* note 312, at 388-91. But see Gerhart, *supra* note 313, at 430-38.

580. In the recent *Monsanto* case, the Antitrust Division, as *amicus*, requested the Supreme Court to overturn the resale price maintenance rule first established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The Court expressly declined to reconsider the doctrine, on the ground that neither party to the case had requested it. It then applied the per se rule to uphold a \$10,500,000 verdict. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1467, 1469 & n.7, 1471-73 (1984). See Hutchinson, *supra* note 236, at 121-22.

581. *White Motor Co. v. United States*, 372 U.S. 253, 260-63 (1963).

582. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

583. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-59 (1977).

584. 104 S. Ct. 1464 (1984).

585. 104 S. Ct. at 1470.

586. The Court held that a resale price agreement could not be inferred from the mere existence of dealer complaints about price-cutting activities of a dealer, followed by the termination of that dealer in response to those complaints. *Id.* at 1470-71. Instead, "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 1471.

587. The Court applied its new standard to affirm a \$10,500,000 verdict against *Monsanto* on quite thin evidence. This "cast a shadow over how great a change in the law it was actually effecting." Hutchinson, *supra* note 236, at 120. Other commentators agree that *Monsanto* affirmed on the basis of very skimpy evidence of a vertical price agreement, and that this affirmation undercut the Court's proffered rationale for adopting its new standard. See, e.g., Brett, *Monsanto: Great Expectations Unfulfilled*, 30 ANTITRUST BULL. 39, 53-54 (1985); Calvani & Berg, *supra* note 269, at 1195-97; Marks & Jacobson, *Price-fixing: An Overview*, 30 ANTITRUST BULL. 199, 244 (1985).

upon rule of reason standard for judging vertical restraints.⁵⁸⁸ The Supreme Court has supplied none,⁵⁸⁹ and the lower courts have suggested conflicting methodologies.⁵⁹⁰ The commentators' proposals cover the entire spectrum from per se legality for all distributional restraints to per se illegality for the more restrictive "airtight" nonprice restraints.⁵⁹¹

Finally, even if the Supreme Court were to formulate a single rule of reason methodology for all the circuits, there is no guarantee, if *NCAA* is any indication, that it would select a coherent operational methodology that offers predictable results.

2. *The Proposed Approach*

My proposal treats price and nonprice vertical restraints alike. No restraint employed in a marketing system would be per se illegal. All such restraints arguably facilitate joint marketing and distribution, and thereby would pass step two. Analysis would proceed in all cases under step three, to determine whether the restraints reasonably promote these productive purposes.

Step four would not apply in vertical cases. It imposes liability only when a challenged restraint produces monopoly power under section 2 standards. Thus, while an effective vertical restraint may enable a manu-

