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The Supreme Court and Antitrust Analysis: The Near Triumph of the Chicago School

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Since the Sherman Act was passed in 1890,[1] the Supreme Court has struggled to find an appropriate analytical and methodological framework for applying the federal antitrust laws. For a while, it appeared as if the Court might succeed. In a series of six cases since 1975,[2] the Court seemed to be moving toward a comprehensive, integrated antitrust methodology based on economic analysis and largely following the writing of Chicago school scholars such as Robert Bork[3] and Richard Posner.[4] Last Term, however, in *Arizona v. Maricopa County Medical Society*,[5] the Court missed a

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[1] 15 U.S.C.A. §§ 1–7 (1980).

[2] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979); Reiter v. Sonotone Corp., 442 U.S. 330 (1979); and Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

[3] BORK, THE ANTITRUST PARADOX (1978); Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division* (pts. 1–2), 74 YALE L.J. 775 (1965); 75 YALE L.J. 373 (1966).

[4] POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 147–67 (1967); POSNER & EASTERBROOK, ANTITRUST (2d ed. 1981). See also Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

[5] 102 S. Ct. 2466 (1982).

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significant opportunity to complete its methodological framework, and in doing so, made antitrust analysis once again confused and haphazard.

This development is unfortunate. There is a central analytical model underlying the antitrust laws, and the Supreme Court has a special responsibility to identify and to articulate that model in order to increase the coherence, rationality, and predictability of antitrust analysis. *Maricopa* provided the Court with a splendid opportunity to do so, and the Court's failure to capitalize on that opportunity is dispiriting, even though the plurality decision may be short-lived.

I. The Chicago School and Antitrust Analysis

Sound antitrust analysis must address two interrelated tasks. The first task is substantive: to identify accurately legislative purposes of the antitrust laws. This is difficult enough, but it is complicated by a second, procedural task: to find an appropriate balance between certainty and fidelity to legislative purpose and to fashion rules of conduct that are reasonably clear, precise, and easily applicable without sacrificing substantive antitrust values. Because the search for an accurate definition of antitrust values takes place in a legal system that promotes clarity, precision, and ease of applicability, the tensions between fidelity and certainty are great, creating the danger, evident in the history of antitrust doctrine, that more weight will be given to promoting certainty than is warranted.

Prior to *Maricopa*, the Supreme Court had begun to embrace two postulates suggested by Chicago school scholars that would minimize the conflicts between the goals of certainty and fidelity. The first postulate, one advocated by Robert Bork as early as 1965,[6] is to restore the per se rule as a component of substantive antitrust analysis. This postulate is of immeasurable importance. When per se rules are applicable, issues of the purpose and effect of a person's conduct are irrelevant. Almost since their inception, however, the per se rules have been a source of mystery and misunderstanding. Per se rules were often thought of as if they had self-executing

[6] Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965).

applicability to easily recognizable conduct, or as literal statements whose primary function was to add simplicity and certainty to antitrust law. As a result, antitrust analysis was deflected from a consideration of underlying substantive policies to a largely semantic effort to "characterize" conduct, and courts have had inordinate difficulty making and explaining decisions to apply per se rules.

The postulate that the Supreme Court appeared to embrace prior to *Maricopa* would restore the original conception of the scope and role of the per se rules—one that views the rules as a summation of substantive antitrust policy and hence to be applied only after analysis of policy considerations. Were this postulate fully accepted it would be significant. It would mean that decisions to apply a per se rule must be based on the substantive policies of the Sherman Act, rather than on linguistic compartmentalization, requiring courts to examine and explain the substantive policies, and thus enlivening antitrust analysis with new substantive vigor.

A second postulate of the Chicago school writers—a reorientation of substantive antitrust policy around the consumer welfare model—was also endorsed by the pre-*Maricopa* Supreme Court. The Court said that the only relevant question in evaluating a restraint of trade is whether the restraint promotes or suppresses competition.[7] By implication, "competition" is not to be viewed necessarily as a process of independence and rivalry, but as the outcome of a process. The "promote competition" standard is meant to focus on whether business activity promotes consumer welfare by increasing productive and allocative efficiency, and it is to be guided by economic analysis.[8]

Were this development continued, it, too, would be immensely significant. The promote/suppress standard is an important and relatively objective synthesizing principle that allows antitrust analysis to cut through overlapping verbal categories to a realistic appraisal of the possibility that business conduct will promote efficiency. Indeed, the "promote competition" standard is a simplifying and clarifying concept. As the Supreme Court appeared to recognize, combinations in restraint of trade possibly promote competition under three circumstances—when there is integration to

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[7] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).

[8] The consumer welfare model is discussed in the text accompanying notes 48–52 *infra*.

efficiency; when the combination overcomes a problem of externalities such as the free-rider problem; and when a combination reduces transaction costs. These three circumstances define the range of cases not covered by a per se rule.

II. The First Postulate: The Role of Per Se Rules

Despite their many benefits, per se rules have been an inadequate component of antitrust analysis, because no coherent theory has existed for determining when the rules were to be applied. This significant deficiency reflects confusion about the role of per se rules and misunderstanding of the substantive antitrust policy that underlies the rules.

Per se rules, which are said to be applicable to price fixing, division of markets, horizontal group boycotts, and tying agreements, encapsulate a conclusion that identified conduct is so inherently anticompetitive or so devoid of redeeming virtues that the conduct is unlawful in and of itself, without regard to the effect of the conduct or the purpose of those engaging in it.[9] Under per se rules, both anticompetitive purpose and anticompetitive effect are conclusively presumed to exist once the forbidden conduct is proven, so that proof of the forbidden conduct is by itself proof of an antitrust violation. In contrast, if a per se rule is not applied, the case must be tried under the rule of reason, which requires the plaintiff to prove the anticompetitive purpose or effect of the conduct and which permits the defendant to prove that the conduct achieves legitimate competitive goals.[10]

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[9] The classic summary of per se rules is from Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, . . . division of markets, . . . group boycotts, . . . and tying arrangements" (citations omitted). There are many scholarly discussions of the scope and function of per se rules, *e.g.*, Elman, *"Petrified Opinions" and Competitive Realities*, 66 COLUM. L. REV. 625 (1966); Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964); von Kalinowski, *The Per Se Doctrine—an Emerging Philosophy of Antitrust Law*, 11 U.C.L.A.L. REV. 569 (1964); Rahl, *Per Se Rules and Boycotts under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959); Rahl, *Price Competition and the Price Fixing Rules—Preface and Perspectives*, 57 NW. U.L. REV. 137 (1962); Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose or Effect*, 19 U. CHI. L. REV. 837 (1952); KAYSEN & TURNER, ANTITRUST POLICY 142–44 (1959).

[10] *E.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

Because they simplify antitrust doctrine, per se rules often promote such important enforcement goals as ease of application, deterrence, and predictability.[11] The certainty provided by the rules, however, is often illusory. Although the per se rules tell a court that issues of purpose and effect are irrelevant to a case in which the rule is applied, no decision to apply a per se rule can be made until after analysis, however rudimentary, of whether the rule should be applied. In all but the easiest cases, the determination whether to apply the rule has been troublesome, largely because few coherent, consistent standards have existed for making that determination.

