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Industry Self-Regulation and the Useless Concept "Group Boycott"

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Industry Self-Regulation and the Useless Concept "Group Boycott"

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"To Rest Upon A Formula Is A Slumber That Prolonged Means Death"¹

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I. INTRODUCTION

A doctor is denied staff privileges at a private hospital after a negative recommendation from the hospital's medical staff.² A real estate agent is denied membership in a multiple listing service by a vote of the current members.³ A golfer is deemed ineligible to compete in a professional golf tournament by a committee of the Professional Golf Association.⁴ A college is refused accreditation by a private accrediting association.⁵ Plywood of type three ply one half inch is found not to meet the commercial standard for douglas fir plywood established by the Douglas Fir Plywood Association.⁶ A fuel cutoff device is said to be in uncertain compliance with the safety standards of the American Society of Mechanical Engineers (ASME) by the ASME's Boiler and Pressure Vessel Committee.⁷ A ceramic gas burner fails the tests needed for a "seal of approval"

2. *E.g.*, *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), *aff'd mem.* 688 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 971 (1982) (upholding hospital's denial of privileges). *Feminist Women's Health Center, Inc. v. Mohammed*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (denying hospital's motion for summary judgment).

3. *E.g.*, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (condemning restriction on membership in MLS); *Brown v. Indianapolis Bd. of Realtors*, 1977-1 Trade Cas. (CCH) ¶ 61,435 (May 6, 1977) (upholding restriction on membership in MLS); *Pomanowski v. Monmouth County Bd. of Realtors*, 175 N.J. Super. 212, 417 A.2d 1119 (1980), *cert. denied*, 459 U.S. 908 (1982) (condemning restriction on membership).

4. *E.g.*, *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (condemning disciplinary suspension of player); *Deesen v. Professional Golfers Ass'n of Am.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (upholding exclusion of player).

5. *Marjorie Webster Jr. College v. Middle States Ass'n of Colleges*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (reversing judgment for unaccredited college).

6. *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd per curiam*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969) (upholding defendant association's disapproval of plaintiff's plywood).

7. *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982) (condemning association's disapproval of plaintiff's product).

from the American Gas Association.⁸ A golf ball is denied approval for tournament play by the United States Golf Association after consultation with the Golf Ball Manufacturers Association.⁹ A producer's film is given an "X" rating by the Motion Picture Association of America, a film board established by competing film producers.¹⁰ A screw thread gauge is found to violate the standards of the American National Standards Institute (ANSI) by the ANSI's Screw Thread Committee.¹¹ A bowling center is denied approval for official play by the Bowling Proprietors Association of America, an association of other bowling centers.¹² A chiropractor is denied access to a hospital's laboratory after the Joint Commission on Accreditation of Hospitals, an association of medical doctors, tells the hospital that allowing access would jeopardize accreditation.¹³

In each situation those immediately harmed, like the doctor or the real estate agent (the plaintiff), may consider an antitrust suit under section one of the Sherman Act for treble damages against the private association and its members (the defendants) whose action caused the harm. Each suit is likely to be analyzed as a "group boycott"¹⁴ and is likely to share the following features: The plaintiff can establish without difficulty the "combination" and the requisite connection with interstate commerce that section one of the Sherman Act requires.¹⁵ The defendants are, at least in part, the

8. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (denying defendant association's motion to dismiss).

9. *Polara Enterprises v. United States Golf Ass'n*. No. C-78-1320 (N.D. Cal. Nov. 30, 1984) (condemning as unreasonable U.S.G.A.'s failure to sanction plaintiff's golf ball).

10. *Tropic Film Corp. v. Paramount Pictures Corp.*, 319 F. Supp. 1247 (S.D.N.Y. 1970) (upholding film board's rating of plaintiff's film).

11. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1374 (1978) (description of *The Johnson Gauge Case*).

12. *E.g.*, *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (condemning association's refusal to sanction bowling center).

13. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) (upholding association's threat to withdraw hospital's accreditation).

14. The defendants' action need not constitute a "refusal to deal" as that term normally is understood in order to be condemned as a "boycott." *E.g.*, *Silver v. N.Y.S.E.*, 373 U.S. 341 (1963) (withdrawal of wire connections between plaintiff and member brokers is a boycott, as is any concerted action that puts a rival at a significant competitive disadvantage).