588. Easterbrook, *Vertical Arrangements*, *supra* note 9, at 153-57; Posner, *supra* note 199, at 14-18.

589. Pitofsky, *supra* note 199, at 11; Posner, *supra* note 199, at 14-18.

590. See Posner, *supra* note 199, at 16-18.

591. Compare R. BORK, *supra* note 37, at 297 (should be per se legal); Easterbrook, *Vertical Arrangements*, *supra* note 9, at 135 (same), and Posner, *supra* note 579, at 6 (same), with Pitofsky, *supra* note 199, at 27-34 (per se illegality for "airtight" restraints). Other proposals fall in the middle. See, e.g., Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and Sylvania*, 64 IOWA L. REV. 461, 513-16 (1979) (plaintiff's showing that restraint substantially eliminates intrabrand competition should shift burden to defendant to demonstrate restriction reasonable and for proper business purpose, a demonstration plaintiff may rebut by showing improper ends, that less restrictive alternatives exist, or harmful effects on interbrand competition); Flynn, *The Function and Dysfunction of Per Se Rules in Vertical Market Restraints*, 58 WASH. U.L.Q. 767, 790 (1980) (presumptively illegal, rebuttable by showing of "objective need to provide significant point of sales services, efficiently market a product, gain entry into a market, or protect public health or safety," as long as restraint is "no more restrictive than objectively necessary."); Meehan & Lerner, *A Proposed Rule of Reason for Vertical Restraints on Competition*, 26 ANTITRUST BULL. 195, 223-24 (1981) (presumptively lawful, rebuttable by plaintiff's showing that restraint supports cartel price-fixing or forecloses entry); Stewart & Roberts, *Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?*, 58 WASH. U.L.Q. 727, 758-59 (1980) (legality should depend on (a) degree of restriction of intrabrand competition and (b) market position of manufacturer); Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania*, 68 CALIF. L. REV. 13, 46-47 (1980) (presumptive illegality if imposed by core members of "tightly knit oligopoly" which may be rebutted only by showing that company is failing or that "extracompetitive interests" are served by restraint); Note, *A Uniform Rule of Reason for Vertical and Horizontal Nonprice Restraints*, 55 S. CAL. L. REV. 441, 465-66 (1982) (presumptive illegality, rebuttable by showing that restraint is least restrictive means of achieving legitimate business purpose).

facturer to differentiate its product so as to pull away consumers from substitute competing brands, the manufacturer's increased market power would nonetheless not constitute monopoly power under section 2 standards. As the Court stated in *United States v. E. I. du Pont de Nemours & Co.*,⁵⁹² the "monopoly" a firm has over its own branded products is not the monopoly power necessary to establish Sherman Act liability.⁵⁹³

Moreover, step four would have no bearing whatsoever on the distributional restraints themselves. Step four applies only to restraints which directly cause monopolization. Distributional restraints do not work this way. Rather, by reducing intrabrand competition, they provide incentives for dealer promotion and services, which in turn makes the product more desirable to consumers. It is this increased desirability, as opposed to the restraint which generates it, that gives the firm greater power.⁵⁹⁴

This proposal does not go as far as those of Posner, Bork and Easterbrook, who argue that all manufacturer-imposed distributional restraints should be per se lawful.⁵⁹⁵ Regardless of the merits of their views, my proposal recognizes that judicial implementation of them would entail improper policymaking. Because vertical restraints come within the definition of restraint of trade,⁵⁹⁶ they should be subject to the same rules as other restraints. The practical difference between my approach and theirs is probably not significant, however. Few, if any, manufacturer-imposed restraints would fail my proposed tests.

C. Tying

1. The Current Approach

The Supreme Court's most recent tying case, *Jefferson Parish Hospital District No. 2 v. Hyde*,⁵⁹⁷ vividly illustrates the uncertainty of current tying doctrine. The traditional rule of per se condemnation escaped obliteration by a single vote.⁵⁹⁸ Moreover, the majority's affirmance of that rule⁵⁹⁹ only emphasized the difficulties inherent in its application.

592. 351 U.S. 377 (1956).

593. *Id.* at 393 ("power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly").

594. See R. BORK, *supra* note 37, at 290-91, 296.

595. See *supra* note 591.

596. See 1 E. KINTNER, *supra* note 29, at 99-101 (common law on vertical restraints).

597. 104 S. Ct. 1551 (1984).

598. *Id.* at 1556-58 (majority retaining per se rule); 1569 (concurring opinion arguing for rule of reason).

599. Several commentators have read *Hyde* as having "removed tying arrangements in all but name" from the per se category. Easterbrook, *supra* note 183, at 10. Professor Hutchinson, for example, states that "it is hard to imagine what tying arrangements will fall within the narrow and internally inconsistent test that Justice Stevens created for the per se rule." Hutchinson, *supra* note 236, at 134-35.