Although the per se rules are usually stated as if they were self-executing, they are not.[12] The per se rule covering tying arrangements, for example, is not applied until several issues of purpose and effect are determined.[13] The per se price-fixing rule is strong but not omnipotent: when independent firms agree to reduce competition between themselves, without doing more, their conduct is doubtless unlawful,[14] but not all conduct that might literally or

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[11] *E.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958): "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

[12] A similar point is made in Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division*, 74 YALE L.J. 775, 777 (1965): "The current shibboleth of per se illegality in existing law conveys a sense of certainty, even of automaticity, which is delusive. The per se concept does not accurately describe the law relating to agreements eliminating competition as it is, as it has been, or as it ever can be. Alongside cases announcing a sweeping per se formulation of the law there has always existed a line of cases refusing to apply it. Doubtless some of the cases in the latter group were wrongly decided, but it would be naive to write them all off as simply incorrect or aberrational. The persistent refusal of courts to honor the literal terms of the per se rules against price-fixing and market-division agreements demonstrates a deep-seated though somewhat inarticulate sense that those rules, as usually stated, are inadequate."

[13] The per se rule is applied only if the seller is selling two separate products, the tying product is unique or has market power, and a not insubstantial amount of commerce in the tied product is foreclosed. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) *(Fortner I)*; United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) *(Fortner II)*. Moreover, the per se rule is not applied if the combined selling of two products is essential to the seller's goodwill. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

[14] The price-fixing per se rule applies to agreements between unintegrated competitors concerning credit terms, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); contractual terms with customers, Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (arbitration clauses), United States v. First National Pictures, Inc., 282 U.S. 44 (1930) (completion of existing contracts and cash deposits); discounts, United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957);

even analogically be characterized as price fixing is price fixing subject to the per se rule.[15] Similarly, the per se rule applicable to horizontal group boycotts is so riddled with exceptions that it is difficult to restate the rule in a meaningful way.[16]

The per se rules became defective because they lost touch with the substantive policy that prompted their formulation. As a result, the characterization process—the process of determining whether the conduct challenged in a lawsuit should be characterized as, for example, price fixing subject to the per se rule—is often guided by analytical methods that bear no relationship to relevant substantive criteria.[17] Even those cases that have correctly avoided the heavy hand of the per se rules—and there are many[18]—have been forced

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United States v. American Smelting & Refining Co., 182 F. Supp. 834 (S.D.N.Y. 1960); markups, Food and Grocery Bureau, Inc. v. United States, 139 F.2d 973 (9th Cir. 1943); trade-in allowances and list prices, Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960); and trading stamps, United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961). It applies to agreements between unintegrated competitors not to advertise, United States v. Gasoline Retailers Ass'n, Inc. 285 F.2d 688 (7th Cir. 1961); agreements to establish uniform costs on which prices can be based, California Retail Grocers & Merchants Ass'n, Ltd. v. United States, 139 F.2d 978 (9th Cir. 1943); and agreement on terms of purchase, National Macaroni Mfgs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965).

[15] *E.g.*, Broadcast Music Industries, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); Evans v. S. S. Kresge Co., 544 F.2d 1184 (3rd Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953); United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960); Department of Justice, Business Review Letter, August 5, 1980 (granting clearance to cooperative activity with an impact on prices).

The per se rule against vertical price fixing is counterbalanced by the *Colgate* doctrine, United States v. Colgate & Co., 250 U.S. 300 (1919), which permits some refusals to deal with price cutters, and by the doctrine that a seller may determine the prices at which his agents or legitimate consignees sell. Marty's Floor Covering Co., Inc. v. GAF Corp., 604 F.2d 266 (4th Cir. 1979).

[16] Attempts to synthesize the group boycott cases are legion. *E.g.*, SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 229–59 (1977); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); McCormick, *Group Boycotts—Per Se or Not Per Se, That Is the Question*, 7 SETON HALL L. REV. 703 (1976); Barber, *Refusals to Deal under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

[17] Without workable criteria for applying the per se rules, antitrust litigation often centers on an elaborate semantic game: for example, a court or advocate wishing to avoid the per se rule against group boycotts must argue either that the conduct is not a boycott (when in fact it is) or that it is a boycott, but not the type of boycott that is subject to the per se rule. *E.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978) ("We hold that the NFL player draft is not properly characterized as a 'group boycott'—at least not the type of boycott that traditionally has been held illegal per se"). Neither approach is satisfactory unless the classification decision is based on substantive policy.

[18] *E.g.*, Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

to so torture the relevant doctrine as to make the application of antitrust law appear whimsical,[19] even when it would not be were it freed from the semantic grip of the per se rules. In short, without a theory for determining when the per se rules are to be applied—that is, without attention to the substantive policy that underlies the rules—the rules became formless and opaque.

One of the most ignominious antitrust cases, *United States v. Topco Associates Inc.*,[20] is illustrative. There, the Court applied the per se rule that prohibits division of territories between sellers of different brands (restraints on interbrand competition)[21] to an agreement in which grocery store members of a joint buying agency bound themselves to sell the agency's merchandise (a single brand) in assigned, closed territories (which restrains only intrabrand competition). Despite the district court's thorough rule of reason analysis upholding the restraint,[22] the Supreme Court eschewed any analysis, even analysis to determine whether the per se rule should be applied. The restraint was classified as a horizontal restraint and the Court refused to determine whether the restraint was different from those horizontal restraints subject to the per se rule.[23] The Court should not have applied the per se rule at all. Unlike horizontal interbrand restraints subject to the per se rule, these "horizontal" restraints were primarily intrabrand restraints and were ancillary to the integration of grocery stores in a joint

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[19] Lower federal courts have been ingenious in creating formulas to blunt the force of literal per se rules. Some courts have established prerequisites for a per se rule. Neeld v. National Hockey League, 594 F.2d 1297, 1299 n.3 (9th Cir. 1979) ("*per se* rules have only been applied in the face of arguably demonstrable anticompetitiveness"); Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977) (per se rule not applied in absence of "minimal indicia of anti-competitive purpose or effect"). Still other courts avoid the per se rules by recharacterizing the conduct, *e.g.*, Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368, 379 (5th Cir. 1977) ("We deal here not with tie-ins, whose adverse effects and lack of redeeming virtue are by now quite familiar, but instead with approved source requirements"). Other courts practice benign neglect of per se rules, *e.g.*, Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (6th Cir. 1980).

[20] 405 U.S. 596 (1972).

[21] *E.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899), *aff'g*, 85 F. 271 (6th Cir. 1898).

[22] United States v. Topco Associates, Inc., 319 F. Supp. 1031 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

[23] The Court's attempt to rely on United States v. Sealy, Inc., 388 U.S. 350 (1967), as a case "on all fours with this case," 405 U.S. 609, is unpersuasive. In *Sealy*, where the territorial restraints accompanied resale price maintenance, the Court had expressly refused to determine the legality of intrabrand territorial restraints standing alone. 388 U.S. at 356.

buying agency, providing a justification that should have taken the restraints out of the per se rule.[24]

In view of the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[25] that nonprice intrabrand restraints imposed vertically are to be judged under the rule of reason, *Topco* should be considered as an endangered species,[26] despite the Supreme Court's dogged attempts to retain it.[27] But the *Topco* outcome—which could have been justified under an appropriate analysis[28]—is less troublesome than the Court's perversion of the per se rules. Virtually every statement concerning the per se rules that the majority made in *Topco* is antithetical to sound antitrust analysis.[29]

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[24] For a fuller discussion of this point, see BORK, THE ANTITRUST PARADOX, 276–77 (1978).

[25] 433 U.S. 36 (1977).

