Antitrust's Rule of Reason: Only Competition Matters

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of" Section 1 of the Sherman Act.[1] Although the express language of Section 1 contains no such limitation, the Supreme Court "has repeated time and again that § 1 'outlaw[s] only unreasonable restraints.'"[2] And the Court has consistently distinguished the unreasonable restraints on the basis of impact on competition. The thesis of this article is that the rule of reason focuses solely on how a challenged restraint affects the competitive process. Much commentary has wrongly assumed that a welfare standard must be applied to decide Section 1 cases or mistakenly claimed that the Supreme Court endorsed a welfare standard.

Part I of this article sheds light on the long-running welfare standards debate. I begin with a primer on welfare concepts, distinguishing between market-level and economy-wide concepts. I then summarize the contributions of Professor Robert Bork on the primacy of "consumer welfare" and the meaning of the term. I go on to explain that Bork's views are widely misunderstood and unfairly criticized because "consumer welfare" has a different meaning now than the one he ascribed. Finally, I clarify major themes and points of contention in the welfare debates Bork triggered, also explaining that Professor Bork opposed deciding cases on the basis of a welfare standard. In concluding, I observe that the welfare debates have misrepresented Bork's views and paid little attention to Supreme Court jurisprudence.

The rule of reason was developed by the Supreme Court,[3] and Part II of this article reviews relevant decisions of the Court. I first recapitulate ways in which the Court articulated the rule of reason and explained its function. I then review the reasoning of modern decisions by the Court addressing or applying the rule. These reviews demonstrate that the impact of a challenged restraint on the competitive process is the only issue the Court considers under the rule of reason. Finally, I examine claims that Supreme Court decisions support a welfare standard and show that these claims are unpersuasive.

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[1] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007).

[2] *Id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

[3] *See* Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 571–72 (1986).

Part III outlines the proper application of the rule of reason, consistent with precedent. I begin by observing that the balancing process courts say characterizes the rule of reason is not a process in which courts actually engage; rather, litigation under Section 1 takes a burden-shifting approach. I set out a burden-shifting approach that considers only how challenged trade restraints affect the competitive process. I explain how burdens are allocated and calibrated on the basis of the likely impact on the competitive process. In sum, I indicate how focusing on competition shapes every substantive aspect of Section 1 litigation.

Part IV concludes by highlighting ways in which focusing on the competitive process affects antitrust litigation by defining the plaintiff's and defendant's burdens. Among other things, I explain that the plaintiff need not plead or prove tangible anticompetitive effects, such as price increases. In this way and others, focusing on the competitive process, rather than applying a welfare standard, favors the plaintiff.

I. WELFARE CONCEPTS AND DEBATES

A. A PRIMER ON WELFARE CONCEPTS

Economics approaches welfare issues from two directions using different modes of analysis. One approach considers the economy as a whole in what is called general equilibrium analysis. The first formal treatment of this approach appeared in the late nineteenth century,[4] although focusing on performance of the economy as a whole goes back further. An eighteenth century contribution is Adam Smith's notion of an "invisible hand" guiding resource allocation and acting to maximize the welfare of the people.[5] To formalize such ideas, economists struggled to sum the utilities of all individuals in the economy but were forced to go a different way.

Economists turned to the concept of Pareto optimality[6] when they determined that they could not compare the utility of one individual with that of another. An allocation of resources is Pareto optimal if no individual can be made better off

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[4] General equilibrium analysis was pioneered by Léon Walras in his 1874 *Elements of Pure Economics*.

[5] Smith's views on the power of self-interested action to promote the general welfare are scattered throughout his 1776 book *An Inquiry into the Nature and Causes of the Wealth of Nations*. The reference to the "invisible hand" appears in book IV, chapter 2. *See* MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 56–58, 60–61 (5th ed. 1997).

[6] The concept was introduced in Vilfredo Pareto's 1906 *Manual of Political Economy*, but its value was not appreciated while economists attempted to sum utilities across individuals.

without making someone worse off. Anything enlarging the metaphorical pie offers a potential Pareto improvement because it is possible to make at least one individual better off while no one is worse off.

In the mid twentieth century, theoretical welfare economics used highly abstract general equilibrium models to ask whether decentralized markets yield an optimal allocation of resources.[7] These models were used to prove the first fundamental theorem of welfare economics: under certain assumptions, competitive equilibrium, with all prices equal to the corresponding marginal costs, is Pareto optimal.[8] Economists make the case for competition on the basis of this theorem.

Terms such as "aggregate welfare" and "social welfare" are used in reference to the economy as a whole, along with the unqualified word "welfare." But these terms refer to a concept rather than a quantity; social welfare is never measured. Economists instead employ the Pareto criterion and generally favor a policy change yielding a Pareto improvement, which they refer to as an increase in (allocative) efficiency or as an increase in welfare. Often, however, it cannot be said that one policy better than another under the Pareto criterion because some individuals are better off with one policy, while some are better off with the other.

Applied welfare economics and industrial organization rely heavily on partial equilibrium analysis pioneered by Alfred Marshall at the end of the nineteenth century.[9] This analysis abstracts from the enormous complexity of the economy by spotlighting a narrow sector referred to as the "market." The most important application of partial equilibrium analysis is supply and demand. Conventional supply and demand curves plot, at different prices, the quantity of a good that producers offer, and the quantity that consumers take.

To examine welfare issues at the market level, Marshall used the concept of

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[7] *See* GERARD DEBREU, THE THEORY OF VALUE 28–97 (1959).

[8] *See, e.g.*, Allan M. Feldman, *Welfare Economics, in* 8 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 721, 722–23 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); Yoon-Ho Alex Lee & Donald L. Brown, *Competition, Consumer Welfare, and the Social Cost of Monopoly*, *in* 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 409, 417–18 (Wayne Dale Collins ed., 2008). Some authors trace the antecedents of modern welfare theorems to Adam Smith, but a leading scholar labels that "a historical travesty of major proportions" because the modern role of competition in promoting welfare is not that ascribed by Smith. BLAUG, *supra* note 5, at 60.

[9] Marshall's main contributions were made in his *Principles of Economics*, first published in 1890. He continued to revise the book until the 1920 eighth edition, which is still in print.

consumer surplus.[10] Graphically, this is the area under the demand curve but above the equilibrium price. It indicates the amount consumers would have been willing to pay for the equilibrium quantity, over and above what they actually did pay. If the supply curve is upward sloping, a surplus also accrues to producers. Producer surplus is the area above the supply curve but below the equilibrium price, and it indicates the amount producers get for the equilibrium quantity over and above the incremental cost of producing it. The sum of consumer surplus and producer surplus is called total surplus.

The economic case against monopoly is distinct from the case for competition and is made using partial equilibrium tools and concepts.[11] Because a monopolist raises price above cost, consumer surplus is less than under competition. Much of the reduction in consumer surplus is captured by the monopolist as profit and becomes producer surplus, but not all lost consumer surplus becomes producer surplus. As compared with competition, monopoly results in a higher price and thus a lower quantity purchased. The consumer and producer surplus associated with the output not purchased under monopoly are lost to society. The lost surplus is termed the deadweight loss due to monopoly, and it measures in money terms the social cost of the resource misallocation associated with the reduction in output from the competitive level.[12]

Monopoly affects the distribution of income, but economics generally is not thought to have anything to say about whether one distribution of income is better than another. Thus, the economic case against monopoly is not focused on the profits that would, under competition, be part of consumer surplus. Rather, monopoly is condemned on the basis that it is inefficient; it misallocates resources and thus shrinks the pie.

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[10] Marshall popularized and named the concept, but Jules Dupuit originated the idea in his 1844 article "On the Measurement of the Utility of Public Works."

[11] For early arguments along these lines, see Harold Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242, 243–45, 254 (1938); A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STAT. 157, 159–61 (1934). Many students of antitrust law were introduced to this case against monopoly by RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8–22, 239–55 (1976).

[12] An early attempt to quantify the social cost of monopoly in the U.S. economy placed that figure at just $1.50 per capita. Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. (PAPERS & PROC.) 77 (1954).

Economists fully recognize the limitations of static analysis. Welfare gains over time stem largely from technical progress, yet static analysis omits such gains. Static analysis also ignores welfare losses arising from output effects that do not occur immediately. Static partial equilibrium analysis takes the deployment of capital as given, but price changes that do not immediately affect output can alter the attractiveness of the affected sectors for investment, and the resulting changes in investment affect output over time.

Using partial equilibrium tools in applied welfare analysis presented difficulties in properly measuring consumer surplus[13] and in justifying welfare conclusions arrived after considering only one small piece of the resource allocation puzzle.[14] Modern theoretical welfare economics addressed the later problem by demonstrating that *changes* in total surplus correspond precisely to *changes* in social welfare under certain conditions.[15]

In addition, the compensation principle offers a simple rationale for relating

[13] To make quantitative statements about changes in social welfare, economists often employ the tools introduced by John Hicks and Nicholas Kaldor that monetize changes in utility. The compensating variation is the increment to income necessary to bring the post-change utility back to the level realized before the change. The equivalent variation is the increment to income necessary to bring the pre-change utility to the level realized after the change. *See* John S. Chipman & James C. Moore, *Compensating Variation, Consumer's Surplus, and Welfare*, 70 AM. ECON. REV. 933 (1980); Daniel T. Slesnick, *Consumer Surplus*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 152 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008). Assuming tractable functional forms, compensating variation and equivalent variation can be quantified using empirical demand curves. *See* Jerry A. Hausman, *Exact Consumer's Surplus and Deadweight Loss*, 71 AM. ECON. REV. 662 (1981).

[14] These difficulties were stressed in a leading 1970s antitrust treatise. *See* LAWRENCE ANTHONY SULLIVAN, ANTITRUST 2–6 (1977). *See also* Lawrence A. Sullivan, Book Review, 75 COLUM. L. REV. 1214, 1219–21 (1975).

[15] These conditions are: First, prices outside the market are unaffected by the conduct or policy at issue, so all other goods can be treated as a composite commodity called a numeraire. Second, each consumer's utility equals the amount consumed of the numeraire plus a function of the amount consumed in the market. Third, a redistributive mechanism allocates the numeraire in the socially optimal manner (whatever that might be). With optimal allocation of the numeraire, any increase (decrease) in total surplus in the market translates into an increase (decrease) in social welfare. *See* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 316–34 (1995). An additional condition not mentioned in economic literature is that the demanders in the market are individuals, so the area labeled consumer surplus actually is that.

changes in total surplus with changes in social welfare. It asks whether individuals gaining from a change in policy would still be better off after they compensated individuals made worse off enough to restore their utility to its prior level.[16] An increase (decrease) in total surplus represents a *potential* increase (decrease) in social welfare under the compensation principle. Put another way, the compensation principle holds that all policy changes are good if they enlarge the pie. Economists sometimes cite the compensation principle as the basis for using total surplus, rather than consumer surplus, as a welfare criterion in competition policy.[17]

Partial equilibrium welfare analysis of antitrust issues was popularized by the writings by Professor Oliver Williamson.[18] Williamson addressed horizontal merger cases and presented a "naïve tradeoff model" for "a merger that yields economies but extends market power."[19] Building on the simple graphical analysis of deadweight loss from monopoly, he illustrated the "net welfare effects," i.e., the effects on consumer and producer surplus, of a merger to monopoly that lowers incremental cost as well as raises price.[20] Because his "naïve tradeoff model" was a static partial equilibrium model, he acknowledged its limitations.[21] He argued that the U.S. merger enforcement agencies should consider this welfare tradeoff before deciding to challenge a merger.

B. PROFESSOR BORK ON CONSUMER WELFARE

The term "consumer welfare" entered the antitrust vernacular through the

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16 *See* John S. Chipman, *Compensation Principle, in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 38 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

17 *See, e.g.*, JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 12 (1988); W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 80 (4th ed. 2005).

18 Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968) [hereinafter, *Welfare Tradeoffs*]; Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977) [hereinafter, *Economies Revisited*]. The first of these articles was inspired by Williamson work in a visiting position at the Antitrust Division of the U.S. Department of Justice.

19 *See* Williamson, *Welfare Tradeoffs, supra* note 18, at 21–23.

20 *See id.* at 21; Williamson, *Economies Revisited, supra* note 18, at 707.

21 *See* Williamson, *Welfare Tradeoffs*, *supra* note 18, at 23–26; Williamson, *Economies Revisited*, *supra* note 18, at 710–13.

writings of Professor Robert Bork,[22] with an assist from the Supreme Court's quotation of his use of the term.[23] Bork's writings first used the term in the mid 1960s and made it commonplace with the 1978 publication of *The Antitrust Paradox*.[24] Before then, the term was only rarely used in economic literature[25] or law reviews,[26] and the term had no standard meaning in economics when Bork adopted it.[27]

Professor Bork's enduring contributions to the way we think and talk about antitrust issues began not long after he joined the Yale law faculty when he coauthored 1963 article in *Fortune* magazine titled *The Crisis in Antitrust*.[28] After explaining the per se rule against cartel activity, the authors posed the question:

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22 *See* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J. L. & PUB. POL'Y 449 (2008); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2252, 2272–75 (2013).