15. That is, the plaintiff would have little difficulty establishing a combination and an effect on interstate commerce under the normal standards used for these requirements. In fact, because the traditional legal approach toward the merits of these cases is so hostile to defendants, many judges strive to avoid the merits and dismiss the case before trial by twisting the normal standards for these requirements and then finding that the require-

plaintiff's horizontal rivals or, more precisely, firms on the same horizontal level as the plaintiff.¹⁶ The defendants' action, directly or indirectly,¹⁷ puts the plaintiff at a significant competitive disad-

ments have not been met. See, e.g., *Cooper v. Forsyth County Hosp. Auth.*, 604 F. Supp. 685 (M.D.N.C. 1985), *aff'd*, 789 F.2d 278 (4th Cir. 1986) (staff privilege case dismissed for lack of Sherman Act agreement); *Pontius v. Children's Hosp.*, 552 F. Supp. 1352 (W.D. Pa. 1982) (staff privilege case dismissed for lack of Sherman Act agreement); see also *Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 552 F. Supp. 1170, 1176-1204 (E.D. Pa. 1982), *rev'd.*, 721 F.2d 68 (3rd Cir. 1983) (staff privilege case dismissed for lack of effect on interstate commerce). See generally Note, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. PA. L. REV. 121 (1983). Another ground for dismissal short of trial is that the state has so compelled the defendants' self-regulation that the defendant's action becomes "state action." *E.g. Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984).

16. That is, at least some of the defendants are businesses or employees of businesses that compete on the same horizontal level as the plaintiff or would so compete were it not for the defendants' action. Often horizontal rivals in fact will make the decision that injures the plaintiff although the decision formally comes from a vertical level. In hospital staff privilege cases, for example, the hospital formally denies privileges, but in fact the hospital acts on the recommendations of the doctors on its staff. *Dolan & Ralston, Hospital Admitting Privileges and The Sherman Act*, 18 Hous. L. REV. 707 (1981).

Professor Lawrence Sullivan, among others, attaches significance to whether the defendants are horizontal rivals of the injured plaintiff, a factor that cuts sharply against the defendants. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 91 (2d ed. 1977). Granted, being the plaintiff's horizontal rivals may increase the defendants' incentive to use self-regulation in order to put the plaintiff at a competitive disadvantage. Too much, however, is made of this factor. The result is a distressing, formalistic tendency to decide these cases by diagramming the defendants' and the plaintiff's relative positions in the chain of distribution and then jumping to conclusions based on that diagram. See, e.g., *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984); *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-71 (9th Cir. 1983); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). Yet, even when the defendants clearly are the plaintiff's rivals, the "boycott" of the plaintiff could be conceptualized as vertical in nature.

17. One unfamiliar with antitrust precedents might assume the method by which the defendants injured the plaintiff would matter in these cases. For example, in *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118, 122 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982) the American Society of Mechanical Engineers (ASME) merely expressed an opinion about whether the plaintiff's product conformed with ASME's safety standards. In light of the benefits of allowing testing agencies to express opinions, one might assume that the ASME would be safe from liability. See Note, *Antitrust Problems of Trade Association Product Safety Standardization*, 55 IOWA L. REV. 439, 449 (1969) (recommendation about products should not give rise to liability). In contrast, one might expect liability in *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), when the Joint Commission on Accreditation of Hospitals went beyond expressing its views about chiropractors and pressured presumably neutral hospitals into denying the chiropractors use of their facilities.

However, the traditional antitrust approach does not, by its terms, show concern for the defendants' method. *E.g.*, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (agreement merely to exchange information about wholesalers found illegal). Rather, the antitrust rules focus on the result of the defendants' concerted action, namely whether it put a rival at a significant competitive disadvantage. Because of this formal indif-

vantage to his rivals, reduces the plaintiff's revenues, or raises his costs.¹⁸ The defendants' action imposes this harm even though the plaintiff has not violated any criminal law or any rule created or imposed by the government. The defendants' action against the plaintiff is not authorized by any legislative or administrative measure. The defendants' action, therefore, may appear a privately imposed restriction of the plaintiff's opportunity to compete on the merits.