[26] Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUPREME COURT REVIEW 171 (1977); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 6–10 (1977); Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and BMI?* 66 VA. L. REV. 879 (1980).

[27] *E.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57–58 nn.27–28 (1977); Arizona v. Maricopa County Medical Society, 102 S. Ct. 2466, 2473 (1982).

[28] Although Topco members were free to expand into one another's territory if they did not use the profitable Topco brand, the Topco brand may have been so integrated into their operations that the members would not expand territories without it. If that were true, the territorial exclusivity for the Topco brand eliminated interbrand as well as intrabrand competition, and that adverse competitive effect might have outweighed the procompetitive effect of the strong Topco brand. Although the findings of the district court undercut this theory (see finding 45, 319 F. Supp. at 1037), the government's brief plausibly challenged that finding. Brief for the United States 30–33.

[29] According to Justice Marshall, "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant," 405 U.S. at 609. This suggests that cases might be decided differently under the rule of reason than under per se rules, a nonsensical suggestion that one of the rules is irrational. Justice Burger expressed the better view in his dissent: "per se rules that have been developed are . . . directed to the protection of the public welfare; they are complementary to, and in no way inconsistent with, the rule of reason." 405 U.S. 621. Justice Marshall also misperceived the relationship between the Court and Congress. "Should Congress," he said, "ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." 405 U.S. 609–10 n.10. When Congress passed the Sherman Act, however, it did not legislate predictability as a weightier value than fidelity, nor did it explicitly legislate any per se rules, much less the rule applied by the *Topco* majority.

Justice Blackmun, who found the *Topco* result "anomalous" because it would "tend to stultify Topco members' competition with the great and larger chains," nonetheless concurred in the result on the mistaken theory that "[t]he per se rule . . . now appears to be so firmly established by the Court that, at this late date, I could not oppose it." 405 U.S. at 612–13. The per se rule, however, had never been firmly established as to territorial intrabrand restraints. Paradoxically, Justice Blackmun later joined the majority in overturning the established per se rule applicable to vertical nonprice restraints. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

Most significantly, the existence of a per se rule should not, and logically cannot, preclude a court from determining whether the per se rule should be applied. The applicability of the per se rule is not an issue that is foreclosed by the existence of a per se rule. If the characteristics of a case are so different from previous per se cases that the substantive policy embodied in the per se rule is no longer applicable, the rule should not be applied. It makes little sense to invoke the per se rule, as *Topco* did, solely because analysis under the rule of reason is complicated.[30] Whether the per se rule is applicable is not complicated or beyond judicial capacities; that issue should rarely be decided on the basis of the difficulty of the analysis once the rule of reason is invoked. If the per se rule is inapplicable, it is because the conduct is possibly procompetitive, and, under most circumstances, any rational attempt to assess competitive effects would be better than invoking a per se rule that, by ignoring procompetitive effects, will inevitably lead to incorrect results.

Concededly, per se rules rest in part on a judgment that more extensive analysis would not produce a sufficiently more accurate assessment of competitive effects to outweigh the costs of the analysis, including both monetary costs and the cost of uncertainty.[31] A per se rule can therefore be applied whenever a court determines that alternate analysis is unduly costly. The existence of the per se rule, however, does not relieve the court from evaluating the costs and benefits of a more detailed analysis in the case before it. Moreover, although there are undoubtedly situations in which the alleged redeeming virtues of restraints of trade are incapable of being

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[30] As Chief Justice Burger said in his *Topco* dissent: "The issues presented by the antitrust cases reaching this Court are rarely simple to resolve under the rule of reason; they do indeed frequently require us to make difficult economic determinations. We should not for that reason alone, however, be overly zealous in formulating new *per se* rules, for an excess of zeal in that regard is both contrary to the policy of the Sherman Act and detrimental to the welfare of consumers generally." 405 U.S. at 624.

[31] *E.g.*, United States v. Container Corp., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting): "Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative cost of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases"). Similar views are expressed in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977) and KAYSEN & TURNER, ANTITRUST POLICY, 142–44 (1959).

identified and evaluated efficiently,[32] most forms of procompetitive collaboration can be identified and evaluated without undue cost.[33] In those cases, a per se rule should not be applied until the appropriate analysis has been completed.

The Court's pre-*Maricopa* opinions began to reflect a per se rule that was attuned more to fidelity to antitrust values than to certainty and thus that was in touch with the substantive policy underlying the per se rules. When it reversed the per se rule applicable to nonprice vertical restraints, the Court referred to the "demanding standards"[34] for establishing a per se rule, and noted that although the per se rules provide procedural advantages, "those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law."[35] Later, when it refused to apply the per se price-fixing rule to the joint licensing of copyright rights, the Court noted that the "easy labels [of per se rules] do not always supply ready answers"[36] and spoke of the importance of examining the substantive policies underlying the rules:[37]

> As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach [in applying the per se rule] does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive and very likely without redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act. . . . Thus, it is necessary to characterize the challenged conduct as falling within or without the category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter.

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[32] This may be true, for example, of the claim that price fixing between unintegrated competitors leads to lower capital costs by reducing uncertainty. Other examples of theoretically procompetitive price fixing are in SCHERER, INDUSTRIAL ORGANIZATION ECONOMICS 509 (1980), and Mason, *Market Power and Business Conduct: Some Comments*, 46 AM. ECON. REV. 471–81 (1956).

[33] See text accompanying notes 62–115 *infra*.

[34] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

[35] *Id.*, n.16.

[36] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8 (1979).

[37] *Id.* at 9.

More important, although this aspect of the case is generally overlooked, in *National Society of Professional Engineers v. United States*,[38] the Court made it clear that applying a per se rule is a matter of substantive policy. At issue in *Professional Engineers* was an ethical canon of the National Society of Professional Engineers that prohibited competitive bidding by the Society's members. The Society asserted that the ethical canon was in the public interest, because competitive bidding would lead to unsafe or unethical practices.[39] Its argument rested on a footnote to the Court's prior *Goldfarb* opinion that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[40]

The Court applied a per se rule, however, and refused to allow the Society to prove its assertion. Because Justice Stevens's majority opinion repeatedly invoked the term "Rule of Reason," and because the rule of reason and per se rules are often thought to be separate analytical categories, some have believed that *Professional Engineers* was decided under traditional rule of reason analysis.[41] To Justice Stevens, however, the "Rule of Reason" contains the analysis necessary to decide whether to apply the per se rule and thus covers all antitrust cases. Justice Stevens's "Rule of Reason" is not a rule of reasonableness, but a rule having to do with reasons.[42] All

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[38] 435 U.S. 679 (1978).

[39] The Court summarized the defense as follows: "[T]he Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer 'to design and specify inefficient and unnecessarily expensive structures and methods of construction.' Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety and welfare. For these reasons, the Society claimed that its Code of Ethics was not an 'unreasonable restraint of interstate trade or commerce.' " 435 U.S. at 684–85 (footnotes omitted).

[40] Goldfarb v. Virginia State Bar, 421 U.S. at 788–89 n.17 (1975).

[41] Justice Blackmun made this assumption in his concurring opinion. 435 U.S. at 700. See also Redlich, *The Burger Court and the Per Se Rule*, 44 ALBANY L. REV. 1, 36 (1979), and Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A.L. REV. 265, 322–23 (1979).