23 *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)).

24 ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

25 The American Economic Association's EconLit database contains fewer than 50 entries published before *The Antitrust Paradox* using the term but nearly 3000 after its publication. An early use of the term was that of Joe S. Bain, *The Sherman Act and "The Bottlenecks of Business*," 5 J. MARKETING 254, 255 (1941). He used the term in characterizing Thurman Arnold's critique of Sherman Act enforcement.

26 In law journals, a few instances of usage appear in discussions of antitrust policy, and the term appears to have been used in roughly the way Bork used it. *E.g.*, Joel Dean, *A Positive Program for Antitrust*, 10 ANTITRUST BULL. 943, 943 (1965); Leon Epstein, *Economic Predilections of Justice Douglas*, 1949 WIS. L. REV. 531, 559 (1949); Almarin Phillips, *Reciprocity under the Antitrust Laws: Observations on the Hales' Comment*, 113 U. PA. L. REV. 77, 77 (1964).

27 Prior to the first of Bork's articles using the term, only one prominent economics article appears to have used the term. Harberger, *supra* note 12, used it interchangeably with "aggregate welfare" in discussing measurement of the economy-wide deadweight loss due to monopoly. Without pointing to any examples, Professor Barak Orbach asserted that "consumer welfare" had a standard definition in economics when Bork wrote, which was consumer surplus. *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34, 137, 138–39, 146 (2011). *But see* John B. Kirkwood, *Consumers, Economics, and Antitrust*, *in* 21 RES. L. & ECON. 1, 30 (John B. Kirkwood ed., 2004) (arguing that "consumer welfare" is used in economics to refer to total surplus).

28 Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138.

"Why should we want to preserve competition anyway?"[29] They explained:

> The answer is simply that the chief glory of competition is that it gives society the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime productive resources are combined and separated, shuffled and reshuffled ever anew in the endless search for greater profits through greater efficiency. Each productive resource moves to the employment where the value of its marginal product, and hence the return paid to it, is greatest. Output is seen to be maximized because there is no possible rearrangement of resources that could increase the value to consumers of total output. We want competition, then, because we want our society to be as rich as possible and because we want individual consumers to determine by their actions what goods and services they want most.[30]

This explanation is significant for the fact that it makes the general equilibrium case for competition, not the partial equilibrium case against monopoly.

A few years later, Professor Bork published two articles in economics journals on the goals of antitrust.[31] The jumping off point for both was Sherman Act decisions invoking a variety of considerations, which he argued made the Act's administration unworkable, perhaps to the point of calling its constitutionality into question. In both articles, Bork argued that the only value courts should recognize is what he called "consumer welfare."[32] Although he did not define the term, he associated it with the general equilibrium case for competition.[33]

One of the articles drew on the legislative debates at the time of the Sherman Act's enactment to argue at length that the intent of Congress was mainly to protect

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[29] *Id.* at 138.

[30] *Id.* at 138–39. An expanded version of the *Fortune* article was published as part of a dialog. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965). A slightly different version of the quoted passage appears at page 365.

[31] Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. (PAPERS & PROC.) 242 (1967) [hereinafter, *Goals*]; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) [hereinafter, *Legislative Intent*].

[32] *See* Bork, *Goals*, *supra* note 31, at 243; Bork, *Legislative Intent*, *supra* note 31, at 8.

[33] *See* Bork, *Goals*, *supra* note 31, at 245 ("The preference for competitive rather than monopolistic resource allocation is most clearly explained and firmly based upon a desire to maximize output as consumers value it. The language of the statutes, then, clearly implies a consumer welfare policy"); Bork, *Legislative Intent*, *supra* note 31, at 7 (explaining that "the maximization of wealth or consumer want satisfaction" is what promotes "consumer welfare").

consumers from harm done by cartels while not undermining efficiency.[34] Bork argued that this intent indicated that Congress valued only "consumer welfare." In *The Antitrust Paradox*, he concisely summed up his historical research: "The Sherman Act was clearly presented and debated as a consumer welfare prescription."[35] And by this he meant mainly that Act's goal was strictly economic.

The Antitrust Paradox elaborated Bork's argument by considering alternative definitions of the word "competition" in antitrust law.[36] He posed and rejected four definitions before concluding that "competition" is "a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternate state of affairs through judicial decree."[37] He thereby defined "competition" as its desirable outcome per theoretical welfare economics—Pareto optimality.[38] Two of the rejected definitions were structure oriented, identifying "competition" as a state characterized by numerous small rivals or as a state in which no buyer or seller can influence price.[39] Two of the rejected definitions were process oriented, identifying "competition" as an absence of restraints or as a process of rivalry.[40]

The Antitrust Paradox also explained what Professor Bork meant by "consumer welfare." He declared that "[t]he 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."[41] And he

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[34] *See* Bork, *Legislative Intent*, *supra* note 31, at 21–31.

[35] *See* BORK, *supra* note 24, at 66.

[36] *Id.* at 58–61.

[37] *Id.* at 61.

[38] Commentators across the spectrum typically embrace Bork's outcome-oriented view of competition. But Eleanor Fox notably has preferred the process-oriented view I argue the Supreme Court has taken. *See* Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (Robert Pitofsky ed., 2008); Eleanor M. Fox, *Abuse of Dominance and Monopolization: How to Protect Competition without Protecting Competitors*, *in* EUROPEAN COMPETITION ANNUAL 2003: WHAT IS AN ABUSE OF A DOMINANT POSITION? 69 (Claus Dieter Ehlermann & Isabella Atanasiu eds., 2006); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

[39] BORK, *supra* note 24, at 59–61.

[40] *Id.* at 58–59.

[41] *Id.* at 91.

observed: "Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation."[42] He also maintained that the law treated all members of society equally[43] and used "consumer welfare" to refer to "the total welfare of consumers as a class."[44]

By referring to "the wealth of the nation" and "consumers as a class," and by appealing to Pareto optimality, Professor Bork equated "consumer welfare" with the general equilibrium concept of social welfare. This usage of the term "consumer welfare" was understood by reviewers of *The Antitrust Paradox*, who acknowledged Bork's association of "consumer welfare" with allocative efficiency and Pareto optimality.[45] Even Bork's most ardent critic acknowledged this association.[46]

C. The Meaning of "Consumer Welfare"

Although there was no standard meaning of "consumer welfare" in economics when Bork adopted the term in the mid 1960s, there is a standard meaning today, and it is not what Bork meant. About the time *The Antitrust Paradox* was published, sporadic usage of "consumer welfare" to mean partial equilibrium consumer surplus began to appear in leading economics journals.[47] Antitrust literature mainly adopted

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[42] *Id.* at 90.

[43] *See id.* at 110–12.

[44] *Id.* at 110.

[45] *See, e.g.*, Donald Dewey, *Antitrust and Economic Theory: An Uneasy Friendship*, 87 YALE L.J. 1516, 1516–17 (1978) (book review); Ernest Gellhorn, Book Review, 92 HARV. L. REV. 1376, 1377–78 (1979); Joseph E. Fortenberry, Book Review, 78 COLUM. L. REV. 1347, 1348 n.6 (1978).

[46] *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 84 (1982).

[47] Most articles used the term somewhat ambiguously to summarize technical analysis not using the term. *See, e.g.*, Hayne E. Leland, *Quality Choice and Competition*, 67 AM. ECON. REV. 127, 127 (1977); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. (PAPERS & PROC.) 267, 270 (1983); Robert D. Willig & Elizabeth E. Bailey, *The Economic Gradient Method*, 69 AM. ECON. REV. (PAPERS & PROC.) 96, 99 (1979). A few articles used the term in the analysis itself. *See, e.g.*, Dale W. Jorgenson, Lawrence J. Lau & Thomas M. Stoker, *Welfare Comparisons under Exact Aggregation*, 70 AM. ECON. REV. (PAPERS & PROC.) 268 (1980). One article on merger policy observed that "consumer welfare" could mean either the surplus of consumers or the total surplus. *See* Steven C. Salop, *Symposium on Mergers and Antitrust*, J. ECON. PERSP., Fall 1987, at 3, 8.

Bork's usage[48] until the usage emerging in the economic literature was forcefully advocated by Professor Joseph Brodley in 1987.[49]

Professor Brodley labeled Bork's usage of the term "as a synonym for economic efficiency . . . an unnecessary and confusing redundancy" and contended that the "term consumer welfare is the most abused term in modern antitrust analysis."[50] Brodley argued, "if consumer welfare is to serve as an operational principle of antitrust law, it must refer to the direct and explicit economic benefits received by the consumers of a particular product as measured by its price and quality. Using the more precise language of economics, consumer welfare can be defined as consumer surplus . . . ."[51] Bork's usage of "consumer welfare" has now almost disappeared,[52] while Brodley's preferred usage has become standard.[53]

With "consumer welfare" understood to mean consumer surplus, several

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48 The term was used as Bork used it by Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677, 679–83 (1988). Professor Areeda indicated that he used the term to mean something close to what Bork meant: "Competitive rather than monopolistic price levels; more rather than less output; innovation; minimum cost production; and the availability of free choices in the marketplace for consumers and producers alike. All of these benefits of competition are often summed up in the shorthand term 'consumer welfare.'" Areeda, *supra* note 3, at 572. An exception is Thomas J. Campbell, *The Efficiency of the Failing Company Defense*, 63 TEXAS L. REV. 251, 258 n.49 (1984) (using "consumer welfare" to mean consumer surplus).

49 Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020 (1987).

50 *Id.* at 1032.

51 *Id.* at 1033.

52 Few scholarly works from the past two decades used the term as Bork did. A notable continuing adherent to his usage is Frank H. Easterbrook, *When Is it Worthwhile for Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 347.

53 *See, e.g.*, EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 994 (2d ed. 2011); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 86 (4th ed. 2011); Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 COLUM. BUS. L REV. 293, 295–98; Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Analysis*, 78 ANTITRUST L.J. 471, 473 (2012); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, COMPETITION POL'Y INT'L, Autumn 2006, at 3, 5; Louis Kaplow & Carl Shapiro, *Antitrust*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1166 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Abraham L. Wickelgren, *Issues in Antitrust Enforcement*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 267, 272 (Einer Elhauge ed., 2012).

commentators, especially those critical of Professor Bork's views, have asserted that the present meaning of term was established when Bork wrote and that he re-defined the term.[54] Such contentions, however, are not supported by the economic and legal literature of the 1960s and 1970s. Commentators now almost universally[55] interpret Professor Bork's concept of "consumer welfare" to be the partial equilibrium concept of total surplus,[56] and they label his use of the term "misleading"[57] and "deceptive"[58]

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[54] *See, e.g.*, Blair & Sokol, *supra* note 53, at 473 (contrasting the "literal" meaning of the term with its use "as Bork intended"); John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2436 (2013) ("Bork redefined 'consumer welfare' as 'total welfare' . . . ."); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 213 (2008) (contrasting "Bork's concept" of "consumer welfare" with "the literal meaning of the term"); Orbach, *supra* note 27, at 146 ("Bork used the term 'consumer welfare' rather arbitrarily, with little attention to the standard economic definition of the term."); *id.* at 149 (contrasting Bork's concept of "consumer welfare" with "the term's literal meaning"); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The* True *Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 347 (2010) (Professor "Bork was effectively re-defining the term 'consumer welfare' to mean something very different.").

[55] A notable exception is Orbach, *supra* note 27. Professor Orbach faults Bork for identifying the goal of the Sherman Act with a general equilibrium welfare concept, arguing that "antitrust methodology . . . is all about partial equilibrium analysis" and therefore "cannot accommodate welfare analysis," including Bork's notion of "consumer welfare." *Id.* at 159–60. In deciding particular antitrust cases, the analytic focus of antitrust is, as Orbach argues, the relevant market, and the mode of economic analysis is partial equilibrium. *See* Gregory J. Werden, *Antitrust Needs the Relevant Market*, *in* 2012 FORDHAM COMPETITION L. INST. 237, 252–56 (Barry Hawk ed., 2013). But no methodological difficulties are presented by identifying the overarching goal of the Act with a general equilibrium welfare concept, while using partial equilibrium analysis in particular cases.

[56] *See, e.g.*, Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 515 & n.119 (2006); Blair & Sokol, *supra* note 53, at 476; Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 437 (2009); Farrell & Katz, *supra* note 53, at 5–6; Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 83 (2012); Alan J. Meese, *Reframing the (False?) Choice between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2219–20 (2013).

[57] *See, e.g.*, Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 432 (2005); Orbach, *supra* note 27, at 136.

[58] *See, e.g.*, Kirkwood, *supra* note 27, at 47 n.11; Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and*

on the basis that total surplus includes the profits of sellers as well as the surplus of consumers. Such an interpretation, however, is not supported by Bork's writings,[59] and his concept of "consumer welfare" is not subject to this criticism. General equilibrium social welfare relates only to actual consumers, which is not true of partial equilibrium consumer surplus when businesses are the customers in the relevant market.