I can imagine some. Tying arrangements involving patented or copyrighted products would

First, the majority attempted to devise a workable test for determining whether the defendant sold two tied products or merely a single package product.⁶⁰⁰ It is beyond the scope of this article to comment on the success of that attempt. Suffice it to say that courts⁶⁰¹ and commentators⁶⁰² have not agreed on a solution to this problem in the thirty years

come under Justice Stevens's test, as Stevens expressly cited the Court's prior patent and copyright tying cases. See *infra* notes 610-11 and accompanying text. Stevens's opinion also did not preclude per se treatment of trademark tying claims. While he did not mention trademarks as a source of power over the tying product sufficient to invoke the per se rule, neither did he reject those lower court cases that *had* so held. These cases applied the logic of the patent and copyright holdings Stevens did mention. See, e.g., *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 725 (7th Cir. 1979) (rejecting Fotomat's argument that it lacked economic power in tying product, the franchise trademark), *cert. denied*, 445 U.S. 917 (1980); *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002, 1015 (5th Cir. 1972) (trademark is "persuasive evidence of significant market leverage"), *cert. denied*, 409 U.S. 1086 (1972); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 50 (9th Cir. 1971) (trademark presents barrier against competition), *cert. denied*, 405 U.S. 955 (1972).

Tying claims in which the defendants' share of the market for the tying product is greater than the 30% share in *Hyde*, but less than a "dominant position" share, also are not ruled out. See *infra* notes 605-607 and accompanying text. The fact that some market power showing is now necessary to invoke the per se rule does not transform it into a rule of reason. Even under *Northern Pacific*, some showing of power over the tying product was required. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 7 (1958). There cannot be a tie at all if the allegedly tying product is available from others on equally attractive terms. The question is what showing will establish that power. While both *Hyde* and *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 487 (1977) (*Fortner II*) seem to indicate that the Court's patent, copyright, and other "uniqueness" doctrines will not be extended, nowhere do they indicate that they will be cut back.

Once the plaintiff establishes the defendant's power over the tying product and makes the traditional showing that "a substantial volume of commerce is foreclosed thereby," 104 S. Ct. at 1560 (citing cases), *Hyde* authorizes per se condemnation, without any showing of anticompetitive effects in the market for the tied product or any inquiry into possible efficiency justifications. This is no rule of reason. The more realistic reading of the opinion is that, as I have suggested earlier, it has a split personality. See *supra* notes 255-268 and accompanying text; see also Hutchinson, *supra* note 236, at 130 ("opinion strains so hard to preserve the per se rule and at the same time to adopt a sophisticated market analysis"), 135 ("Two forces seems to be at work in the *Hyde* majority . . ."). Judges who, like Justices Brennan and Marshall, like the old, more expansive rule against tie-ins, see *id.*, will continue to use that rule, citing *Hyde*'s "reaffirmation" of the old precedents. Other judges may cite the commentators' readings of *Hyde* and disregard the old precedents. The resulting division among the lower courts will cause further uncertainty in tying doctrine.

600. *Hyde*, 104 S. Ct. at 1561-65.

601. The confusion of the lower courts over the separate product issue is documented in ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 77-81 (2d ed. 1984).

602. See, e.g., Ross, *The Single Product Issue in Antitrust Tying: A Functional Approach*, 23 EMORY L.J. 963, 1014 (1974) (proposed test: single product if components either (1) are independently capable of performing same function, (2) are in combination authorized by another federal statute, or (3) are normally used in fixed proportions); Turner, *supra* note 434, at 72 (suggesting as one, "though not the only test," that "sale of items used in fixed proportions might be deemed prima facie the sale of a single product; the combined sale of items used in variable proportions, prima facie a tie-in of different products."); Wheeler, *Some Observations on Tie-ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557, 1572-73 (1972) (proposing that if items are produced and sold as single unit for some purposes, for example, car with spark plugs, but sold separately for other purposes, for example, replacement spark plugs, consider combination single product for first purpose but not second); Note, *Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws*, 46 S. CAL. L. REV. 160, 165-69 (1972) (would find separate products if (1) seller's competitors in either

since the single-product defense first appeared in *Times-Picayune Publishing Co. v. United States*.⁶⁰³ This rift is most apparent in *Hyde* itself, where the four-Justice concurrence employs its own test to reach the opposite of the conclusion reached by the majority.⁶⁰⁴