[42] According to Justice Stevens, "the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." 435 U.S. at 688. Rather, "[t]o evaluate [defendants'] argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by [defendants]." 435 U.S. at 687. After considering these justifications, the Court dismissed them because they "are not reasons that satisfy the Rule." *Id.* at 694.

restraints must be supported by reasons (i.e., justifications) that are legally acceptable; the "Rule of Reason" determines which reasons are legally acceptable and which are not. In effect, the decision in *Professional Engineers* to disallow defendants' asserted reason for their restraint is a decision, under Justice Stevens's "Rule of Reason," to apply the per se rule,[43] one that is based on the substantive policy of the antitrust laws.

Under these pre-*Maricopa* cases, per se analysis functions as the keystone of antitrust analysis. A decision to apply a per se rule should be a decision that the conduct has no redeeming virtues, or at least none worth considering. Conversely, a decision not to apply a per se rule should reflect the substantive content of the rule. It should be based on a conclusion that the conduct in question has redeeming virtues that are worth trying to evaluate, and should thus identify the factors that are relevant in a more extended, factual analysis. These are substantive policy decisions and are not designed merely to simplify antitrust doctrine.

III. The Second Postulate: The Consumer Welfare Model

The Supreme Court's characterization of the per se rules as substantive, not procedural, rules is important. Even more important is that in its pre-*Maricopa* cases the Court restored the original vision of policy-based per se rules by identifying the substantive policies that guide their application.

The Court invoked the familiar promote/suppress standard from *Chicago Board of Trade*[44] as the unifying antitrust standard.[45] Under this standard, if a restraint arguably promotes competition, it is supported by reasons that require analysis of the net effect of the restraint. If, on the other hand, the only reason for the restraint is to suppress competition, it is supported by no acceptable reason and is therefore unlawful per se.

[43] Justice Stevens's notion that per se cases are a category of cases under the Rule of Reason has not been repeated by the Court. Indeed, when Justice Stevens wrote the *Maricopa* opinion, note 5 *supra*, he did not capitalize "rule of reason." It is nonetheless clear that a court must examine the reasons advanced to justify a restraint before deciding in which category to place it.

[44] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[45] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).

At one level the promote/suppress standard appears paradoxical. If "competition" means business rivalry, then all restraints of trade suppress competition and should be unlawful under the standard. For example, when the seller of a business agrees not to compete with the buyer of the business, competition is suppressed in the sense that the restraint eliminates the potential rivalry of the seller. Hence, if competition is equated with rivalry, a literal interpretation of *Professional Engineers* might "call into question the classic ancillary restraints"[46] or preclude a court from considering ethical or safety norms, even though the Supreme Court has said that those restraints are to be evaluated under the rule of reason.[47]

The explanation for this apparent paradox is that the Court uses the consumer welfare model articulated by Professor Bork[48] to apply the promote/suppress standard. Under this model, competition is seen not as a process of rivalry but as a process that maximizes consumer welfare by maximizing both allocative and productive efficiency. Competition is thus promoted by increasing the efficiency of markets, even if a reduction in rivalry results. The promote/suppress standard thus permits rivalry to be restrained in order to maximize efficiency and consumer welfare.

Although the Burger Court has not explicitly endorsed the consumer welfare model, the promote/suppress standard and the Court's pre-*Maricopa* decisions are intelligible only if interpreted in the light of that model. Moreover, in those decisions the Court often used language suggestive of the consumer welfare model. For example, the Court cited Robert Bork's contention that the Sherman Act is a "consumer welfare prescription"[49] and noted that "an antitrust policy divorced from market considerations would appear to lack any objective benchmarks."[50] Moreover, said the Court, antitrust analysis is to focus "directly on the challenged restraint's impact on competitive conditions"[51] to determine "whether the practice facially appears to be one that would always or almost

[46] Robinson, *Recent Antitrust Developments—1979*, 80 COLUM. L. REV. 1, 17 (1980).

[47] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688, 696 (1978).

[48] BORK, THE ANTITRUST PARADOX (1978).

[49] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

[50] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1977).

[51] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).

always tend to restrict competition and decrease output."[52] The last phrase captures the central theme of the consumer welfare model: conduct that restricts output by reducing allocative efficiency is unlawful because it reduces consumer welfare. Conduct that increases productive efficiency without a counterbalancing restriction of allocative efficiency is lawful because it promotes consumer welfare.

By interpreting the promote/suppress standard in the light of the consumer welfare model, the Court made the standard a potentially potent synthesizing principle.

A. SUPPRESSING COMPETITION: THE POLICY UNDERLYING THE PER SE RULES

In *Professional Engineers*, Justice Stevens identified the central substantive policy underlying the per se rules, linking that policy directly to the first case to use the term "per se," *United States v. Socony-Vacuum Oil Co.*[53] As stated by Justice Stevens, antitrust analysis "does not support a defense based on the assumption that competition itself is unreasonable,"[54] so the purpose of antitrust analysis "is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress."[55] Because competition is always in the public interest, antitrust analysis does not permit "inquiry into the reasonableness of the prices set by private agreement" or "argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition."[56] Accordingly, the Society's attempt in *Professional Engineers* to justify its restraint "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,"[57] providing no "reasons that

[52] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979).

[53] 310 U.S. 150 (1940).

[54] 435 U.S. at 696.

[55] *Id.* at 692.

[56] *Id.* at 689.

[57] *Id.* at 695.

satisfy the Rule [of Reason]"[58] and thus requiring no factual analysis.

In short, the per se rules wield their power because they express the substantive conclusion that restraints may not be justified by the argument that without the restraint the competitive process would be undesirable, destructive, or contrary to the public interest. Under the consumer welfare model, restraints that are unable to improve efficiency cannot be justified on any other basis.

Justice Stevens also clarified the *Goldfarb* footnote and the relevance of the Society's argument that the professional aspects of engineering require less stringent analytical standards than are normal. The Court denied that the "cautionary footnote" of *Goldfarb* could "be read as fashioning a broad exemption under the Rule of Reason for learned professions."[59] Instead:[60]

> [W]e adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. . . . [W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In other words, special considerations relating to the professions might influence analysis under the rule of reason, but they do not affect analysis of whether to apply the rule of reason. Thus, when competitors "regulate and promote" competition by prohibiting unethical practices, the rule of reason requires a court to consider whether aspects of the professions are relevant to "the nature of competition" within the profession. In contrast, a decision to apply a per se rule depends only upon examining the reasons advanced to justify a restraint to see if they are "cognizable under the Sherman Act,"[61] and that examination is the same for professions as for other business. Because the defendants in *Professional Engineers* restrained competition and not unethical practices, a per se rule was applica-

[58] *Id.* at 694.

[59] *Id.* at 696.

[60] *Id.*

[61] *Id.*

ble, and the rule's impact was not changed because the restraint involved a learned profession.

B. PROMOTING COMPETITION THROUGH TRADE RESTRAINTS

Although the "suppress" side of the promote/suppress standard captures the central antitrust principle that consumer welfare is always in the public interest (unless Congress deems otherwise), the "promote" side of the standard is far more interesting and intricate, in part because defendants generally will have the burden of proving that their restrictive agreements promote competition. Analysis of the three ways that trade restraints promote competition shows that the promote competition standard is an economics-oriented theory around which antitrust doctrine can be developed, predicted, and evaluated.