D. THE WELFARE DEBATES

Professor Bork's argument that "consumer welfare" was the overarching goal of the Sherman Act sparked continuing debates both about the Act's goal and welfare standards for deciding cases. Initially, the debate focused on what should be gleaned from the sentiments of legislators responsible for the Sherman Act. Relying on essentially the same evidence as Bork, Professor Robert Lande argued that Bork was wrong to infer that allocative efficiency was the Act's goal.[60] Lande contended that the "primary purpose of the antitrust laws is to prevent consumers from paying prices that exceed competitive levels."[61]

Lande evidently identified competitive prices as the goal of the Sherman Act because they are ideal, but he articulate no basis for thinking that so. Theoretical welfare economics could fill the gap in his argument, but Lande argued that the insights from mid-twentieth century economics should be ignored in divining the Sherman Act's goal.[62] Of course, theoretical welfare economics demonstrates that pricing at competitive levels is ideal in the sense that it achieves Pareto optimality.

Professor Lande argued that determining the Sherman Act's goal was important

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Consumer Choice, 81 FORDHAM L. REV. 2349, 2360 n.54 (2013); Robert H. Lande, *Chicago's False Foundations: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 638 (1989).

[59] The main support for this interpretation appears to be Bork's presentation of Williamson's "naïve tradeoff model" and his description of the associated graph as a "consumer welfare diagram." *See* BORK, *supra* note 24, at 107–08; *see also id.* at 109 (referring to Williamson's graphical analysis as a "representation of the consumer welfare model").

[60] *See* Lande, *supra* note 58, at 632 & n.5, 634–39. Lande suggests that the Sherman Act is special interest legislation, not intended to promote general economic welfare. The protected interests, however, are those of every economic actor in the economy, since every individual and business is harmed by paying supracompetitive prices.

[61] *Id.* at 632.

[62] *Id.* at 635.

because that goal dictates the applicable standard for deciding cases.[63] More recently, Professor Steven Salop had taken the same position and claimed that adopting Bork's view of the Sherman Act's goal would lead to a decision rule in exclusionary conduct cases that even Bork would find irrational because it would give substantial weight to the lost profits of injured competitors.[64]

This inextricable linkage between the Sherman Act's goal and standard for deciding cases did not exist in the mind of Professor Bork.[65] At about the same time he first set out his position on the goal of the Sherman Act, he explained that efficiency depends on factors "not susceptible of direct study and measurement" so "the decision in most cases must be accomplished by the use of presumptions created with the guidance of economic theory."[66]

> Economic analysis does away with the need to measure efficiencies directly. It is enough to know what sorts of transactions efficiencies are likely to be present and in what sorts anticompetitive effects are likely to be present. The law can then develop objective criteria, such as market shares, to divide transactions likely to be predominantly favorable to consumers through the creation of efficiency from those likely to be predominantly injurious through their suppression of competition.[67]

Bork also explained how he thought the trial of a rule of reason case should proceed, making no reference to "consumer welfare":[68] The trial first considers whether the restraint is naked and the sort deemed unlawful per se. Defendants contending that the restraint is ancillary to a legitimate integration of economic activity then have an opportunity to demonstrate "substantial capacity for increasing the efficiency of the integration."[69] If the defendant does so, the trial considers evidence of purpose and effect, with purpose being dispositive only "in exceptional

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[63] *Id.* at 641–44.

[64] *See* Salop, *supra* note 54, at 347. In making this argument, Salop assumed that Bork's "consumer welfare" means total surplus. *See supra* note 56 and accompanying text.

[65] This has long been a matter of confusion. Bork's 1967 article (Bork, *Goals*, *supra* note 31) was read by Oliver Williamson to advocate allocative efficiency as the decisional test. *See* Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 AM. ECON. REV. (PAPERS & PROC.) 105, 107 (1969).

[66] Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 363, 410 (1965).

[67] *Id.* at 411.

[68] *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 387–90 (1966).

[69] *Id.* at 389.

cases."[70] In normal cases, the task is to assess probable effect "by applying rules of thumb constructed with the aid of economic analysis" where the "main criterion is market power."[71] Bork cautioned that courts should not "attempt to measure the efficiencies [from most restraints] since measurement, for all practical purposes, is impossible."[72] As a Judge, Bork later observed that, in applying the rule of reason, "[w]eighing effects in any direct sense will usually be beyond judicial capabilities" and indicated that no such weighing is needed.[73]

In the continuing welfare debates, the argumentation is not about what Congress intended, and the dispute sometimes is not framed in terms of the Sherman Act's goal. The dispute now is over what standard should be used to decide cases (or select rules for deciding cases), and the possibility of not applying a welfare standard generally is not considered. Contributions to the debates in law reviews generally address only which of the two partial equilibrium welfare concepts is better,[74] and the analysis normally does not consider how the decision in any one case might have broader effects operating through incentives.

A quite separate debate among economists has addressed only the standard for deciding merger cases.[75] Economists nearly always begin with the proposition that

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 390.

[73] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230 n.11 (D.C. Cir. 1986).

[74] *See, e.g.*, Blair & Sokol, *supra* note 53; Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 799 (2006); Meese, *supra* note 56, at 2209; Salop, *supra* note 54, at 336; Steven C. Salop, *Exclusionary Conduct, Consumer Harm, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329 & n.68 (2006); Wickelgren, *supra* note 52, at 272–76.

[75] Modern decisions under Section 7 of the Clayton Act hold that efficiencies are relevant to whether a merger substantially lessens competition. *See* William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 231–35 (2003) (reviewing cases). These decisions can be explained on the basis that the word "competition" is understood "metaphorically, in reference to its salutary effects." Gregory J. Werden, *An Economic Perspective on the Analysis of Merger Efficiencies*, ANTITRUST, Summer 1997, at 12, 13. The decisions suggest that the test for legality is the likely effect of a merger on consumer surplus. *See* Gifford & Kudrle, *supra* note 57, at 446–48. That proposition, however, is not firmly established in case law.

society should seek to maximize aggregate welfare,[76] but they sometimes question whether case-by-case application of a partial equilibrium total welfare standard is the best way to achieve society's goal.[77] Several arguments are advanced for why that might not be so. Some of the arguments are based on how merger enforcement affects which mergers are proposed.[78] Others are based on how the merger review at the agencies works.[79] For reasons I detail elsewhere, I do not find any of the arguments persuasive,[80] but the arguments do make an important point—that the best decision rule for promoting a particular welfare objective could be a criterion other than the objective itself.

E. CONCLUSION

Professor Bork succeeded in getting antitrust courts to value only economic considerations, and he succeeded in making the term "consumer welfare" part of the antitrust vernacular. But his views on "consumer welfare" are now largely misunderstood and wrongly criticized.

Professor Bork argued that the overarching goal of the Sherman Act was to make the economic pie as large as possible, without regard to how it is divvied up. He was inspired by the case for competition made by theoretical welfare economics—that competition achieves Pareto optimality. Bork needed a term for referring to the value that competition thereby promotes, and he chose "consumer welfare." The term had no generally accepted meaning in economics when Bork adopted it, but the term has come to mean something different from Bork's usage in both economics and antitrust law.

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[76] An exception is Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, COMPETITION POL'Y INT'L, Autumn 2007, at 205.

[77] *See, e.g.*, David Besanko & Daniel S. Spulber, *Contested Mergers and Equilibrium Antitrust Policy*, 9 J.L. ECON. & ORG. 1 (1993); Farrell & Katz, *supra* note 53; Sven-Olof Fridolfsson, *A Consumer Surplus Defense in Merger Control*, *in* THE POLITICAL ECONOMY OF ANTITRUST 287 (Vivek Ghosal & Johan Stennek eds., 2007); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, COMPETITION POL'Y INT'L, Autumn 2006, at 29; Damien J. Neven & Lars-Hendrik Röller, *Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control*, 23 INT'L J. INDUS. ORG. 829 (2005).

[78] *See* Besanko & Spulber, *supra* note 77; Fridolfsson, *supra* note 77.

[79] *See* Neven & Röller, *supra* note 77; Pittman, *supra* note 76, at 221–22.

[80] *See* Gregory J. Werden, *Consumer Welfare and Competition Policy*, *in* COMPETITION POLICY AND THE ECONOMIC APPROACH 11, 23–25 (Josef Drexl et al. eds., 2011).

Professor Bork did not argue that cases should be decided on the basis of the partial equilibrium concept of total surplus (aka total welfare).[81] Indeed, he argued against case-by-case analysis of likely effects and had not use for any particular metric for measuring them. He did not think that the rule of reason demanded such analysis, and he did not think that the legal system was up to the task. His argument that "consumer welfare" was the goal of the Sherman Act was not intended to make antitrust more complex by injecting economic analysis into every case, but rather to make antitrust simpler by keeping non-economic considerations out.

The welfare debates of the past quarter century have tended to skip over the threshold policy question of whether the rule of reason should be applied as a welfare standard and the threshold legal question of whether the Supreme Court has articulated and applied the rule of reason as a welfare standard. Part II of this article addresses the latter question.

II. THE RULE OF REASON IN THE SUPREME COURT

A. DECISIONS ARTICULATING THE RULE OF REASON

In the 1911 *Standard Oil* decision,[82] the Supreme Court first considered in depth the meaning of Section 1 of the Sherman Act. Chief Justice White's opinion for the Court worked from the unarguable premise that "some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated."[83] The Court "deduced from the history of the act and the analysis of its text" that Congress intended to adopt "the standard of reason which had been applied at the common law."[84] Thus, the Court

[81] Bork responded to the attribution of a particular analysis to *The Antitrust Paradox* by stating: "I had no idea I was a proponent of partial-equilibrium analysis . . . ." Robert H. Bork, *Economics and Antitrust: Response*, 3 CONTEMP. POL'Y ISSUES 35, 40 (1984). Perhaps unaware of Bork's denial, Professor Alan Meese argues at length that Bork embraced partial-equilibrium analysis. *See* Meese, *supra* note 56, at 2219–22.

[82] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[83] *Id.* at 60.

[84] *Id.* at 60, 66. The Court observed that English common law treated "as illegal all contracts or acts which were unreasonably restrictive of competitive conditions" on the basis of their "nature or character" and whether circumstances "give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of

declared that "in every case where it is claimed that an act or acts are in violation of the statute[,] the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied."[85]

A few weeks later, Chief Justice White's opinion for the Court in *American Tobacco* provided the first full statement of the rule of reason, holding that Section 1 prohibits only restraints "operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."[86] Sustaining a criminal conviction under Section 1 in 1913, Justice Holmes improved on the Chief Justice's prose, stating that "only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."[87] The three decisions first articulating the rule of reason equated unreasonably restraining trade with "unduly restricting competition," and the Court's focus on competition has never wavered.

Justice Brandeis wrote for the Court in the 1918 *Chicago Board of Trade* decision, explaining that:

> The true test for 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.[88]

This formulation remains good law in view of recent Supreme Court decisions

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commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." *Id.* at 58.

[85] *Id.* at 66.

[86] United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

[87] Nash v. United States, 229 U.S. 373, 376 (1913).

[88] Bd. of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918). For an explanation of why the Court was right to find that the restraint promoted competition, see Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The* Chicago Board of Trade *Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, *in* 15 RES. L. & ECON. 1 (Richard O. Zerbe, Jr. & Victor P. Goldberg eds., 1992).

repeating it.[89] And it identifies "the fundamental nature of the rule of reason inquiry, which is to determine whether a restraint destroys competition."[90]

The Brandeis formulation has been criticized for identifying "the haystack but not the needle,"[91] but it does not open the door to considerations other than competition.[92] It merely invites arguments that restraints are procompetitive in the sense that they make markets work better. The scenario contemplated by Justice Brandeis is that participants in a market identify an "evil" threatening the market's efficient operation and giving them a "reason for adopting the particular remedy" they agree upon, which "merely regulates . . . competition." In determining whether the facts of a case fit this scenario, a court might need to consider many of the factors mentioned in the passage quoted above.[93]

For nearly four decades after deciding *Chicago Board of Trade*, the Supreme Court added nothing of note about the content of the rule of reason. The next decision to do so was *Northern Pacific*,[94] a 1958 tying decision based on a per se theory. Justice

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[89] The Court sometimes quotes *Chicago Board of Trade*. *E.g.*, Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216 n.10 (2010); Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 n.13 (1982). The Court also has paraphrased it: Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

[90] 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1912b, at 351 (3d ed. 2011). *See* Andrew I. Gavil, *Moving beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 742 (2012) ("Justice Brandeis's timeless explanation of the rule of reason incorporates many of its most enduring characteristics.").

[91] HOVENKAMP, *supra* note 53, at 275.