On the other hand, the antitrust laws aside, the defendants' action does not violate any federal or state criminal law. The action does not prevent the plaintiff from operating legally, as occupational licensing or mandatory standard setting by the government would. If pressed, the defendants can offer reasons for their action which may make that action appear "reasonable," using that term in the colloquial, rather than economic, sense. Assessing these reasons often will require a more intimate understanding of the industry than a court can acquire.¹⁹ Moreover, the defendants' formation of their private association, as distinct from their subsequent action that injured the plaintiff, is not challenged. Indeed,

ference to the defendants' methods, the law gives little guidance about permissible concerted conduct toward rivals.

The only antitrust rule that expressly addresses the methods by which the defendants may act against the plaintiff is the famous *Noerr-Pennington* doctrine. This doctrine holds that defendants who combine to hurt their competitors through lobbying to influence legislation are in a safe harbor, free from antitrust exposure. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). At least one court also would include in the safe harbor a consumer boycott to influence legislation. *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *see also Note, Application of the Sherman Act to Politically Motivated Boycotts*, *Missouri v. National Organization for Women, Inc.*, 1981 UTAH L. REV. 599.

18. The magnitude of the plaintiff's injury varies greatly from case to case. The dominant antitrust precedents, however, indicate that as long as the plaintiff is put at a significant competitive disadvantage, the magnitude of the injury, while it affects the plaintiff's damages, does not affect the defendants' antitrust liability. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945); *see also Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) (substantial competitive disadvantage is sufficient).

19. The difficulty of review is most pronounced when the defendants' decision-making process deals with specialized knowledge. A court is most reluctant to review the activity of defendants enjoying equal or greater prestige than the court. *Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 202, 238 A.2d 665, 671 (1968); *Note, Expulsion and Exclusion from Hospital Practice and Organized Medical Societies*, 15 RUTGERS L. REV. 327, 329 (1961); *see also Chafee, The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993, 1021-23 (1930); *Note, Exclusion from Private Associations*, 74 YALE L.J. 1313, 1314 (1965); *cf. Stigler, The Theory of Economic Regulation*, 2 BELL J. OF ECON. 3, 13-14 (1971) (the occupation's per capita income and concentration in large cities directly affects the occupation's power to obtain favorable regulation).

the defendants' formation of their private association can be conceptualized as an efficiency-enhancing joint economic activity that lowers costs, increases demand, or helps to overcome a market imperfection like the "free rider" problem. Such joint activities illustrate the general principles that efficiency may call for coordination between firms as well as for rivalry, and that joint activities are just one of the ways in which rivalry may occur. Judicial interference with an efficiency-enhancing joint activity will reduce the incentives for engaging in the activity below optimum levels and therefore would be inefficient.²⁰ In addition, the defendants can defend their specific action against the plaintiff as ancillary to their efficiency-enhancing joint activity. For example, the exclusion of a rival from a multiple listing service may maintain the efficient number of realtors in the service, thereby lowering the cost of providing the service, or increasing the consumer demand for the service, that is, increasing its value. Thus, the defendants may advance an hypothesis, more or less plausible in each case, suggesting that both their original joint activity and their later action against the plaintiff are efficiency enhancing. In economic theory at least, the plaintiff—by expansion or combination—can form a rival private association, thereby achieving the efficiencies the defendants have achieved and overcoming the competitive disadvantage the defendants have imposed.²¹ Viewed this way, the defendants' actions are merely a type of rivalry on the merits, and the plaintiff's injury is identical to that any business suffers from being unable to share its rivals' more efficient production techniques, better organization, special talents, and resulting lower prices or higher quality. In any event, the continued existence of other rivals at the plain-

20. As the ability to control how the joint activity will act toward rivals, decide membership matters, and distribute gains decreases, the incentive for attempting the activity, and thus the likelihood of the activity being attempted, also decreases.