1. *Integration to efficiency.* The predominant form of procompetitive competitor collaboration—and the form that is easiest to recognize and evaluate—is integration to efficiency. The law protects worthwhile integration by permitting restraints that are necessary to facilitate savings of resources or improvements of quality. This strain of the market efficiency theme is pervasive, evident not only in the law applicable to mergers[62] and joint ventures,[63] where it has long been recognized, but also in the law relating to tying arrangements,[64] group boycotts,[65] and price fixing.[66]

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[62] Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21 (1968); BORK, THE ANTITRUST PARADOX 198–201 (1978).

[63] *E.g.*, Justice Department, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 13 (Jan. 26, 1977); Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007, 1014–16 (1969).

[64] *E.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (package sale of two items substantially reduces seller's costs and is therefore not unlawful); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961).

[65] *E.g.*, Instant Delivery Corp. v. Cities Stores Co., 284 F. Supp. 941 (E.D. Pa. 1968) (integrating delivery services of independent department stores and using one carrier is not an unlawful boycott); Interborough News Co. v. Curtis Publishing Co., 225 F.2d 289 (2d Cir. 1955) (no conspiracy when one publisher establishes a distributor and all other publishers shift business to that distributor); Parmelee Transp. Co. v. Keeshin, 144 F. Supp. 480, 186 F. Supp. 533 (N.D. Ill. 1958, 1960), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 405 F. Supp. 99 (D. Hawaii 1975) (joint workman's compensation plan not unreasonable).

[66] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Evans v. S. S. Kresge Co., 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

Integration occurs when independent firms pool resources to achieve a task; integration results in efficiencies when it permits the firms to avoid costs or to improve quality; integration is worthwhile when firms could not otherwise achieve the efficiencies as quickly. When a restraint is ancillary to an integration that provides efficiencies not otherwise obtainable, a court must apply the rule of reason to determine whether the value of the market efficiency achieved by integration outweighs the adverse effect of the restraint.

Two recent Supreme Court cases nicely illustrate the difference between restraints that are ancillary to integration and those that are not.

Performing rights organizations like ASCAP and BMI were organized by composers to facilitate the enforcement of rights under the copyright laws. Both organizations hold nonexclusive licenses from copyright owners. They sublicense their rights to copyright users and distribute the proceeds to the copyright owners in accordance with a schedule that reflects, among other things, the frequency and nature of use of each copyrighted work. Both organizations refuse to sublicense individual works. They grant only blanket licenses that cover all works in which they have an interest. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[67] CBS challenged the blanket license policy. CBS did not claim that ASCAP and BMI agreed to any term of sale. CBS claimed instead that by establishing a price for its blanket license, each performing rights organization independently engaged in price fixing that is per se unlawful.

The Supreme Court refused to apply a per se rule, finding that "the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain."[68] More particularly, the blanket license "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."[69] The blanket license "is a necessary consequence of the integration necessary to achieve these efficiencies,

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[67] 441 U.S. 1, 20 (1979).

[68] 441 U.S. at 13.

[69] *Id.* at 20.

and a necessary consequence of [a blanket] license is that its price must be established."[70] Thus, the per se rule was inapplicable.

In contrast, *Catalano, Inc. v. Target Sales, Inc.*[71] involved competitors coordinating, not integrating, their operations. The defendants, competing beer distributors, had agreed to stop selling on credit. Although the per se rule had long been thought to outlaw agreements between independent firms covering any aspect of price,[72] including agreements covering credit terms,[73] both the district court[74] and the Ninth Circuit Court of Appeals[75] refused to apply the per se rule. The Ninth Circuit characterized the credit agreement as a nonprice agreement, akin to product standardization, which "may actually enhance competition."[76]

In a brief per curiam opinion, the Supreme Court reversed this derogation of the per se rule.[77] Holding that credit is an aspect of price, so that a horizontal agreement on credit terms is subject to a literal application of the per se rule, the Court also held that prior cases "foreclose both of the possible justifications"[78] suggested by the Ninth Circuit. The argument that by reducing credit competition the defendants would induce new, procompetitive entry was said to be identical to arguing that competitors should be allowed to make entry attractive by agreeing to raise prices. The per se cases had rejected that argument.[79] Similarly, the argument that by reducing credit competition the defendants might increase price visibility and thus increase overall competition was unacceptable under the per se rule. "Any industrywide agreement on prices will result in a more accurate understanding of the terms offered by all parties

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[70] *Id.* at 21. On remand, the court of appeals found the blanket license policy to be lawful under the rule of reason. Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors and Publishers, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 100 S. Ct. 1491 (1981).

[71] 446 U.S. 643 (1980).

[72] See note 14 *supra*.

[73] United States v. First National Pictures, Inc., 282 U.S. 44 (1930) (agreement to lease only to those making cash deposits).

[74] See 446 U.S. 643 (1980).

[75] 605 F.2d 1097 (9th Cir. 1979).

[76] *Id.* at 1099.

[77] 446 U.S. at 648.

[78] *Id.* at 646.

[79] *Id.* at 649.

to the agreement"[80] but, under the per se rules, no such agreement is permitted. As a result, the defendants' agreement to eliminate credit was unsupported by permissible reasons and was therefore unlawful per se.

The Court's reasoning is sound. *Catalano* involved no integration of functions, only coordination of operations. Moreover, the defendants could not convincingly argue that their agreement integrated the market to make it operate more efficiently. In short, no resource savings counterbalanced the loss of competition flowing from the restraint, and the restraint was therefore per se unlawful.

2. *Externalities, free-riders, and optimal investment.* The second way in which trade restraints may increase market efficiency is by overcoming misallocation of resources caused by externalities—the costs and benefits of economic activity that are not reflected in market prices.[81] Investment decisions made in the market will reflect consumer welfare as long as all social costs and benefits of the activity are included in market prices; all investments that consumers are willing to pay for, but only those investments, will be generated by the market. As a result, in a competitive system it is ordinarily presumed that market forces, not government or private restraints, should govern investment decisions.

The problem of externalities, however, may mean that investment decisions reached through market mechanisms are inappropriate. When the value of commercial activity can be appropriated by consumers (and competitors) without payment, underinvestment in that activity is likely because the rewards of investment are reduced. This is true, for example, for so-called public goods[82]—goods such as national defense that benefit even those who do not pay for them. Conversely, when economic activity imposes costs on the public or competitors that are not included in market prices, too much investment may take place. Under such circumstances, intervention in the market to overcome the resource misallocation caused by externalities may increase market efficiency and thus be procompetitive.

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[80] *Id.*

[81] *E.g.*, MISHAN, ECONOMICS FOR SOCIAL DECISIONS 85–111 (1975); Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958).

[82] *E.g.*, Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954); Oakland, *Public Goods, Perfect Competition, and Underproduction*, 82 J. POL. ECON. 927 (1974).

The problem of externalities is an important integrating concept in the laws relating to the competitive system. It serves as a justification for environmental and safety regulation[83] and as the primary economic support for the prohibition on copying and imitation found in the law of copyrights,[84] patents,[85] and unfair competition.[86] In antitrust, the free-rider problem is the externality that has attracted the most attention.[87] It is thus significant that the Supreme Court accepted the free-rider argument as a legitimate justification for nonprice vertical restraints.[88] Nonprice vertical restraints may increase investment in services provided by dealers and distributors, and thus increase market efficiency, by assuring that consumers and competitors will not benefit from such investment without paying for it.