[92] *Contra* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST 221 (2006) ("[T]he Court appears to be asking whether the arrangement has purposes and effects other than restricting competition and, if so, whether these validate the arrangement when weighed against any resulting competitive injury."); Gavil, *supra* note 90, at 743 (The Brandeis formulation "seemed to define 'effects' broadly, suggesting a willingness to go beyond competitive effects."); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 306 (1986) ("Under this standard, no defense can be ruled out so long as it is presented as some effort to right the wrongs of society.").

[93] For a similar view, see 7 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1502, at 389 (3d ed. 2010).

[94] N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

Black's opinion for the Court distinguished between the basic aim the Sherman Act and loftier goals Congress hoped to advance by pursuing that aim:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[95]

The Court reiterated that the Sherman Act prohibits "only those contracts or combinations which 'unreasonably' restrain competition."[96] But the Court also explained that unreasonableness can follow immediately from a restraint's character: "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[97]

Northern Pacific began an era during which the Supreme Court saw a "pernicious effect" in every restraint it examined.[98] The Court said nothing of note about the rule of reason until the era came to a close with the 1977 *Sylvania* decision.[99] That decision, discussed in the next section, quoted the Brandeis formulation of the rule of reason in a footnote, while simplifying it in the text: "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[100]

In *Professional Engineers*[101] the Court addressed the scope provided by the rule of reason for justifying a trade restraint. The Court explained that its decisions consistently identified competition as the "central principle of antitrust analysis" and held that: "Contrary to its name, the Rule [of Reason] does not open the field of

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95 *Id.* at 4.

96 *Id.* at 5.

97 *Id.*

98 *See* Gavil, *supra* note 90, at 744–45.

99 Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

100 *Id.* at 49.

101 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[102] The Court's application of this keystone principle is discussed in the next section.

The Court further stressed the centrality of competition under the Sherman Act in *Broadcast Music*.[103] The issue before the Court was whether the blanket copyright license offered by ASCAP and BMI should be viewed as per se unlawful price fixing. The Court rejected that categorization based on form in favor of categorization based on the nature of the conduct at issue. The Court observed that its prior decisions had "held that certain agreements or practices are so plainly anticompetitive and so often lack any redeeming virtue that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."[104] The Court went on to explain that, in determining whether a restraint is conclusively presumed unlawful, the

> inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . ., or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."[105]

Three decisions from the 1983 term commented on the rule of reason. In *Monsanto*, the Court concisely paraphrased *Sylvania*, noting that the rule of reason "requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition."[106] In *Copperweld*, the Court commented on how and why the rule of reason is applied by describing it as "an inquiry into market power and market structure designed to assess [a restraint's] actual effect," and by explaining that "mergers, joint ventures, and various vertical agreements" are not unlawful per se because they "hold the promise of increasing a firm's efficiency and enabling it to compete more

[102] *Id.* at 688.

[103] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[104] *Id.* at 8 (citations, internal quotations, and ellipsis in original omitted).

[105] *Id.* at 19–20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

[106] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

effectively."[107]

In *NCAA* the Court explained that "there is often no bright line separating *per se* from Rule of Reason analysis" and that "the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."[108] In a footnote, the Court quoted the passage from *Northern Pacific* declaring that "the policy unequivocally laid down by the [Sherman] Act is competition."[109]

In *California Dental Association*, the Court observed that *NCAA* and a few other decisions form a "basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason" applied when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[110] When "the likelihood of anticompetitive effects is comparably obvious," the Court explained, no further showing by the plaintiff is necessary to place "the burden of procompetitive justification on those who agree" to restrain trade.[111] Similarly, in *American Needle*, the Court observed that, "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye."[112]

In *California Dental Association*, the Court also commented that

> there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after

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[107] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

[108] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 & n.26 (1984).

[109] *Id.* at 104 n.27.

[110] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[111] *Id.* at 771.

[112] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216–17 (2010) (internal quotations omitted).

case reach identical conclusions.[113]

The forgoing decisions, spanning a century, identify a single criterion for evaluation the legality of a trade restraint—impact on competition.[114]

B. DECISION RATIONALES ILLUMINATING THE RULE OF REASON

The rationales of five Sherman Act Section 1 decisions rendered between 1977 and 1996 offer important insights into the rule of reason. Although the cases address a variety of issues and types of conduct, the decisions demonstrate a consistent vision. In most of these cases, exploring the path not taken, although mapped by concurring or dissenting justices, clarifies that vision.

In *Sylvania*[115] the Supreme Court addresses the Sherman Act's treatment of non-price vertical restraints. A decade prior, in *Schwinn*, the Court had held such restraints unlawful per se,[116] but in *Sylvania,* the Court reverses itself, declaring that *Northern Pacific*'s rationale for per se condemnation does not apply. Justice Powell's opinion for the majority observes that there had been "no showing . . . that vertical restrictions have or are likely to have a 'pernicious effect on competition' or that they 'lack . . . any redeeming virtue.'"[117] Rather, he notes that economic literature identifies "ways in which manufacturers can use [non-price vertical restraints] to compete more effectively against other manufacturers" and that "manufacturers

[113] *Cal. Dental*, 526 U.S. at 780–81.

[114] A case cited as an exception is *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). *See, e.g.*, SULLIVAN & GRIMES, *supra* note 92, at 221–24. The Court's analysis of the joint selling agency at issue in the case lacked the hostility toward competitor cooperation that characterizes many of its decisions, but the Court nonetheless kept its focus on competition. The Court declared that the "mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it," but the Court made clear that its point was that not all trade restraints are prohibited. *Appalachian Coals*, 288 U.S. at 360–61. The coal producers exclusively using the joint selling agency supplied a substantial portion of the coal in the market, and the arrangement apparently eliminated price competition among those using it, but the Court stressed that the joint selling agency made no attempt "to limit production" and that, had it done so, other producers easily could have made up for the reduced production. *Id.* at 357, 367–69, 373–74. Although the Court of a different time might have viewed the arrangement as a cartel, the Court of 1933 apparently favored the contrasting view urged by defendants. *Id.* at 359.

[115] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[116] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[117] *Sylvania*, 433 U.S. at 58 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products."[118] The majority thus rejects per se condemnation because the restraints at issue are apt to promote efficiency and competition.

Justice White, concurring, agrees that the per se rule should not be applied given the facts of the case, particularly Sylvania's tiny share of the relevant market, but he sees no need to overrule *Schwinn*.[119] Justice White also expresses "substantial misgivings" about overruling *Schwinn*.[120] And he sees merit in the "notion" he finds in some of the Court's decisions that distributors and retailers "should have the freedom to dispose of the goods they own as they see fit."[121]

Less than a year after *Sylvania*, the Supreme Court decides *Professional Engineers*.[122] Justice Steven's majority opinion remains one of its most elucidating on the meaning of the rule of reason. The case concerns a canon of ethics for a professional association that bars participation in competitive bidding by engineers who design and construct bridges, buildings, and such. The issue before the Supreme Court is whether the canon can be justified on the basis that competition among consulting engineers is "contrary to the public interest."[123] Defendants argue that their bidding ban "ultimately inures to the public benefit" by preventing "deceptively low bids" and eliminating the "tempt[ation of] individual engineers to do inferior work with consequent risk to public safety and health."[124] The Court rejects the justification as a matter of law and upholds the lower courts' determination that the self-evident anticompetitive effect of the competitive bidding ban is a sufficient basis for condemning it under the rule of reason.

Justice Stevens labels the proffered justification a "frontal assault on the basic policy of the Sherman Act."[125] He explains that administration of the Act must always focus on its basic aim of protecting the competitive process, even when doing so might not advance the Act's lofty goals:

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118 *Id.* at 55–56.

119 *Id.* at 59–66 (White, J., concurring).

120 *Id.* at 66.

121 *Id.* at 66–68.

122 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

123 *Id.* at 684–86.

124 *Id.* at 693.

125 *Id.* at 695.

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.[126]

Justices Blackmun and Rehnquist concur in the judgment but write separately to express their preference for putting off deciding "whether the 'Rule of Reason' as applied to the professions could ever take account of benefits [from industry self-regulation] other than increased competition."[127] These Justices doubt that "holding that ethical norms can pass muster under the Rule of Reason only if they promote competition . . . leaves enough elbowroom for realistic application of the Sherman Act to professional services" in which self-imposed rules such as "standards of minimum competence" can have anticompetitive effects yet be "important in a profession's proper ordering."[128]

Another opinion by Justice Stevens, the *NCAA* decision,[129] follows *Professional Engineers* in utilizing a streamlined application of the rule of reason. The case concerns a challenge by universities to the NCAA's restraint on the amount of college football that could be televised. The district court had characterized the NCAA's control over football as a cartel, and the court of appeals had held the restraint unlawful per se.[130] In the alternative, the court of appeals held the restraint unreasonable in view of its obvious threat to competition and the NCAA's apparent market power.[131] The Supreme Court rejects per se condemnation of the restraint on the grounds that "horizontal restraints on competition are essential if the product is to be available at all," but indicates that this does "not change the ultimate focus of [its] inquiry"—the restraint's "impact on competition."[132]

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[126] *Id.* (citation omitted) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)). *See also* Gavil, *supra* note 90, at 748 (The decision "sharply refocused the Sherman Act inquiry on competitive effects").

[127] *Id.* at 699 (Blackmun, J., dissenting).

[128] *Id.* at 700–01.

[129] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

[130] Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in pt. and remanded*, 707 F.2d 1147 (10th Cir. 1983).

[131] *NCAA*, 707 F.2d at 1157–60.

[132] *NCAA*, 468 U.S. at 101, 104.

The Court finds the anticompetitive impact of the restraint "apparent" from the resulting restriction of output and increase in price for television rights.[133] The NCAA argues that there could be "no significant anticompetitive effect" because it lacked market power.[134] But the Court rejects this argument as a matter of fact and as a matter of law, holding that "the absence of market power does not justify a naked restriction on price or output."[135] Thus, the Court holds that the NCAA has "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of the free market."[136] And the Court finds cognizable, yet wholly insufficient, several justifications offered for the restraint.[137]

Justices Rehnquist and White dissent, taking issue with the majority on whether the restraint reduces output in the relevant market, and they suggest that it actually might promote competition.[138] These Justices find critical that the "restraint operates on nonprofit educational institutions as distinguished from business entities."[139] In their view, the case is distinguishable from *Professional Engineers* and the Court should afford scope for consideration of the "legitimate noneconomic values" promoted by the NCAA, including "amateurism."[140]

Indiana Federation of Dentists[141] concerns the FTC's challenge to the policy of dentists to withhold x-rays from insurers. Through its administrative process, the FTC had found the policy to be an unreasonable restraint of trade "even absent proof that the Federation's policy had resulted in higher costs to insurers and patients than would have occurred had x rays been provided."[142] The court of appeals disagreed that the restraint adversely affected competition and held that the FTC's findings did not support the conclusion that the restraint was unreasonable.[143] The Supreme Court, however, unanimously reverses in an opinion by Justice White.

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133 *Id.* at 104–07.

134 *Id.* at 109.

135 *Id.* at 109–12.

136 *Id.* at 113.

137 *Id.* at 113–14, 117–20.

138 *Id.* at 120–33 (White, J., dissenting).

139 *Id.* at 133.

140 *Id.* at 134–35.

141 FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

142 *Id.* at 452.

143 *Id.* at 453 (citing Ind. Fed'n of Dentists v. FTC, 745 F.2d 1124 (7th Cir. 1984).

The Court holds that the record contains sufficient evidence to demonstrate "that competition was actually suppressed," meaning that, but for the restraint, many dentists would have provided x-rays to insurers.[144] The Court finds that the "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty," explaining that:

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare . . . . Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, such an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.[145]

The Court rejects contrary arguments advanced by the Federation. The FTC's "failure to engage in detailed market analysis" is of no moment because proof of actual detrimental effects "can obviate the need for an inquiry into market power."[146] The FTC is not required to find that the x-rays have utility to insurers, much less that their withholding results in higher prices or any other consumer injury, because the "Federation is not entitled to pre-empt the working of the market."[147]

Finally, the *Discon* case[148] also is highly instructive on the content of the rule of reason. The case concerns a scheme by the defendant telephone company to pay higher than market prices for certain services and pass the higher cost on to customers through the regulatory rate-setting process. The scheme precluded price competition in the provision of the services, caused the plaintiff to go out of business, and profited the defendant through an end-of-year rebate from the over-paid service provider.[149] The plaintiff's antitrust damages action, however, had been dismissed for failure to state a claim. The court of appeals reinstated the case on the basis that the complaint would state a claim under Section 1 of the Sherman Act if, as it

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144 *Id.* at 455–57.

145 *Id.* at 459 (citations and internal quotations omitted).

146 *Id.* at 460–61.

147 *Id.* at 461–62.

148 NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

149 *Id.* at 131–32.

appeared, the scheme had "no purpose except stifling competition."[150] But, in an opinion by Justice Breyer, the Supreme Court unanimously reverses.