21. Allowing the defendants to exclude the plaintiff from their joint activity (such as their association) may increase output by pressuring the plaintiff to form his own rival joint activity. The resulting rivalry among joint activities should reduce any output-restraining power the defendants may possess, thus providing a clear benefit to society. Unfortunately, forming a rival private association often will prove impractical. For example, the real estate market in many communities will be too thin to support a second multiple listing service. Certain economies also may favor a single multiple listing service. Thus, the existing members of the multiple listing service may enjoy "first mover" advantages. *Cf.* Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1521 n.33 (1972) (discussing "first mover" advantage enjoyed by dominant firms). *See also* Liebler, *Market Power and Competitive Superiority in Concentrated Industries*, 25 UCLA L. REV. 1231, 1258 (1978) ("first mover" advantages spring from efficient behavior and should not become the predicate for a firm's dissolution).

tiff's horizontal level, against whom the plaintiff can prove neither monopolization, price fixing, nor other output-restraining behavior, suggests that output²² may not be affected even if the plaintiff ceases to function altogether. Thus, the defendants' action cannot confidently be characterized as output restraining.²³

Lower courts encounter many cases that share these features. For lack of a better term, I call them "industry self-regulation" cases.²⁴ Albeit on a small scale, the cases seem to present a colli-

22. I use the words "output" and "rivalry" rather than "competition" because the word "competition" so often is understood to refer both to the output that results from rivalry between firms (in contrast to the reduced output that results from a price-fixing cartel, a monopoly, a successfully coordinating oligopoly, or an industry protected by restrictive occupational licensing) and to the process of rivalry (the process by which more efficient firms take business from less efficient firms). I do not suggest, however, that achieving a competitive output is a satisfactory economic definition of competition. See McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639 (1968) (no satisfactory definition of competition exists).

Unfortunately, separating the concepts of "output" and "rivalry" suggests a clear distinction between voluntary restraints on rivalry that reduce output, said by some to be the target of antitrust laws, and excesses of rivalry deemed improper on ethical and other non-economic grounds, said by some to be the target of the tort law of unfair competition. This distinction emphasizes the conflict between the laws of antitrust and unfair competition. See *Northwest Power Prods., v. Omark Indus.*, 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); cf. Callmann, *Boycotts and Price Wars: Violation of the Antitrust Laws or Unfair Competition*, 23 OHIO ST. L.J. 128, 136-142 (1962) (antitrust measures aim at agreements imposing peace when there should be rivalry, while unfair competition measures aim at nonconstructive acts of rivalry). Although the distinction often aids understanding, it ultimately separates what cannot be separated. Excesses of rivalry that exclude, handicap, or raise rivals' costs also may reduce output. Moreover, the Sherman Act was aimed against excesses of rivalry at least as much as against restraints on rivalry. *Northern Sec. Co. v. United States*, 193 U.S. 197, 405 (1904) (Holmes, J., dissenting) ("It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.") See *infra* text accompanying notes 182-230.

23. The defendants' action often threatens common byproducts of rivalry even when the action does not threaten output. The defendants' action against the plaintiff, for instance, could narrow the range of consumers' choices, depriving the plaintiff's specialized patrons of their opportunity to patronize him. Of course, the plaintiff's demise through his own inefficiency would hurt these specialized patrons in exactly the same way. Judge Posner has expressed the Chicago School's unwillingness to recognize the harm to these specialized patrons:

Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated . . . The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.

Products Liability Ins. Agency v. Crum & Forster Ins. Co's., 682 F.2d 660, 663-64 (7th Cir. 1982).

24. The concept of industry self-regulation attempts to cover the kind of conduct referred to in the first part of *Silver v. N.Y.S.E.*, 373 U.S. 341 (1963), namely concerted conduct that puts the plaintiff at a significant competitive disadvantage. Use of the term "regulation" is unfortunate because it suggests defendants have some authority to enforce

sion between the religion of equal (or at least "fair") opportunity and the logic of economic efficiency. The traditional legal approach, which applies the law of group boycotts, is formalistic, unrealistic, and bewildering.²⁵ This Article in Part II first reviews the traditional approach exemplified by *Silver v. N.Y.S.E.*²⁶ and *Denver Rockets v. All-Pro Management*.²⁷ It then discusses the Chicago School's opposing approach exemplified by Judge Posner's claim that "boycotts are properly attacked under the antitrust laws when, and only when, they are employed to enforce a practice that is objectionable on the basis of substantive antitrust policy."²⁸ Compared to *Silver's* approach, Posner's approach generally applauds industry self-regulation and opposes any judicial interference with it in order to aid the plaintiff. The Article next reviews the pro-defendant modifications to *Silver's* traditional approach announced in the Supreme Court's 1985 decision *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*²⁹ It

their actions and often they do not. Indeed, as in the *Hydrolevel* case, defendants merely may be offering suggestions or information to buyers or sellers. *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 555 (1982).