Second, the degree of market power over the tying product necessary to invoke the per se rule remains unclear. The Court deemed the *Hyde* defendants' thirty percent share insufficient,⁶⁰⁵ suggesting that the power requirement may be the same as that of section 2. Yet Justice Stevens's majority opinion did not repudiate his statement in *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*,⁶⁰⁶ again for the majority, that the Supreme Court's tying cases "do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product."⁶⁰⁷

Indeed, in *Hyde* Stevens cited this line of older cases with approval.⁶⁰⁸ Yet he refused to apply their logic which the lower court did apply, holding that, because "patients tend to choose hospitals by location rather than price or quality," the defendant's unique location gave it substantial market power.⁶⁰⁹ In the Court's older cases, uniqueness was sufficient to establish the requisite power. The uniqueness might come from a patent,⁶¹⁰ copyright,⁶¹¹ "strategically located" land holdings,⁶¹² or an "advantage not shared" by other sellers "differentiating his product."⁶¹³ Thus, *Hyde* leaves unclear both when uniqueness will satisfy the power requirement, and, when it will not, just what degree of market power will.

The *Hyde* majority exacerbated this uncertainty by insisting on retaining the per se rule. The fact is that tying arrangements are not naked restraints,⁶¹⁴ as the Court believed them to be in the cases that

line offer it separately, and (2) used in variable proportions, and (3) seller makes profit on both items); Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861, 863-67 (1970) (endorsing judicial tests holding single product where (1) two separate products so closely related as to be considered a unit and (2) even if clearly distinct items, good economic reasons for packaging exist).

603. 345 U.S. 594, 613-14 (1953).

604. *Hyde*, 104 S. Ct. at 1574-75 (1984) (O'Connor, J., concurring).

605. *Id.* at 1566-67.

606. 429 U.S. 487 (1977).

607. *Id.* at 620.

608. *Hyde*, 104 S. Ct. at 1560-61.

609. *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286, 290 (5th Cir. 1982), *rev'd*, 104 S.Ct. 1551 (1984).

610. See *International Salt Co. v. United States*, 332 U.S. 392 (1947).

611. See *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

612. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 7 (1958).

613. *Fortner II*, 429 U.S. at 620.

614. See *infra* note 620.

established the rule.⁶¹⁵ Because the per se rule permits no direct consideration of either the business justifications for the tie-in or its lack of anticompetitive effects in the market for the tied product, analysis must focus on the difficult issues of whether there is a single product and whether there is market power over the tying product. Defendants have prevailed in the lower courts by making a rule of reason presentation in the guise of a single-product defense.⁶¹⁶ While this may produce correct results in many cases, it engenders confusion among the circuits.

The uncertainty of current tying doctrine chills tying arrangements that produce cost savings but do not threaten to monopolize the market for tied products. The per se approach thus clearly is inconsistent with the 1890 Congress's basic policy choice to permit combinations in aid of production which do not create monopoly power.

2. *The Proposed Approach*

Under my proposal, step one would replace the confusing single-product issue. The threshold question would no longer be whether the seller offered one or two products, but whether the buyer agreed not to purchase goods from a third party. This would be the case where the buyer agreed to limit its subsequent purchases to the seller's products.⁶¹⁷ Such an agreement is a contract in restraint of trade.

The harder case, of course, is where the buyer merely agrees to accept a package product which, as a practical matter, precludes the buyer's purchase of third-party goods. This is the situation in which single-product issues arise today. Unfortunately, the single-product inquiry cannot resolve all such cases. For example, it is impossible to say whether a pair of shoes is one product or two.

My proposal recognizes that the single-product inquiry has no foundation in section 1.⁶¹⁸ That statute forbids contracts in restraint of trade, not the packaging of components. The proper inquiry is thus whether the

615. See *Northern Pac. Ry. Co.*, 356 U.S. at 6 (1958); *Times-Picayune*, 345 U.S. at 605; see also *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949) (dictum).