Constrained by the questions presented, the Supreme Court addresses only whether the conduct could be per se unlawful,[151] but its rationale entirely forecloses liability under Section 1 when the case is remanded.[152] The Court holds that invoking the per se rule requires that the plaintiff "allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."[153] The Court describes the scheme as "a regulatory fraud" that "hurt consumers by raising telephone service rates" but observes that the injury flowed not "from a less competitive market" but rather from lawfully acquired market power and "deception worked upon the regulatory agency."[154] It does not matter to the Court that driving the plaintiff out of business was an intended consequence of the scheme.[155]

A unifying theme of these decisions is single-minded focus on competition. In four of the five decisions, the Supreme Court addresses whether the Sherman Act values something beside competition, and in all four, the Court holds that it does not. In *Sylvania* the Court holds that the Act places no value on the freedom of distributors and retailers. In *Professional Engineers* the Court holds that the Act places no value on public safety or standards of professionalism. In *NCAA* the Court holds that the Act places no value on promoting education or maintaining amateurism. And in *Discon* the Court holds that the Act places no value on consumer injury not traced to the suppression of competition.

The two most recent of these decisions, which have little in common other than

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[150] Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1061 (2d Cir. 1996) (quoting Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978) (en banc)).

[151] *See Discon*, 525 U.S. at 140.

[152] On remand, the district court grants summary judgment for the defendants on several alternative bases, including that: "The Supreme Court held in this case that in order for Discon to prevail on its Sherman Act claims, it must allege and show that NYNEX's conduct caused market-wide harm to *competition*, not just harm to Discon itself or to consumers in general. The undisputed facts in this case make clear that Discon has not and cannot meet this burden." Discon, Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 165 (W.D.N.Y. 2000).

[153] *Discon*, 525 U.S. at 135.

[154] *Id.* at 136–37.

[155] *Id.* at 137–38.

the unanimity of the justices, indicate that the Court views competition as a process and holds that the Sherman Act focuses solely on how restraints affect that process. This is explicit in Justice Breyer's *Discon* language, and it is implicit in Justice White's analysis in *Indiana Federation of Dentists*. In the latter case, the suppression of competition sufficient to violate Section 1 is not linked to effects on price, quality, output, or any other source of harm to consumers. It is sufficient that the competitive process is corrupted. And, in *Discon*, harm to consumers is clear, but the decisive factor is that the competitive process is not corrupted.

C. CONTRARY INTERPRETATIONS OF SUPREME COURT DECISIONS

Nuance and ambiguity in Supreme Court antitrust decisions permit divergent interpretations of what the Court said and, more to the point, what the Court meant. Some commentators claim that the Court's decisions indicate that it applies or endorses a welfare standard. Under close scrutiny, however, these claims are seen to illustrate the adage that "believing is seeing."[156]

Professors Roger Blair and Danny Sokol find many indications in Supreme Court decisions that the rule of reason is a welfare standard,[157] the earliest appearing in the Court's 1977 decisions in *Brunswick*[158] and *Sylvania*.[159] They point to Justice White's *Sylvania* concurrence, which disagreed with the "purely economic approach" he associated with Professors Bork and Posner[160] and the view that "the Sherman Act as directed solely to economic efficiency" he associated with Professor Bork.[161] Blair and Sokol suggest that Justice White also was characterizing "the position of the Court,"[162] but as Court observed in *Leegin*, Justice White was pointing out that Court

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156 The earliest appearance of this adage of which I am aware is in Harold Demsetz, *Two Systems of Belief about Monopoly, in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 164 (Harvey J. Goldschmid et al. eds., 1974). More recently, the phrase has appeared in several works of fiction and the titles of several scholarly publications.

157 Blair & Sokol, *supra* note 53, at 477.

158 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

159 Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

160 *Id.* at 69 (White, J., concurring) (citing Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 391–429 (1966); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 292–93 (1975)).

161 *Id.* at 68 (citing Bork, *supra* note 160; Bork, *Legislative Intent*, *supra* note 31).

162 Blair & Sokol, *supra* note 53, at 477.

has not aligned itself with Bork and Posner; the Court supported unequal treatment for price and non-price vertical restraints, which Bork and Posner argued against.[163]

Blair and Sokol also point to Justice Marshall's rationale for the antitrust injury requirement in *Brunswick*.[164] In that decision, the unanimous Court barred recovery of profits lost when a merger "preserved competition," explaining that the antitrust laws "were enacted for 'the protection of competition, not competitors,'" so it "is inimical to the purposes of these laws to award damages for the type of injury claimed."[165] Section 4 of the Clayton Act authorizes damages suits by those injured "by reason of anything forbidden in the antitrust laws,"[166] and the Court concluded that preserving competition does not make a merger unlawful, so the injuries at issue "did not occur 'by reason of' that which made the acquisitions unlawful."[167]

The Court also observed that a clearly expressed congressional purpose to award damages under such circumstances could not be found "in either the language or the legislative history" of Section 4.[168] Blair and Sokol opine that "*Brunswick* seems to favor a consumer welfare standard" on the basis this slim legislative history reference,[169] even though nothing in the opinion suggests a welfare standard and the Court singled out competition as the central value of antitrust law.

The Supreme Court first used the term "consumer welfare" in the 1979 decision *Reiter v. Sonotone Corp.*,[170] but the Court said nothing in that decision about liability standards. The case was a putative class action brought by purchasers of hearing

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163 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 901 (2007).

164 *Brunswick*, 429 U.S. at 488–89. I discuss *Brunswick* after *Sylvania* out of order in this otherwise chronologically organized section because Blair and Sokol, *supra* note 53, at 477, say that *Sylvania* came first and "we would not have the ambiguity that exists today" but for "subsequent[]" decisions like *Brunswick*.

165 *Brunswick*, 429 U.S. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) (citation omitted).

166 15 U.S.C. § 15.

167 *Brunswick*, 429 U.S. at 488.

168 *Id.*

169 Blair & Sokol, *supra* note 53, at 477. They advert to legislative history suggesting "that the trebling of damages provided individual consumers with a remedy against the anticompetitive behavior of firms." *Id.* But they do not point to such legislative history or provide any indication that the Court was aware of any.

170 442 U.S. 330 (1979).

aids seeking to recover overcharge damages.[171] The question before the Court was whether their claim is permitted by Section 4 of the Clayton Act, which confers recovery rights on persons injured in their "business or property." Without dissent, the Supreme Court reversed the determination by the court of appeals that consumer injury was not of that nature.[172]

Chief Justice Burger's opinion for the Court considered the meaning of the word "property" and how it had been interpreted under Section 4. He concluded that injury to property arises when a person's "money has been diminished by an antitrust violation."[173] He also examined the legislative history of section 4 and found no indication from the floor debates that Congress intended to "exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use."[174] He added: "On the contrary, they suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[175] The quotation is, of course, from *The Antitrust Paradox*. Blair and Sokol suggest that the Court's use of the quotation "speaks more to consumer welfare than to total welfare,"[176] but it says nothing about liability. Moreover, Bork did not advocate a welfare standard, and his concept of "consumer welfare" is not what Blair and Sokol mean by the term.

The phrase "consumer welfare prescription" also was quoted in the opinion for the Court by Justice Stevens in *NCAA*.[177] Professor Einer Elhauge claims that this use of the quotation demonstrated a clear preference for a consumer surplus standard over a total surplus standard.[178] Elhauge's inference appears to be based entirely on the use of the term "consumer welfare," to which he ascribes the current meaning, although the Court's usage in 1984 almost certainly was that of Bork.

[171] *Id.* at 335.

[172] *Id.* at 336–37, *rev'g* Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978).

[173] *Id.* at 337–40.

[174] *Id.* at 342–43.

[175] *Id.* at 343. The Solicitor General had taken a similar approach, but with a more extensive review of the legislative history, and a longer version of the Bork quotation. Brief of the United States at 12–18, Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (78-690).

[176] Blair & Sokol, *supra* note 53, at 478.

[177] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984). In addition, Justice Powell's dissent in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), quoted the phrase. He did so in criticizing the majority for condemning under the per se rule "a novel plan about which it knows little." *Id.* at 367.

[178] *See* Elhauge, *supra* note 56, at 436 & n.99.

Moreover, in citing "consumer welfare" as the goal of antitrust, the Court did not imply that the test for liability was a consumer welfare standard.

Professor Steven Salop claims that the *NCAA* opinion indicates that the rule of reason "generally is interpreted as an anticompetitive effect test that focuses on the net impact on consumer welfare."[179] But he points to a portion of the opinion[180] in which the Court held that "the criterion to be used in judging the validity of a restraint of trade is its impact on competition."[181] The Court also indicated in this portion of the opinion that the NCAA's television plan "restrains price and output" giving it "a significant potential for anticompetitive effects."[182] But nothing in that observation suggested that the Court equated "anticompetitive effects" with impact on consumer surplus.

Salop also points to the portion of the opinion in which the Court focused on price and output.[183] The Court noted that the restraint made price and output "unresponsive to consumer preference" and explained that television viewers often were unable to watch games they wanted to watch.[184] The Court found responsiveness to consumer preference "significant because 'Congress designed the Sherman Act as a "consumer welfare prescription."'"[185] And the Court declared that a restraint with "the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."[186] The Court appears to have taken a process-oriented view of competition in that it found that the restraint inconsistent with the "fundamental goal of antitrust law" because it undermined role of the market in satisfying consumer wants. And ultimately, the Court held that "[t]his naked restraint on price and output requires some competitive justification" and found all proffered justifications wanting,[187] with no indication that the Court used impact on consumer surplus as the touchstone.

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179 *See* Salop, *supra* note 74, at 329. He used the term "consumer welfare" to mean consumer surplus with possible adjustments for longer term effects.

180 *See id.* at 329 n.68 (citing *NCAA*, 468 U.S. at 103–04).

181 *NCAA*, 468 U.S. at 104.

182 *Id.*

183 *See* Salop, *supra* note 54, at 340 (citing *NCAA*, 468 U.S. at 107–08 (1984)).

184 *Id.* at 107 & nn.33–34.

185 *Id.* at 107 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

186 *Id.*

187 *Id.* at 110, 113–20.

Professor Elhauge claims that the *Brooke Group* decision[188] demonstrates that the Supreme Court applies a consumer surplus standard.[189] He points to the Court's holding that below-cost pricing violates Section 2 of the Sherman Act only when accompanied by a likelihood of recoupment[190] and to the Court's observation that below-cost pricing alone "produces lower aggregate prices in the market, and consumer welfare is enhanced."[191] Elhauge, infers that the recoupment requirement could not be motivated by consideration of total surplus because pricing below cost is inefficient and thus fails to maximize total surplus.[192]

Like Blair and Sokol,[193] Elhauge argues from the premise that a close reading of Supreme Court decisions reveals which of the two partial equilibrium welfare measures the Court used as its guide. He arbitrarily rules out other guides, yet the Court indicated in *Brooke Group* that its principal guide was something else:

> As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.[194]

And the Court's usage of the term "consumer welfare,"[195] while ambiguous, could have been that of Bork and thus quite different from Elhauge's usage. Bork represented the prevailing party in the Supreme Court.

The Supreme Court explained in *Brooke Group* that its below-cost pricing requirement addressed whether challenged conduct can harm a competitor, whereas the recoupment requirement addressed whether harming a competitor "would likely injure competition."[196] The Court also explained that "'cutting prices in order to

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[188] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[189] *See* Elhauge, *supra* note 56, at 436. Similar arguments are made by Salop, *supra* note 54, at 341–42, and Kirkwood & Lande, *supra* note 54, at 217.

[190] *Brooke Group*, 509 U.S. at 222–26.

[191] *Id.* at 224.

[192] The assumption that below-cost pricing is inefficient, and hence reduces total surplus is questionable. *Brooke Group* avoided any determination of the appropriate measure of cost, and efficient pricing goes below measures of cost some courts have used (e.g., average total cost), and some commentators have advocated (e.g., long-run average incremental cost).

[193] Similar reasoning characterizes the analysis of Blair & Sokol, *supra* note 53, at 477–80.

[194] *Brooke Group*, 509 U.S. at 223.

[195] *Id.* at 221, 224.

[196] *Id.* at 225–26.

increase business is the very essence of competition,'" and it resolved to make sure that "antitrust suits themselves [do not] become a tool for keeping prices high."[197] The Court's explicit rationale for the holding on which Elhauge stakes his claim was not linked to any welfare measure, but rather to protecting the competitive process.

Elhauge cites the *Weyerhaeuser* decision[198] for exactly the same proposition he cites *Brooke Group*.[199] In that decision, the Supreme Court extended the analysis of *Brooke Group* to the scenario in which the allegedly exclusionary conduct is overbidding for scarce inputs. In the portion of the decision Elhauge relies upon, the Court likens predatory overbidding for inputs with predatory pricing and observes that failed predatory bidding might benefit consumers just as failed predatory pricing.[200] But the consumer benefit is dubious, and this observation follows the principal point of that portion of the opinion, that "actions taken in a predatory-bidding scheme are often the very essence of competition."[201] Like *Brooke Group*, *Weyerhaeuser* lends more support to the proposition that the Sherman Act protects the competitive process than to the proposition that it implicates a welfare standard.