The problem of externalities, however, is not limited to vertical distribution restraints. For example, when Justice Stevens analyzed the venerable *Mitchell v. Reynolds*[89] in *Professional Engineers*,[90] he showed that concern for the free-rider problem is a long-standing antitrust theme. *Mitchell v. Reynolds* approved a noncompetition agreement given by the seller of a business—a classic restraint of trade imposed to overcome a free-rider problem. A person who sells his business is a potential free-rider on the value of the goodwill transferred with the business, because his established business relationships and accumulated know-how permit him to appropriate inexpensively the customer goodwill and business opportunities he transferred to the new owner. The law therefore permits the seller to agree not to compete with the buyer of the business in

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[83] Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 555 (1979).

[84] Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

[85] Machlup, *An Economic Review of the Patent System*, Study No. 15 of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee of the Judiciary, U.S. Senate, 85th Cong., 2d Sess. (1958); Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY (National Bureau of Economic Research) 617 (1982); Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 12 (1969); Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

[86] KITCH & PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 2d ed., 48–53 (1979); International News Service v. Associated Press, 248 U.S. 215 (1918).

[87] *E.g.*, POSNER, ANTITRUST LAW, 147–67 (1976).

[88] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977).

[89] 1 P. Wms. 181, 24 Eng. Rep. 347 (ch. 1711).

[90] 435 U.S. 679, 689 (1978).

order to overcome this free-rider possibility and protect the value of the business being transferred. Such a restriction, if reasonable, is upheld because "the long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition."[91]

Free-rider problems also underlie permissive treatment in some price-fixing and boycott cases.[92] For example, restrictions on hiring by organized athletic teams may be justified as necessary to avoid the possibility that one team will impose costs—in the form of decreased reputation[93] or safety[94]—on the other teams without having to compensate for those costs.

Identifying the problem of externalities as a justification for trade restraints shows the relationship between cases previously thought to be unrelated. The externalities problem is not, however, an acceptable justification in every antitrust context,[95] so care must be taken in its application. Courts should focus their analysis of particular cases on whether circumstances exist that give rise to a genuine problem of externalities; whether the investment induced or saved by the restraint is significant enough to outweigh the restrictive

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[91] 435 U.S. at 688–89.

[92] Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division*, 75 YALE L.J. 373, 457–64 (1966) (analyzing United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960) and United States v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800 (D. Kans. 1957, *aff'd*, 355 U.S. 10 (1957)). See also Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978) (price restrictions on sales outside assigned territories should be treated as territorial restrictions).

[93] Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 244 (S.D.N.Y. 1961); Manok v. Southeast Dist. Bowling Ass'n, 306 F. Supp. 1215 (C.D. Cal. 1969) (not a violation to suspend plaintiff, after a hearing, for fraudulent activities intended to manipulate handicaps). *Contra*, Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973).

[94] Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979) (prohibition on hiring one-eyed hockey player is justified). See also Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967) (restrictions on dealing between florists in integrated network may be necessary to prevent cream skimming). The court appears to have misused the free-rider analysis in Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) (restrictions on distribution of unique plant cuttings per se unlawful by analogy to *Fashion Originators' Guild).*

[95] *E.g.*, Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (secondary boycott not justified to overcome free-riding-style piracy). Compare Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929) (copying fabric designs is not unfair competition). The author's view that the free-rider problem does not explain or justify resale price maintenance is articulated in Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417 (1981).

features of the restraint; and whether the externalities can be overcome by any less restrictive means.

C. REDUCING TRANSACTION COSTS

Collaborative conduct may also increase market efficiency by reducing transaction costs—the costs of matching buyers and sellers.[96] Unlike the model of pure competition,[97] in real markets information is not ubiquitous or costless. It is costly to search for goods and for information about goods, to bargain over terms of sale, and to enforce bargains. Uncertainty is pervasive, and measures to reduce uncertainty or control risks are costly. As a result, market output is increased when restraints reduce information or bargaining costs, overcome impediments to the flow of information and efficient bargaining, or reduce uncertainty. Several examples of procompetitive restraints that reduce transaction costs are illustrative.

1. *Integration to reduce bargaining costs.* Transaction costs are reduced, of course, when integration of activities eliminates duplicate bargaining efforts and thus reduces the cost of bargaining, as in *Broadcast Music*[98] and several cases upholding joint sales agencies.[99] The antitrust issues in such cases are similar to those in any cases of integration, namely, (1) whether the integration is reasonably necessary to achieve the efficiencies, and (2) whether restraints flowing from the integration are truly necessary to achieve the integration. When both questions are answered affirmatively, it may safely be concluded that the procompetitive effects of the integration outweigh any resulting loss of competition.

2. *Organization to reduce search costs.* The amount and quality of information available about the market significantly affects search costs—the costs of knowing and evaluating the options the market

[96] See generally WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 20–40 (1975).

[97] *E.g.*, MANSFIELD, MICROECONOMICS 234–35 (2d ed. 1975).

[98] 441 U.S. 1 (1979). See text accompanying notes 67–71 *supra*.

[99] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Webster County Memorial Hospital, Inc. v. United Mine Workers of America Welfare and Retirement Fund of 1950, 536 F.2d 419 (D.C. Cir. 1976). Compare Virginia Excelsior Mills, Inc. v. FTC, 256 F.2d 538 (4th Cir. 1958); United States v. American Smelting & Ref. Co., 182 F. Supp. 834 (S.D.N.Y. 1960). See also L.C.L. Theatres v. Columbia Pictures, Indus., 566 F.2d 494 (5th Cir. 1978) (collective surveillance of plaintiff's movie theater to check on alleged underreporting of revenue is permissible).

provides.[100] Efficient amounts of appropriate information may not be generated by the market, however, without competitor collaboration or government intervention, because of the public goods characteristic of information,[101] and because persons will not want to divulge information without a promise that the recipients will reciprocate. As a result, in the absence of a restriction of output, numerous forms of restraint ancillary to information improvement are sanctioned by the antitrust laws—information exchanges among competitors,[102] organized trading exchanges,[103] and product testing and rating.[104]

The problem of search costs and the explanation of the way in which quality, safety, and ethical norms may promote efficiency[105] explain why the Court in *Professional Engineers* said that "[e]thical norms may serve to regulate and promote . . . competition"[106] and thus fall outside the per se rules. When it is costly for consumers to evaluate products, it is difficult for them to reward the products they like with higher prices; prices will reflect the average quality of all interchangeable products, both good and bad. As a result, the

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[100] See Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 338 (1972); Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970); Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

[101] Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF ECONOMIC ACTIVITY 609 (1962); Posner, *Information and Antitrust*, 67 GEO. L.J. 1186, 1193 (1979).

[102] Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976) (exchanging information on plaintiff's creditworthiness is not unlawful where there is no incentive for joint action or uniform conduct); FTC Advisory Opinion (1969); 16 C.F.R. § 15:361 (1980) (permitting trade association credit reporting so long as each member makes own decision and certain protections are afforded).

[103] See, *e.g.*, Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Danville Tobacco Ass'n v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964) and 372 F.2d 634 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966); United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

[104] Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (6th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980); McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir. 1939); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Ore. 1966), *aff'd per curiam*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969). See Note, *Promoting Product-Quality Information: A Proposed Limited Antitrust Exemption for Producers*, 30 STAN. L. REV. 563 (1978).

[105] See Leland, *Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979); Ackerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Oi, *The Economics of Product Safety*, 4 BELL J. ECON. 3 (1973).