616. See, e.g., *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980) (franchise agreement's premises, lease and security deposit), *cert. denied*, 451 U.S. 970 (1981); *Foster v. Maryland State Sav. and Loan Ass'n*, 590 F.2d 928, 930-33 (D.C. Cir. 1978) (attorney's fees under crediting agreement), *cert. denied sub nom Foster v. Maryland Fed. Sav. and Loan Ass'n*, 439 U.S. 1071 (1979); *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214, 1216 (8th Cir. 1972) (advertising incident to franchise agreement).

617. See, e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936).

618. Neither is it the correct question for tying cases under § 3 of the Clayton Act, 15 U.S.C. § 14 (1985), which applies only to sale or lease transactions entered into by the seller or lessor "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller." *Id.*

seller restrains the buyer from making subsequent purchases from third-party sellers, by either an express agreement to purchase only from the seller or a long-term requirements contract that achieves the same result. Whether the seller's package constitutes one or two products is irrelevant to this inquiry. The buyer's decision to purchase the seller's package remains his unilateral business decision, based on his judgment that the package is a better deal than alternatives offered by others.

This decision is functionally indistinguishable from a decision to buy both components separately from the seller. In each case, the buyer purchases the package he desires on the basis of price and quality, even if the seller has some power over the tying product. Except in specific instances,⁶¹⁹ the seller's package price is equal to the sum of the prices it could command for the products sold separately.

If there is an agreement in restraint of trade, step two would come into play. The overwhelming weight of numerous studies is that most tying arrangements are not naked restraints, but are imposed to forward some productive purpose.⁶²⁰ If the literature is correct, most defendants would be able to demonstrate that their arrangements are arguably ancillary to a productive business transaction, and thereby pass step two scrutiny.

Under step three, plaintiffs would have to demonstrate that the tying arrangement is not reasonably related to its productive purpose. The defendant receives a presumption that such a relationship exists. Again, if the literature on the reasons for tying is correct, most tying arrangements would survive this step.

Finally, while step four conceivably could condemn a tying arrangement where the arrangement had enabled the defendant to monopolize the market for the tied product, I know of no case where such monopolization has actually happened. The literature that is favorable to the existing per se rule cites no such case.⁶²¹ Despite the rhetoric of the leverage theory, it appears that no one has yet employed tying to obtain monopoly power.

The benefits of this approach are readily apparent. Adoption of this

619. Where the seller has some market power over *both* components, as with the copyrighted motion pictures in *United States v. Loew's Inc.*, 371 U.S. 38 (1962) (block booking of copyrighted motion pictures is illegal tying arrangement), a package sale may enable the seller to charge a higher price than the sum of the prices he could obtain if the products were sold separately. See Stigler, *United States v. Loew's Inc., A Note on Block Booking*, 1963 SUP. CT. REV. 152, 153.

620. See, e.g., R. BORK, *supra* note 37, at 375-81; Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 VA. L. REV. 1235, 1257-61, 1275-82 (1980); Easterbrook, *Vertical Arrangements*, *supra* note 9, at 145-46; Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 307-12 (1981); Kenney & Klein, *The Economics of Block Booking*, 26 J. L. & ECON. 497 (1983).

621. See, e.g., C. KAYSEN & D. TURNER, *ANTITRUST POLICY* 157-59 (1959); Kaplow, *supra* note 313.

proposal would greatly simplify section 1 tying analysis.⁶²² Only where a case reached step four would difficult market power questions arise.⁶²³ Moreover, unlike the current per se rule, this proposal would effectuate the basic policy choices of the 1890 Congress, by forbidding only those tying arrangements that are naked or might create a monopoly, while permitting those in aid of production.