Professors John Kirkwood and Robert Lande find it highly significant that the opinion of Justice Thomas for the unanimous Court in *Weyerhaeuser* referred to effects on consumers.[202] But consumer interests were not in jeopardy in the case, so those references could not imply a consumer welfare standard. Commentators favoring a consumer welfare standard properly observe that, under that standard, antitrust law would have been indifferent to the injury of the input supplier that brought suit,[203] but Justice Thomas was not indifferent to that injury.

The most recent Supreme Court decision cited in support of a welfare standard

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197 *Id.* at 226–27 (quoting Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 n.17 (1986), quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

198 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312 (2007).

199 *See* Elhauge, *supra* note 56, at 436. A similar argument is made by Blair & Sokol, *supra* note 53, at 479–80.

200 *Weyerhaeuser*, 549 U.S. at 323–24. Elhauge cites 129 S. Ct. 1069, 1077, which contains the text on page 323 and the first half of page 324 in United States Reports version.

201 *Weyerhaeuser*, 549 U.S. at 323 (internal quotations omitted).

202 *See* Kirkwood & Lande, *supra* note 54, at 217–18.

203 *See* J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353; Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 677–78, 685–89 (2005).

is the majority opinion in *Leegin* by Justice Kennedy.[204] This is the only Supreme Court opinion that arguably asserts a consumer welfare standard directly. Justice Kennedy commented: "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[205] Professor Elhauge argues that the Court thereby "equated 'anticompetitive effect' with being 'harmful to the consumer' and 'stimulating competition' with being 'in the consumer's best interest.'"[206]

Elhauge, however, overlooks the fact that the comment appears in a paragraph beginning with the statement of the rule of reason, quoted from *Sylvania*: "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[207] In context, Justice Kennedy should not be understood to have abandoned the Court's focus on the competitive process. Rather, he merely indicated that that competition is "in the consumer's best interest," as indeed it is.

Blair and Sokol point not just to what Justice Kennedy wrote, but also to what Justice Scalia said in the oral argument.[208] Justice Scalia and Solicitor General Olson had an exchange on whether low prices necessarily were preferred by consumers when they could get better service at a higher price. In this exchange, Justice Scalia commented that "the object of the Sherman Act . . . was consumer welfare."[209] Blair and Sokol claim that this snippet and the language of the opinion "make it clear that the Court supports a consumer welfare standard."[210] But they are wrong to equate the "object" of a statute with its operative test. Justice Scalia previously had highlighted that error in holding that "[e]very statute purposes, not only to achieve

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204 Among those pointing to this decision are Blair & Sokol, *supra* note 53, at 480; Elhauge, *supra* note 56, at 436; and Kirkwood & Lande, *supra* note 54, at 218–19.

205 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

206 Elhauge, *supra* note 56, at 436.

207 *Leegin*, 551 U.S. at 885 (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

208 Blair & Sokol, *supra* note 53, at 480 & n.50.

209 Transcript of Argument at 15, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06-480), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-480.pdf.

210 Blair & Sokol, *supra* note 53, at 480.

certain ends, but also to achieve them by particular means . . . ."[211] The only means though which the Sherman Act promotes "consumer welfare," in any sense of the term, is by protecting the competitive process.

D. CONCLUSION

By consistently addressing only the impact trade restraints have on competition, the Supreme Court has demonstrated a consistent focus on the competitive process rather than on any measure of welfare, especially what is now called consumer welfare. This demonstration is clearest in *Indiana Federation of Dentists* and *Discon*. The Court held in the former case that consumer harm is not necessary to establish a violation, and the Court held in the latter case that clear consumer harm is not sufficient. In both cases, the Court's sole concern is the impact of the challenged restraint on the competitive process. As one appellate has court explained: "The antitrust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest."[212]

III. AN APPROACH TO THE RULE OF REASON

Lower courts sometimes describe the rule of reason as a "balancing approach"[213] and describe their task under it with words like "balance" and "outweigh,"[214]

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211 Dir., Office of Workers' Comp. Programs v. Newport News Shipbldg. & Dry Dock Co., 514 U.S. 122, 136 (1995).

212 Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986).

213 United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); Weiss v. York Hosp., 745 F.2d 786, 820 (3d Cir. 1984).

214 *See, e.g.,* Cal. v. Safeway, Inc., 651 F.3d 1118, 1133 n.10 (9th Cir. 2011) (en banc) (The "rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects."); Benson v. St. Joseph Reg'l Health Ctr., 575 F.3d 542, 549 (5th Cir. 2009) ("The court must balance the anticompetitive effects of the restrictive practice against any benefits or justifications . . . ."); Stop & Shop Supermkt. Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004) (Legality under the rule of reason depends "upon the balance between efficiencies gained and any harm to competition that could be shown . . . ."); Eichorn v. AT&T Corp., 248 F.3d 131, 143 (3d Cir. 2001) ("[U]nder the rule of reason . . . courts can balance the effect of the alleged anti-competitive activity against its competitive purposes . . . ."); Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1046 (8th Cir. 2000) (en

perhaps evoking the image of lady justice holding her scales. Courts began using the balancing metaphor in the late 1970s,[215] apparently believing they were restating the teaching of *Sylvania*. But in *Sylvania*, the Supreme Court stated that "the factfinder weighs all of the *circumstances* of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[216] The weighing of circumstances is unlike the balancing of opposing effects.[217] *Sylvania* cites the *Chicago Board of Trade* formulation, and the two decisions must be read to describe the same test. The "true test for legality" in *Chicago Board of Trade* asks whether a restraint "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[218] This test does not identify, measure, and balance distinct effects; rather, it merely asks into which of two boxes a restraint fits best.[219]

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banc) (An agreement will "constitute an unreasonable restraint of trade under the rule of reason if the anticompetitive effect of the agreement outweighs its beneficial effects."); Hertz Corp. v. City of New York, 1 F.3d 121, 130 (2d Cir. 1993) ("The traditional rule-of-reason approach requires the defendant to demonstrate that the procompetitive aspects of the agreement outweigh its anticompetitive aspects.").

[215] *See, e.g.*, Gough v. Rossmoor Corp., 585 F.2d 381, 388–89 (9th Cir. 1978) ("[T]he rule of reason has been primarily directed to a balancing of the competitive evils of the restraint against the competitive benefits asserted on its behalf."); Los Angeles Mem'l Coliseum Comm'n v. NFL, 468 F. Supp. 154, 167 (C.D. Cal. 1979) ("Under the rule of reason, the court must balance the anticompetitive evils of the challenged restraints against their procompetitive virtues to determine whether the restraints are reasonable and thus legal.").

[216] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (emphasis added); *see also* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (quoted in text at note 106 *supra*); Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982) ("As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.").

[217] Decisions by the courts of appeals often refer to weighing of "circumstances." *E.g.*, Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1333 (11th Cir. 2010); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010); Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 316 (2d Cir. 2008); United States v. LSL Biotechnologies, 379 F.3d 672, 697 (9th Cir. 2004).

[218] Bd. of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

[219] Professor Kirkwood dismisses focusing on harm to the competitive process in part because such a focus would be problematic for conduct "with mixed effects." Kirkwood, *supra* note 54, at 2427. But "mixed effects" are no problem for a rule seeking to identify *the predominant effect* of a restraint, while a rule purporting to balance "mixed effects" generally

Moreover, the courts, in reality, do not engage in balancing under a welfare standard,[220] nor have they explained how that could be done.[221] As Professor Herbert Hovenkamp explains, "[t]he set of rough judgments we make in antitrust litigation does not even come close to this 'balancing' metaphor."[222] In applying the rule of reason, courts apply a burden-shifting approach that "strips away issues and hopefully resolves the antitrust dispute without any need for balancing."[223]

I outline a burden-shifting approach to the rule of reason after establishing a foundation. To assure that the rule of reason is applied faithfully, I identify Section 1's basic aim. To assure that the rule of reason is applied efficiently, I examine how litigation burdens should be allocated and calibrated. And to assure that that the rule of reason is applied rationally, I outline the proper role of economics.

A. FOUNDATIONAL ISSUES ON SECTION 1 OF THE SHERMAN ACT

The Sherman Act's basic aim is the means Congress selected to advance loftier goals, and the decisions discussed in Part II are animated by the Supreme Court's consistent view that Section 1's basic aim is protecting the competitive process.[224] The point also was made well by Judge Breyer:

> The Supreme Court adopted the "rule of reason" in order to provide an intellectually, administratively, and legally satisfactory way to limit the Sherman Act's broad language, which, if taken literally, might forbid all agreements, good and bad, that were in any sense at all "in restraint of trade.". . . The "rule of reason" limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications . . . .
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> "Anticompetitive," too, has a special meaning. It refers not to actions that merely

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cannot be applied as written because balancing is infeasible.

[220] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265.

[221] *See* Kaplow & Shapiro, *supra* note 53, at 1136 (No court has indicated "what metric is employed for measurement and conversion to a common denominator . . . .").

[222] HOVENKAMP, *supra* note 90, ¶ 1912b, at 371.

[223] *Id.*

[224] I argue elsewhere that this also is the basic aim of Section 2 of the Sherman Act. *See* Gregory J. Werden, *Competition, Consumer Welfare, & the Sherman Act*, 9 SEDONA CONF. J. 87, 89–90 (2008); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 428–30 (2006).

> injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods.[225]

After the *Discon* decision, also written by Breyer, several additional circuits proclaimed that the basic aim of Section 1 is to protect the competitive process.[226] The reasonableness inquiry I describe, therefore, is focused on the impact of a challenged restraint on the competitive process.

Decades of antitrust case law development have structured the reasonableness inquiry, and Professor Phillip Areeda provided a good overview of this structure.[227] He gleaned from the cases a burden-shifting process: The plaintiff must allege and show a restraint that threatens the competitive process. If the plaintiff does so, the

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[225] Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) (citations omitted). Judge Breyer wrote similar things in other decisions: Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) ("[A] practice is 'anticompetitive' only if it harms the competitive process."); Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988) ("[T]he antitrust laws exist to protect the competitive process itself . . . ."); Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9, 10 (1st Cir. 1987) ("'Anticompetitive' also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process . . . .") (citation omitted). Contemporaneously, Judge Posner wrote: "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986).

[226] *See, e.g.*, Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1280 (10th Cir. 2012) ("The primary concern of the antitrust laws is the corruption of the competitive process . . . ." (quoting Tal v. Hogan, 453 F.3d 1244, 1258 (10th Cir. 2006)); Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 290–91 (4th Cir. 2009) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." (quoting *Morrison*, 797 F.2d at 1437)); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 902 (9th Cir. 2008) (The Supreme "Court has often reinforced the principle that the antitrust laws' prohibitions focus on protecting the competitive process . . . ."); Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 489 (2d Cir. 2004) ("The antitrust laws, however, safeguard consumers by protecting the competitive process.").

[227] 7 PHILLIP AREEDA, ANTITRUST LAW ¶¶ 1500–11, at 361–436 (1986). The current edition of the treatise is similar on these points and contains much of Areeda's original language. *See* AREEDA & HOVENKAMP, *supra* note 93, ¶¶ 1500–11, at 379–497.

defendant then has an opportunity to show that "a legitimate objective is served" by the restraint. And, if that showing is made, the plaintiff has the burden of showing either that the objective "can be achieved by a substantially less restrictive alternative" or that "the challenged behavior is, on balance, unreasonable."[228] All Section 1 cases fit into this general framework, although a simplified version of it is used when the per se rule is invoked.[229]

As to each of the steps, especially the first, Professor Areeda explained that Section 1 is applied by varying "the quantum of proof required in light of what we think we know."[230] He addressed what constitutes a legitimate objective largely through examples drawn from cases, indicating that "correcting market failure" qualifies because it "promotes competitive results."[231] He began his explanation of the final step by stressing "the limits of our knowledge and understanding" and the importance of "administrative convenience."[232] He observed that "we almost never know enough" to "quantify the magnitude" of the harm and benefit from conduct.[233]

Professors Louis Kaplow and Carl Shapiro ruefully observe that "if the rule of reason is legally defined in terms of competition itself—that which promotes competition is legal, that which suppresses competition is illegal, end of story—then economics cannot directly address the legal test."[234] That is so, but economics nevertheless guides the courts in critical ways: Economics provides an analytic framework for appreciating the significance of complex facts and for testing many of the arguments made by litigants. More importantly, economics is the primary source of wisdom as to what we think we know about the impact of trade restraints on the

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[228] AREEDA, *supra* note 227, ¶ 1502, at 371–72, ¶ 1507b, at 397–98.

[229] Herbert J. Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2477 (2013).