[106] 438 U.S. at 696.

incentive for any seller to improve the quality of his products is decreased and the incentive to take a free ride on the quality of other products is increased; that is, there will be underinvestment in product quality. When competitors eliminate poor or unsafe products, the average price of products will rise (reflecting the increase in average quality), and the proper investment incentive will be restored. Under such circumstances, restraints of trade may promote consumer welfare by helping to overcome the effects of imperfect consumer knowledge.

This is not an argument that quality or ethical norms always increase efficiency and consumer welfare. Moreover, product norms may be inferior to other, more direct, means of overcoming the problem of insufficient consumer information.[107] But the promote side of the promote/suppress standard is broad enough to permit such sources of consumer welfare to be considered, and the reasonableness test is flexible enough to permit a court to determine whether the prerequisites of this argument have been met—namely, whether the characteristics of the market (particularly the cost of consumer information) are such that quality and safety norms are likely to increase welfare, whether the norms as articulated and applied limit only objectively unsafe and substandard products, and whether other means of overcoming consumer information problems—for example, disclosure requirements—are superior means of achieving the same end.

3. *Transaction costs and product standardization.* Product standardization is a particular form of competitor collaboration that may reduce transaction costs and thus promote competition. Establishing and policing product grading standards,[108] for example, reduces a consumer's cost of evaluating products. Exchanging information about product specifications may reduce the cost of competitive imitation, an important source of consumer welfare.[109] Establishing standard sizes may facilitate handling. And establishing standard

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[107] For example, disseminating product information to enable consumers to evaluate products may permit greater product differentiation and thus reward and encourage product improvement. Lunsford, *Consumers and Trademarks: The Function of Trademarks in the Market Place*, 64 TRADEMARK REP. 75 (1974).

[108] See, e.g., Tropic Film Corp. v. Paramount Pictures Corp., 319 F. Supp. 1247, 1254 (S.D.N.Y. 1970) (rating motion pictures not unreasonable). *Cf.* Dept. of Justice, Business Review, Transportation Association of America, June 24, 1968 (standardizing terms of reference and tariff formats would enhance transportation competition).

[109] *Cf.* Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968) (accurately comparing copied product to original is not trademark infringement or unfair competition).

product characteristics may facilitate product interconnection, as when the circuitry of audio components is standardized, or interchangeability, so that, for example, replacement parts can be purchased from any of a number of sellers. For these types of standardization, the risk of anticompetitive harm is small enough and the possibility of economic benefit great enough to support treatment under the rule of reason.

The Court's opinion in *Catalano*,[110] in contrast, exposes the limits that have been placed on the product standardization argument. The Ninth Circuit's refusal to invalidate a horizontal agreement eliminating credit sales was based on its belief that the elimination of credit might be procompetitive, because it would channel rivalry away from nonprice competition and toward price competition by simplifying transactions and eliminating the "distraction" of nonprice terms. Although the Ninth Circuit's characterization of credit as a nonprice term is questionable,[111] the characterization issue is only a semantic quibble: the central issue is whether it is permissible for competitors to channel competition toward one form rather than another.

Channeling competition into particular forms of rivalry, however, does not legitimately reduce transaction costs. The defendants in *Catalano* were not trying to give consumers more information about the market. Their argument was that consumers and the market process would benefit if there were less information about credit terms, because consumers would then focus on information (about prices) that would be more to their advantage. This is not an argument that increasing the amount of information leads to transactional efficiency, but that consumers should be protected from their own misuse of information generated by the market.[112] That argument is inconsistent with consumer welfare. When credit competition is flourishing it is presumably because consumers have chosen credit rivalry over price rivalry.[113] If the consumer sover-

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[110] 446 U.S. 643 (1980).

[111] See note 14 *supra*.

[112] In applying the First Amendment, the Supreme Court has rejected a similar protectionist argument advanced to justify government restraints on commercial speech. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748, 769 (1976).

[113] If there were a free-rider problem in the provision of information, one could not be so confident that consumers get the information they really want; but no free-rider problem is apparent in *Catalano*.

eignty underlying a market economy is to be preserved, that decision should be respected and protected.[114]

The distinction between legitimate product standardization and the "standardization" in *Catalano* is clear. The standardization in *Catalano* was not to provide information to make competitive offerings comparable. It was to make them comparable by homogenizing them, reducing them to simplified terms by eliminating some forms of competition. This, as the Supreme Court said,[115] is no different from homogenizing and simplifying transactions by agreeing to sell at a single price and was therefore correctly held to be per se unlawful.

IV. MARICOPA: THE COURT STUMBLES

Had the Supreme Court recognized the substantial doctrinal synthesis it achieved in its pre-*Maricopa* cases, it would have written a much different opinion in *Maricopa*. Its *Maricopa* opinion is retrogressive: it champions a wooden, mechanical view of the per se rules and fails to recognize the full range of circumstances in which trade restraints may promote competition.

Maricopa involved an agreement in which nonaffiliated doctors established a maximum price schedule for services they provide patients insured by sponsoring insurance carriers. The plaintiff, the State of Arizona, moved for summary judgment, claiming that the maximum price fixing was a per se antitrust violation. The Ninth Circuit refused to apply a per se rule, noting that too little was known about either the effect of the agreement or the health care industry to permit the per se rule to be invoked.[116]

The Supreme Court, applying the per se rule to invalidate the agreement, reversed. Justice Stevens's opinion for the plurality paid little attention to the economic impact of the maximum price fixing in the context in which it was employed. Instead, the out-

[114] Thus, in *Catalano*, the Court rejected the argument that "nonprice" competition is less significant than price competition, just as it earlier rejected the argument that the nonprice competition induced by vertical nonprice restraints is less significant than price competition. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56, n.25 (1977) (an argument "flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services").

[115] 446 U.S. at 649.

[116] 643 F.2d 553, 556 (1980).

come rested largely on the longevity and procedural simplicity of the per se price-fixing rule. Thus, Justice Stevens stressed "the costs of judging business practices under the rule of reason"[117] and openly acknowledged the loss of fidelity when per se rules are applied: "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable."[118] These statements signal a retreat from the promote/suppress standard, because they imply that restraints that potentially promote competition may nonetheless be subject to the per se rules. The Court made that conclusion clear: "The anticompetitive potential inherent in all price-fixing agreements," said the Court, "justifies their facial invalidation even if procompetitive justifications are offered for some."[119]

Justice Stevens's emphasis on the certainty and automatic nature of the per se rules is a throwback to the worst aspects of *Topco*.[120] By implying that per se rules can be applied without considering policy implications whenever something called price fixing is observed, the Court lost sight of the fundamental principle that it had recognized in the cases between *Topco* and *Maricopa*: neither the existence of the per se rules nor the certainty provided by the per se rules enables a court to determine whether to apply the per se rule. The decision to apply the per se rule can be made only after a court determines whether the reasons advanced to justify the restraint are the type of reasons that are acceptable under the promote/suppress standard, that is, whether the restraint possibly promotes competition in one of the three ways described above. To ignore this principle undermines sound antitrust analysis by sacrificing fidelity for certainty.[121]

The Court was no doubt influenced by its belief that the per se

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[117] 102 S. Ct. 2466, 2473 (1982).

[118] *Id.*

[119] 102 S. Ct. 2466, 2477 (1982).

[120] See text accompanying notes 20–33 *supra*.