CONCLUSION

This Article has shown that current judicial interpretation of section 1 reflects no unifying principle, and thus fails to provide internal coherence among the precedents and, worse yet, any predictable consistency in particular cases. This doctrinal incoherence is the inevitable result of the conventional wisdom that the Sherman Act is no more than a blank check, a standardless delegation to the judiciary to make national microeconomic policy. The inconsistency in individual cases results from the inability of the Supreme Court to perform this policymaking function with any degree of clarity and, to a lesser extent, from its inability to frame tests of liability that noneconomist decisionmakers can implement competently.

This standardless, constitutional approach imposes intolerable costs upon society. Businesses cannot plan effectively. Litigation takes too long and costs too much. Litigants become liable for punitive sanctions without having had fair notice. Worst of all, the constitutional Sherman Act theory requires the judiciary to perform an essentially political task, one which the Constitution's basic separation of powers does not permit.

This Article has proposed abandonment of the constitutional approach to the Sherman Act and a return to proper methods of statu-

622. It also would simplify tying claims under Clayton Act § 3, if courts continued to apply the same legal standards under both statutes. That would be appropriate, despite the conventional wisdom that the Clayton Act was intended to provide stricter prohibitions to tying and exclusive dealing. *See, e.g., Hyde*, 104 S. Ct. at 1557 ("Congress expressed great concern about the anticompetitive character of tying arrangements"); *Standard Oil Co. v. United States*, 337 U.S. 293, 311-14 (1949). While there is no room here for a complete refutation of this argument, I should mention two points. First, the language of § 3 only condemns tying and exclusive dealing arrangements if they "may . . . substantially lessen competition or tend to create a monopoly," a condition that could be satisfied only if they failed step four. Second, the legislative history reveals that § 3 was a classic legislative compromise. The House passed a criminal prohibition of all tying and exclusive dealing arrangements, without the qualifying language just quoted. The Senate passed a bill that prohibited only patent tie-ins. The final language of § 3 came from a conference committee, and was obviously intended to paper over the difference by leaving the treatment of tie-ins to the FTC and the courts with a minimum of statutory direction. *See* 1 M. HANDLER, *supra* note 190 at 412-16.

623. Assuming such a case arose, the plaintiff would have to show that (1) the defendant obtained monopoly power in the tied product's market and (2) that it previously had power in the market for the tying product. Otherwise, the power in the tied product's market could not have been caused by the tying.

tory construction. It has applied these methods to derive a four-step methodology for resolving all section 1 cases. Building on Taft's *Addyston Pipe* decision, the methodology requires a plaintiff to show (1) the existence of a combination, contract or conspiracy in restraint of trade, which covers only those combinations and agreements that actually eliminate unilateral business decisionmaking, *and* (2) that the restraint is naked, that is, not arguably ancillary to a productive business transaction, *or* (3) if arguably ancillary, that it is not reasonably related to achieving that productive business purpose, giving deference to good faith business judgment, *or* (4) even if reasonably ancillary, that it creates monopoly power in the defendants under section 2 standards. The proposal would exclude actions taken by local governments and truly non-profit organizations from the Act's prohibitions.

I have based this proposal upon the policy choices made by the 1890 Congress, the institutional limits of the judiciary, and the requirements of the rule of law. It gives effect to the decision of the enacting Congress to federalize the common law of trust regulation as it then existed, specifically by providing a mechanism for the courts to "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade"⁶²⁴ with a reasonable degree of predictability and consistency. This mechanism would reduce the costs of the current approach to a tolerable level, while leaving Congress and the Federal Trade Commission free to prohibit further conduct to the extent these politically responsible bodies choose to do so.

In sum, this proposal attempts to transcend the current debates over the proper goals of antitrust and the economic effects of market structure. It adheres to other, more important values which should inform any effort to construe section 1, particularly the rule of law and the proper role of the judiciary under the Constitution. It is time that these values be given effect in Sherman Act adjudication.

624. 21 CONG. REC. 2456 (1890), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 29 at 115 (statement of Senator Sherman).