[230] AREEDA, *supra* note 227, ¶ 1507b, at 399; *see* ¶ 1507b, at 399–403; *see* Hovenkamp, *supra* note 229, at 2475–76 ("The case law generally assigns and weighs presumptions depending on the court's opening assessment of the degree of danger that a restraint imposes.").

[231] AREEDA, *supra* note 227, ¶ 1504, at 377–83.

[232] *Id.* ¶ 1507a, at 394–97; *see also* AREEDA & HOVENKAMP, *supra* note 93, ¶ 1507b, at 428 ("The first wisdom in applying the rule of reason is to acknowledge the limits of our knowledge and understanding.").

[233] AREEDA, *supra* note 227, ¶ 1507b, at 397.

[234] Kaplow & Shapiro, *supra* note 53, at 1034.

competitive process.[235]

The Supreme Court relied heavily on economics in *Sylvania*[236] and *Leegin*[237] in determining that vertical restraints should not be considered unlawful per se. And in *California Dental Association*, the Court surely expected economics to inform the courts in determining what inquiry is "meet for the case."[238] That decision endorsed Professor Areeda's insight that "reasonableness analysis" involves "'something of a sliding scale'" in which "'the quality of proof required should vary with the circumstances.'"[239] Courts draw on economics to calibrate the plaintiff's burden in establishing anticompetitive effects and the defendant's burden in establishing procompetitive justifications.[240]

B. THE PLAINTIFF'S INITIAL BURDEN

The plaintiff must make an initial showing that the challenged conduct involves an agreement restraining trade and thereby harming the competitive process.[241] To

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235 This is essentially the role for economics advocated by Judge Posner. In the preface to *Antitrust Law*, he remarks that nearly "everyone professionally involved in antitrust . . . agrees that the only goal of antitrust should be to promote economic welfare," and he explains that "economic welfare should be understood in terms of the economist's concept of efficiency." RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001). But he does not advocate using allocative efficiency as a legal test or even as the principal basis for a legal test. He describes his approach as "searching for ways of avoiding prohibiting efficient, albeit noncompetitive, practices without having to compare directly the gains and losses from a challenged practice." *Id.* at 29.

236 *See supra* text accompanying notes 115–18.

237 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889–99 (2007) (relying heavily on economic analysis in determining that resale price maintenance should no longer be deemed unlawful per se).

238 *See supra* text accompanying note 113.

239 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999) (quoting AREEDA, *supra* note 227, ¶ 1507, at 402).

240 *Cf.* AREEDA & HOVENKAMP, *supra* note 93, ¶ 1500, at 381 ("[E]conomic theory often provides indispensible insights into the possible harms or benefits of challenged behavior."); *Leegin*, 551 U.S. at 888–89 ("Courts can . . . devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.").

241 Non-governmental plaintiffs also have a burden to demonstrate standing and antitrust injury, but these important issues are not discussed here.

do so, the plaintiff usually characterizes the conduct in a manner relating it to what we think we know about the threats to the competitive process posed by various categories of restraints. This characterization is critical because precedent treats different restraints differently; as the Supreme Court indicated in *California Dental Association*, the burdens on both plaintiffs and defendants operate as a sliding scale depending on the conduct.[242]

What antitrust knows best is that cartel activity is "manifestly anticompetitive" and lacks "any redeeming virtue."[243] Indeed, it is "the supreme evil of antitrust."[244] So antitrust law deems unlawful per se all naked agreements among competitors to fix prices, rig bids, restrict output, allocate customers, or divide markets.[245] The Supreme Court declared price fixing unlawful per se because it inevitably corrupts the competitive process:

> The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.[246]

Much the same can be said of all other forms of cartel activity,[247] and all are treated

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242 *See supra* text accompanying notes 239–40.

243 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977), and Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985)).

244 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

245 *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (per curiam) (holding market allocation unlawful per se).

246 *Socony-Vacuum*, 301 U.S. at 225–26 n.59; *see also* United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints . . . .").

247 *Cf.* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 777 (1999) ("[R]aising price, reducing output, and dividing markets have the same anticompetitive effects." (quoting Gen.

the same under the Sherman Act. Though often viewed as an alternative to the rule of reason, the per se rule is best seen as a special case of its application.

The initial burden on a plaintiff alleging cartel activity is just to establish the existence of the challenged restraint and explain its characterization as cartel activity. Conduct deemed unlawful per se under the Sherman Act is categorically unreasonable, so the circumstances of a particular case matter only in characterizing the conduct. The legal assessment ends once the factfinder is satisfied that the challenged conduct is, in fact, cartel activity.

Based on what we know about cartel activity, we suspect that nearly naked agreements among competitors to fix prices, restrict output, allocate customers, or divide markets also corrupt the competitive process, and in much the same way as naked agreements. The plaintiff's initial burden in challenging such conduct is somewhat greater than that in challenging cartel activity; with nearly naked restraints, characterization demands a deeper inquiry into circumstances.

Even for restraints about which we think we know little, *California Dental Association* invites plaintiffs to explain that "an observer with even a rudimentary understanding of economics [would] conclude that the" challenged restraint is anticompetitive.[248] When this invitation is accepted, the plaintiff must show that the restraint harms the competitive process as it relates to an important dimension of competition. Absent any direct restraint on prices, outputs, customers, or markets, the plaintiff must show that the restraint alters the incentives of competitors and predictably affects their choices of prices, outputs, customers, or markets in a manner comparable to that from cartel activity.

The plaintiff's initial burden is much greater for restraints that do not fit into any of the foregoing categories, i.e., for non-suspect restraints. The plaintiff must provide a sound basis in theory and fact for believing that the restraint harms the competitive process, yet we think we know that certain types of restraints can be efficient and procompetitive. For example, we think we know that vertical restraints "hold promise of increasing a firm's efficiency and enabling it to compete more effectively," and thus they normally do not harm the competitive process.[249] Consequently, a plaintiff challenging a vertical restraint typically must make a detailed and

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Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.)).

[248] *Id.* at 770.

[249] Copperweld Corp. v. Independence Tube Corp., 467 US 752, 768 (1984).

convincing showing to carry its initial burden.

For non-suspect horizontal restraints, the plaintiff's burden also is heavy if the restraint is facially procompetitive. An example is standard setting, particularly with open technology standards. Such standards are likely to promote competition, and a plaintiff is apt to find it exceptionally difficult to carry its initial burden without showing that the standard setting process itself was corrupted.

To carry its initial burden, a plaintiff challenging a non-suspect restraint must demonstrate, inter alia, the potential for a significant anticompetitive effect. For this, the courts generally require a threshold showing of market power.[250] As one court explained, "[i]n analyzing agreements that are not *per se* violations of the antitrust laws, the court is looking to whether the action complained of 'has the potential for genuine adverse effects on competition,' and this analysis usually involves an inquiry 'into market definition and market power.'"[251] The conventional approach is to "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry . . . ."[252]

The plaintiff instead may demonstrate the potential for a restraint to have a significant anticompetitive effect by showing its actual marketplace impact. The Supreme Court explained in *Indiana Federation of Dentists* that, "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects."[253]

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[250] *See, e.g.*, Agnew v. NCAA, 683 F.3d 328, 337 (7th Cir. 2012) ("[A] plaintiff's threshold burden under the Rule of Reason analysis involves the showing of a precise market definition in order to demonstrate that a defendant wields market power, which, by definition, means that the defendant can produce anticompetitive effects."); Behrend v. Comcast Corp., 655 F.3d 182, 192 (3d Cir. 2011) ("For antitrust claims analyzed through the rule of reason, plaintiffs must demonstrate that the defendant possessed market power in the relevant . . . market."), *rev'd on other grounds*, 133 S. Ct. 1426 (2013); E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 5 (1st Cir. 2004) (Boudin, J.) ("[T]he identification of market power is ordinarily the first step in any rule of reason claim under Section 1.").

[251] Lie v. St. Joseph Hosp. of Mount Clemens, 964 F.2d 567, 569 (6th Cir. 1992) (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986)).

[252] Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).

[253] *Ind. Fed'n of Dentists*, 476 U.S. at 460–61 (internal quotations omitted).

The showing that sufficed in *Indiana Federation of Dentists* was not a showing of actual anticompetitive effects in the usual sense. It was merely a showing that the restraint altered the behavior of many subject to it.[254] The Court found that showing sufficient because it meant that the restraint had a palpable impact on an aspect of the competitive process with the potential to affect market performance adversely. On the authority of *Indiana Federation of Dentists,* lower courts permit plaintiffs to prove market power by showing that it has been exercised through raising price and restricting output,[255] although attempts to do so usually fail.[256]

The plaintiff's initial burden is sufficiently heavy for non-suspect restraints that many plaintiffs fail to carry it. Although the plaintiff's burden is lighter for suspect restraints, plaintiffs often do not make factual allegations sufficient to indicate that the challenged conduct is of a suspect variety, or they fail to support such allegations with evidence. Courts grant motions to dismiss when plaintiffs fail to plead facts necessary to carry their initial burden, and courts grant motions for summary judgment when the undisputed facts indicate that the plaintiff cannot prove critical allegations.[257] Consequently, defendants frequently have no burden of justification.

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[254] *Id.* at 460.

[255] *See, e.g.*, Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1001 (9th Cir. 2008) ("Evidence of restricted output and supracompetitive prices is direct evidence of market power."); Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) ("If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power."); Toys "R" Us v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) ("One [way to prove market power] is through direct evidence of anticompetitive effects."); Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196–97 (1st Cir. 1996) ("A plaintiff can either show direct evidence of market power (perhaps by showing actual supracompetitive prices and restricted output) or circumstantial evidence of market power.").

[256] *E.g.*, Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997) (that the defendant hospital charged higher prices than other hospitals and reaped high profits could not establish market power with no "showing of restricted output"); United States v. Eastman Kodak Co., 63 F.3d 95, 108–09 (2d Cir. 1995) (prices twice marginal cost could not establish market power absent proof that the defendant was "earning monopolistic profits").

[257] *See* AREEDA & HOVENKAMP, *supra* note 93, ¶ 1507, at 427 ("[T]he litigation must be terminated in the defendant's favor at any time that it becomes clear that an essential element of the plaintiff's case will fail.").

C. THE DEFENDANT'S BURDEN

The defendant in a rule-of-reason case, as any other, is entitled to dispute relevant factual allegations, including that the existence of an agreement to adopt the alleged restraint. A defendant also can dispute the characterization of its conduct advanced by the plaintiff. Both disputes are common in litigation under Section 1 of the Sherman Act. For conduct categorized as cartel activity, these are the only possible disputes. For similar conduct, these may be the only disputes affording defendants significant potential to prevail. The courts are rightly skeptical of justifications for even non-naked agreements among competitors to fix prices, restrict output, allocate customers, or divide markets.

For non-suspect restraints, the defendant can rebut any showing the plaintiff makes on the potential for significant anticompetitive effects. Market delineation is often a major area of dispute, as are other factors relevant to market power. If direct evidence is relied upon by the plaintiff, the relevance and sufficiency of the evidence can be contested. Because the plaintiff has the ultimate burden, the defendant can avoid the need to make any affirmative showing by successfully rebutting the plaintiff's evidence and argument.

A special line of argument exists for conduct not resembling cartel activity as to which the plaintiff has made a showing that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." The defendant can dispute not only the factual basis for the plaintiff's argument but also the economics relied upon. And the defendant has the opportunity to explain that someone with a deep understanding of economics would appreciate a different impact of the restraint on the competitive process than would someone with a rudimentary understanding. If the plaintiff accepts the invitation of *California Dental Association* and the defendant undercuts the asserted basis for concluding that the restraint would have an anticompetitive effect, either the case ends, or it becomes a case involving a non-suspect restraint.

In cases not involving cartel activity, justifications can be important, and three distinct sorts of justifications are possible, although all purport to examine the restraint in its factual context and thereby clarify its true impact on the competitive process. As Professor Milton Handler explained, the admissibility of all justifications depends on "whether they, like the Sherman Act itself, postulate competition as the basic instrument of social control" because "promoting social values other than workable and effective competition will not justify [trade] restraints."[258] Thus, a defendant cannot justify a restraint on the basis that it promotes social or consumer welfare in any way other than through promoting competition.[259]

Sherman Act jurisprudence adopted the justification of ancillarity, available under the common law, in Judge Taft's 1898 *Addyston Pipe* opinion.[260] Taft understood the common law to hold that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[261] Taft did not anticipate the rule of reason, and his nascent ancillary restraints doctrine divided all trade restraints into just two categories—ancillary and prohibited.

What we now call the ancillary restraints doctrine is confined to restraints imposed by a joint venture on the conduct of the participants outside the venture.[262] The burden in asserting an ancillarity justification for such a restraint is that of establishing its reasonable necessity to the efficiency or effectiveness of the venture.[263] It is not enough that the restraint makes the venture more attractive for the participants; there must be an "organic connection between the restraint and the cooperative needs of the enterprise."[264]

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[258] MILTON HANDLER, ANTITRUST IN PERSPECTIVE 27 (1957).