[121] Even more remarkable, perhaps, is Justice Stevens's notion, also dredged from *Topco*, see note 29 *supra*, that per se rules "enhance the legislative prerogative to amend the law," because they put the onus on Congress to create exceptions to the per se rules. 102 S. Ct. at 2478. Congress, however, did not enact the per se rules; it enacted a statement of principle—faith in efficiently functioning markets—for the Court to apply. Congress should not be expected to remedy every derogation of that principle that results from a misapplication of per se rules.

rule against maximum price fixing is based on sound policy. The rule arose virtually without examination or explanation at a time when the Court geared its antitrust policy toward protecting the autonomy of businesses rather than toward identifying and protecting business arrangements that promote efficiency.[122] The rule arose, moreover, in cases involving vertical price fixing, rather than the horizontal price fixing in *Maricopa*, so the rule's application in *Maricopa* need not have been automatic.[123] Even the Court's list of the potential anticompetitive dangers of maximum price fixing, which was an exaggeration,[124] could not excuse the Court from determining whether this maximum price fixing promoted or suppressed competition.

When the Court finally reluctantly considered the argument that maximum price fixing by these defendants promotes competition, its analysis was unsatisfactory. Professor Frank Easterbrook has explained how maximum price fixing in the context of *Maricopa* promotes competition by reducing the transaction costs of providing insured medical care.[125] Several factors account for high transaction costs. Because insurers find it difficult to predict the incidence of illness and the cost of treatment, they find it difficult to estimate the medical care costs they must cover under their policies. As a result, their premiums are increased to reflect the risk that their estimates will be erroneous. The difficulty of predicting insurance payouts is exacerbated by the "moral hazard" problem typified by insurance: an insured person has no incentive to shop for low-cost services, because the insurer, not the insured, pays for the services. Although insurers have attempted to ameliorate the problem by agreeing to compensate insureds only for "usual, ordinary, and customary" medical costs, that standard is difficult to apply. It also requires the insurer and the insured to incur the additional costs of determining which fees are "usual, ordinary, and

[122] *E.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951) (maximum price "agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"). In *Maricopa* the Court may have reverted to this mode of analysis by concluding that "horizontal agreements to fix maximum prices [are] on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices." 102 S. Ct. at 2475.

[123] Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887–90 (1981).

[124] *Id.* at 900–908.

[125] *Id.* at 896–98 (1981). *Contra*, Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules, and the Sherman Act*, 1978 DUKE L.J. 645, 678–84.

customary." Moreover, both insurers and insureds find it difficult to evaluate the necessity for, and the quality of, medical care, which increases further the transaction costs of an efficient insurance system.

These problems of transaction cost are potentially ameliorated by the maximum price fixing utilized by the doctors in *Maricopa*. Because doctors who subscribe to the plan agree to a maximum fee for covered services, insurers are able to estimate more accurately their liability under their policies and thus reduce premiums. Insureds find the plan attractive, because they are guaranteed that their entire cost of service will be covered if they go to a doctor who subscribes to the plan. With respect to doctors, their maximum fee is fixed, so they have no incentive to inflate costs by providing more services than are required. Minimum quality standards are maintained by physician peer review groups, which check on the medical necessity and appropriateness of treatment provided to insureds.[126]

The Court recognized the strength of these assertions,[127] but rejected them, because it found that the maximum fee schedule challenged in *Maricopa* originated with doctors rather than with an insurer,[128] as is the case with many other types of medical insurance. The Court apparently viewed fee schedules originating with insurers to be a less restrictive, but reasonably substitutable, alternative to fee schedules originating with doctors. The Court was wrong. Doctors may be able to establish maximum prices more efficiently than insurers, because doctors have better information about the cost of various medical services and can more easily determine the maximum prices that will clear the market. If so, insurer-sponsored maximum price schedules are a more expensive, and hence less desirable, alternative to doctor-originated maximum price schedules. The Court recognized this possibility but gave it little weight, because the possibility was "far from obvious" and because any efficiencies from doctor-originated maximum fee

[126] The defendants' peer review function, which could be characterized as a form of group boycott, was not challenged in *Maricopa*. 102 S. Ct. 2466, 2471 (1982).

[127] The Court found it arguable "that the existence of a fee schedule, whether fixed by the doctors or by the insurers, makes it easier—and to that extent less expensive—for insurers to calculate the risks that they underwrite and to arrive at the appropriate reimbursement on insured claims." 102 S. Ct. at 2477 n.25.

[128] 102 S. Ct. at 2477–78.

schedules might be offset by the "power of the [doctors] to dictate the terms of such insurance plans."[129]

The Court's reasoning is inconsistent with sound antitrust analysis. Because *Maricopa* came to the Court on plaintiff's motion for summary judgment, there was no factual record, and the Court therefore could not determine whether doctors can establish maximum fee schedules more efficiently than insurers. The only issue appropriately before the Court was whether it is worth the cost to determine at trial the relative efficiency of doctor-originated maximum fee schedules or whether the relative efficiency of doctor-originated fee schedules could be determined from theoretical analysis so as to avoid a trial. The Court refused to address that issue and instead hid behind the procedural fix of the per se rules to avoid the crucial issue. Similarly, the Court's concern that maximum price fixing may enable doctors to "dictate the terms of insurance policies" raises a factual issue that the Court could not appropriately address in reviewing a motion for summary judgment. Although the conspiring doctors in *Maricopa* comprised seventy percent of the doctors in the relevant market,[130] which made it legitimate to question their market power, that is no justification for invoking a per se rule, because the per se rule assumes that the maximum price fixing would be unlawful whatever the market power of the defendants.

The Court should have acknowledged that the maximum price fixing by these doctors might promote competition by facilitating insured medical care, and it should have then identified the factual issues raised by that possibility and openly considered whether an accurate determination of the issues required a trial or whether, given the cost of a trial, an acceptably accurate answer could be given through economic analysis. The Court's approach—avoiding legitimate factual issues in order to shoehorn this case into a per se rule meant for other contexts—only subverts antitrust analysis.

IV. Conclusion

One of the enduring legacies of the Chicago school of antitrust analysis is the identification of a coherent, unified, and consis-

[129] 102 S. Ct. at 2478.

[130] 102 S. Ct. at 2470.

tent framework for analyzing antitrust issues. Prior to *Maricopa*, the Supreme Court appeared to be using that framework in its own analysis. The Court's performance in antitrust cases would improve if it continued to do so.

Antitrust analysis would be improved substantially if the Court would interpret the promote/suppress standard using the consumer welfare model; that is, if it would examine restraints of trade to determine whether they improve productive or allocative efficiency. Under this approach, the per se rules would cease to be viewed as easily applied rules designed to simplify antitrust analysis. Rather, per se rules would be viewed as substantive rules, to be applied when analysis shows that conduct is unable to improve productive or allocative efficiency or that it is costly to determine the efficiency effects of conduct. This approach would not gut the per se rules. Collaboration between nonintegrated competitors that has no possibility of increasing productive or allocative efficiency can be recognized easily; conduct that is now properly subject to per se rules would continue to be subject to per se rules, and just as decisively.

At the same time, rational analysis of conduct that might increase efficiency would be improved. Recognizing that the per se category is separated from the rule of reason category because of the potential for some conduct to promote efficiency, shows the unity of antitrust analysis and focuses attention on the substantive criteria that really matter in evaluating conduct. Moreover, adopting the consumer welfare model would require courts to consider more carefully the efficiency-producing properties of conduct and would thus enliven antitrust analysis with new substantive vigor.