[259] Nevertheless, a restraint likely would be permitted if the factfinder determined it was necessary to public health or safety. The articulated basis for permitting such a restraint most likely would be the failure of the plaintiff to carry its initial burden.

[260] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). On the doctrine generally, see HOVENKAMP, *supra* note 90, ¶ 1912c, at 351–57; Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SEC. PROC. 211 (1959); Gregory J. Werden, *The Ancillary Restraints Doctrine after* Dagher, 8 SEDONA CONF. J. 17 (2007).

[261] *Addyston Pipe*, 85 F. at 282.

[262] *See* Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (The ancillary restraints "doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities.").

[263] *See* Werden, *supra* note 260, at 23–24.

[264] Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.); *see also* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1151 (9th Cir. 2003) ("The fixed support fee is not reasonably ancillary to the combined MLS database.

For many restraints, especially vertical restraints, a justification in the spirit of Taft's ancillarity concept could be asserted. Restraints such as exclusive dealing "may be used as a technique of waging competition, thus enhancing rather than impairing the vitality of the market."[265] To carry its burden in justifying such a restraint, the defendant must only provide a solid basis for thinking that the restraint bolsters the incentive or ability to compete. One way to make the required showing is to identify a significant free-rider problem and explain how the restraint solves it. Another is to explain how the restraint works to induce distributors or retailers to work harder and sell more.[266] And yet another way is to show that the restraint increases the defendant's "efficiency . . . enabling it to compete more effectively."[267]

A different sort of justification, applicable to certain horizontal restraints, is that they make the market work better and thereby promote competition. As the Supreme Court held in *Chicago Board of Trade,* trade restraints can be justified on the basis that they are reasonable means for addressing imperfections that otherwise prevent markets from operating efficiently or even existing at all. The Brandeis formulation of the rule of reason directs inquiry into "[t]he 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 . . . ."[268] This inquiry is well tailored for determining whether a serious market imperfection was identified by the defendants and whether the restraint imposed was a reasonable response.

D. THE PLAINTIFF'S ULTIMATE BURDEN

The plaintiff has the ultimate burden of persuasion and can sustain its case in any of three ways if the defendant offers a substantial justification. The plaintiff might discredit the justification by showing that the restraint could not accomplish

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Defendants offer no explanation for how it improves the efficiency of the MLS or has any effect at all beyond raising prices.").

265 HANDLER, *supra* note 258, at 27.

266 *Cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–92 (2007) (Vertical restraints can "encourage[] retailers to invest in tangible or intangible services or promotional efforts" on which "discounting retailers can free ride." And, "even absent free riding," vertical restraints can "expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services.")

267 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

268 Bd. of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

what is claimed of it. The plaintiff might negate the justification by showing that a less restrictive alternative would have accomplished what the restraint accomplishes as well or better. The plaintiff also might show that the restraint nevertheless harms competition. Few cases turn on this last sort of argument, and for most that do, the showing by the plaintiff cannot aptly be described as balancing.

If the justification is that the restraint makes the market work better, the third option is unavailable. A restraint actually making the market work better does not harm the competitive process. To sustain the challenge, the plaintiff must discredit or negate the justification. The plaintiff might show that, as a matter of fact or as a matter of economics, the restraint really does not make the market work better. And the plaintiff might show that the market easily could have been made to work just as well without restraining trade to nearly the degree that the challenged restraint does.

If the defendant offers a substantial justification that the restraint is a "technique of waging competition," the plaintiff has all three options. The justification might be discredited. The plaintiff also might show that the defendant had an obvious alternative to the challenged restraint that would have similar procompetitive effects without harming the competitive process to the same degree, and possibly without harming it at all. And the plaintiff might show that the procompetitive potential of the restraint is so slight that its predominant effect clearly is to harm the competitive process. In the close cases, the plaintiff almost surely will fail to carry its burden because no analytic apparatus offers the precision necessary for making close calls.

If the defendant offers a substantial ancillarity justification, the upshot should be that the challenged conduct is assessed as part of a package along with the legitimate collaboration to which the restraint is reasonably necessary.[269] The package is reasonable if the collaboration is sufficiently procompetitive, which often will be the case. But the plaintiff can sustain the challenge by showing that the competitive harm from the ancillary restraint is greater in some sense than the competitive benefit of the collaboration.[270] The plaintiff might be able to make the benefit seem

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[269] *See* Werden, *supra* note 260, at 19; Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 706 (1998).

[270] The *Polygram* decision posits the introduction of a new product by a joint venture of major automobile producers and observes that, "if the only way a new product can be profitably introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product." PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 38 (D.C. Cir. 2005).

slight or the harm substantial, so that the collaboration with its ancillary restraints could be found to suppress competition. Only rarely could the plaintiff rely significantly on quantitative economic analysis, and if quantification were possible, it typically would be unhelpful because the harm and benefit would differ in kind.

IV. CONCLUSION

The "policy unequivocally laid down by the [Sherman] Act is competition."[271] The rule of reason, therefore, demands an inquiry into, and only into, the impact of a trade restraint on competition. The inquiry, in general terms, is whether, under the circumstances of the case, a restraint's predominant effect is to harm the competitive process.[272] If so, the restraint is unlawful; if not, the restraint is lawful. To be sure, the application of the rule of reason is not that simple, but the idea of the rule is.

A rule of reason inquiry is highly structured. Burdens are allocated and calibrated on the basis of accumulated wisdom from experience and economics on how restraints of various sorts typically affect the competitive process. The plaintiff's burden is lightest for cartel activity, and no justification is admissible. For conduct that appears similarly destructive of the competitive process, burdens are not much different. For restraints that are not so obviously harmful to the competitive process, the plaintiff's burden much heavier, and cases are apt to end, at or before trial, with a ruling that the plaintiff failed to carry its burden.

Focusing on the competitive process has important implications for the litigation under Section 1. As the Supreme Court held in *Indiana federation of Dentists*,[273] the plaintiff need not plead or prove welfare effects or, indeed, any specific tangible anticompetitive effects on price, quality, quantity, or other performance indicators. Plaintiffs commonly would have difficulty satisfying pleading and proof requirements on tangible anticompetitive effects,[274] but because the rule of reason is

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271 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.27 (1984) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958)).

272 Professor Kirkwood dismisses focusing on harm to the competitive process in part because the "terms are not self-defining." Kirkwood, *supra* note 54, at 2427. Professor Elhauge poses a similar objection. *See* Elhauge, *supra* note 56, at 436 n.104. But there is no need to wrestle with definitions in the analysis set out in Part III.

273 *See supra* text accompanying notes 141–47.

274 Professor Kirkwood argues that "anticompetitive conduct" should be defined as "conduct that creates market power, transfers wealth from consumers to producers, and fails

focused on the competitive process, overcoming such difficulties is not required.[275] As the Supreme Court explained in *Northern Pacific*,[276] tangible anticompetitive effects are expected to follow from harm to the competitive process. But a restraint's impact on the competitive process is more proximate, and typically much easier to discern, than tangible performance effects that follow.

Cases suggesting that a plaintiff must show harm to "consumer welfare" really are not to the contrary. Some of the cases are articulating the antitrust injury requirement[277] and asking whether the plaintiff's injury is associated with harm to the competitive process. Other such cases are asserting a threshold requirement to establish the defendant's market power[278] or the restraint's marketplace impact,[279] and they are asking whether the challenged restraint is capable of harming the

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to provide consumers with compensating benefits." Kirkwood, *supra* note 54, at 2429. He does not address litigation burdens, but requiring plaintiffs to prove that conduct is anticompetitive under this definition would impose a vastly greater burden than the one I describe. Professor Elhauge advocates a consumer welfare standard and argues that it "does not mean that courts must assess consumer welfare effects on a case-by-case basis." Elhauge, *supra* note 56, at 437 n.104. He argues that the consumer welfare standard is implemented through a systems of rules designed to protect consumer welfare. *Id.*

[275] *Cf.* David S. Evans, *Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases*, 75 ST. JOHN'S L. REV. 545 (2001) (arguing that the government has not demonstrated harm to consumers in its cases but should have been required to do so).

[276] *See supra* text accompanying note 95.

[277] *E.g.*, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (The plaintiff cannot establish antitrust injury if the challenged conduct is not anticompetitive in that it does not harm "consumer welfare."); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 972 (10th Cir. 1994) ("The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare."). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 341–45 (1990); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109–13 (1986).

[278] *E.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) ("To be judged anticompetitive, the agreement must actually or potentially harm consumers," so the "[r]ule of reason first asks whether [the defendant] possesses market power . . . .").

[279] *E.g.*, K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128 (2d Cir. 1995) ("The overarching standard is whether defendants' actions diminish overall competition, and hence consumer welfare." (internal quotations omitted)).

competitive process.

A second implication of focusing on the competitive process is that the plaintiff cannot carry its pleading and proof burdens merely by pointing to tangible effects of the sort generally associated with harm to the competitive process. Tangible effects, of course, are highly relevant if they actually flow from harm the competitive process, but the plaintiff must plead and prove such harm and connect the tangible effects to it. The plaintiff cannot satisfy its burden with arguments committing the *post hoc ergo propter hoc* fallacy. And, as the Supreme Court made clear in *Discon*,[280] the plaintiff cannot proceed under antitrust law when the mechanism responsible for adverse changes in price, quality, or quantity does not implicate competition.

Finally, the defendant cannot justify a restraint on the basis that promotes welfare in any way other than by promoting competition. Efficiency defenses are cognizable because enhancing efficiency is part of the competitive process. Restraints associated with organized markets (e.g., the Chicago Board of Trade) can be defended on the basis that they make their respective markets operate more efficiently. But, as the Supreme Court held in *Professional Engineers*,[281] a restraint on competition cannot be justified simply on the basis that a measure of welfare was enhanced by its imposition.

If Congress or the Supreme Court were to declare that the rule of reason is a consumer welfare standard (with the current meaning of the term), the legal status two categories of restraints would change substantially. One category consists of pricing tactics, including tying and bundling, that allow existing market power to be more fully exercised through some form of price discrimination.[282] These practices can allow for a greater exercise of existing market power to the detriment of consumers.[283] Focusing on the competitive process has narrowed the range of

[280] *See supra* text accompanying notes 148–55.

[281] *See supra* text accompanying notes 122–26.

[282] *See* Hovenkamp, *supra* note 229, at 2480–90. Other pricing tactics with similar properties are discussed by Blair and Sokol, *supra* note 53, at 497–500, but they offer no basis for viewing most of the tactics they discuss as trade restraints.

[283] Commentators are divided on how Section 1 should apply to these practices. *Compare* Elhauge, *supra* note 56, at 420–42, *with* Thomas A. Lambert, *Appropriate Liability Rules for Tying and Bundled Discounting*, 72 OHIO ST. L.J. 909, 926–50 (2011), *and* Hovenkamp, *supra* note 229.

prohibited practices.[284] The other category consists of trade restraints imposed by buyers to reduce the prices they pay. Such restraints harm suppliers but consumers at the end of the supply chain often are unaffected.[285] Focusing on the competitive process has broadened the range of prohibited practices;[286] for example, buyer cartels are treated the same as seller cartels despite their different consumer impact.[287]

Many commentators favor interpreting the Sherman Act as if it contained a welfare standard, viewing such an interpretation as the implication of the Act's (implicit) goal of promoting "consumer welfare." But their reasoning is faulty. "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means . . . ."[288] In enacting the Sherman Act, "Congress sought to establish a regime of competition as the fundamental principle governing commerce in this country."[289] Neither the Congress nor the Supreme Court has rewritten the law to substitute a different principle, and attempts to do so by the rest of us are futile.

[284] As to tying, the Supreme Court explained that "the economic effect . . . condemned by the rule against tying" is that the defendant "foreclosed competition on the merits" in the tied product market. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21 (1984). For a similar understanding of the law presented in detail, see Lambert, *supra* note 283, at 927–34. For a drastically different view, see Elhauge, *supra* note 56, at 422–25.

[285] Commentators also are divided on how Section 1 should apply to these restraints. *Compare* Rosch, *supra* note 203, at 353, 359–65, *and* Salop, *supra* note 203, at 685–89, *with* Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 623–24 (2005), *and* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 735–36 (2007).

[286] *See* Weyerhaeuser v. Ross-Simmons Hardwood Lumber, 549 U.S. 312, 321–26 (2007) (treating predatory bidding just as predatory pricing despite a different effect on consumers); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 222–23, 235–36 (1948) (holding a buyer cartel unlawful per se under circumstances in which consumers would not be adversely affected); *see also* Werden, *supra* note 285, at 713–21 (reviewing relevant legislative history and case law).

[287] *See* Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.).

[288] Dir., Office of Workers' Comp. Programs v. Newport News Shipbldg. & Dry Dock Co., 514 U.S. 122, 136 (1995).

[289] City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978).