The many economists who focus on whether defendants' activity is efficiency-enhancing would not group these cases together based on the common features mentioned in *Silver*. Rather, they would insist on learning more details about each case in order to identify the efficiencies, if any, that the defendants are creating.

Franchisor-franchisee disputes, dealer terminations, and all intrabrand cartel behavior like that in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), call for separate analysis and are not considered industry self-regulation cases. See Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671 (1966) (explaining why such cases call for a separate analysis); Liebel, *Intrabrand "Cartels" Under GTE Sylvania*, 30 UCLA L. REV. 1 (1982) (explaining why such behavior properly is viewed as a vertical restraint and does not threaten to reduce output).

25. A rich tradition of critical comment has developed around the industry self-regulation cases. See Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325 (1970); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 880 (1955); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); Rahl, *Per Se Rules and Boycotts Under The Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws*, 27 RUTGERS L. REV. 773 (1974); Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966); Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962). Fortunately the results ultimately reached in these cases usually satisfy as much as the doctrinal approach disturbs.

26. 373 U.S. 341 (1963).

27. 325 F. Supp. 1049 (C.D. Cal. 1971).

28. R. POSNER, ANTITRUST LAW 210 (1976).

29. 472 U.S. 284 (1985). Many courts anticipated *Pacific Stationery's* modification of *Silver*. E.g., *United States v. Realty Multi-List, Inc.*, 679 F.2d 1351 (5th Cir. 1980). See also

then suggests the best approach for a lower court that supports the goals of the traditional approach, but wishes to give prospective parties clear guidelines to conform their behavior to the law. To explain the suggested approach, the Article in Part III surveys the wide variety of benefits and dangers these cases present and illustrates the shortcomings of the other approaches.

II. APPROACHES TO INDUSTRY SELF-REGULATION

A. Silver's *Traditional Approach*

The traditional approach invites a court faced with an instance of industry self-regulation to undertake an analysis that may consist of as many as nine steps. The court first will cite *Silver*,³⁰ its clarifying progeny, *Denver Rockets*,³¹ and *Silver's* famous predecessors, *Klor's v. Broadway-Hale Stores, Inc.*³² and *Fashion Originators' Guild of America v. FTC*,³³ for the principle that the defendants' concerted action that places the plaintiff at a significant competitive disadvantage is "in simple terms a group boycott. Hence, absent any justification derived from the policy of another statute or otherwise, the [defendants] acted in violation of the Sherman Act."³⁴ Second, in order to allow the defendants' action to fall within the "or otherwise" language and escape immediate condemnation, the court usually adopts the policy justification for the self-regulation suggested by the defendants' attorneys. Typically, the court finds that the industry's structure inherently

Jones, *Multiple Listing Services and the Sherman Act: Fifth Circuit Applies "Facial" Rule of Reason Analysis*, 32 MERCER L. REV. 1295 (1981).

30. 373 U.S. 341 (1963).

31. 325 F. Supp. 1049 (C.D. Cal. 1971). The same *Silver-Denver Rockets* approach often is used for industry self-regulation cases in which the defendants are not the plaintiff's horizontal competitors. *Denver Rockets* was itself such a case. Nevertheless, the court in that case felt driven to the same analysis used for "horizontal boycotts." Other courts handling "vertical boycotts" also have employed the same analysis used for "horizontal boycotts." *Compare Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (defendants' action against vertical rival deemed unreasonable and condemned) with *Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (defendants' action against horizontal rival deemed reasonable and upheld) and with *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd mem., 688 F.2d 824 (3rd Cir.), cert. denied, 459 U.S. 971 (1982) (defendants' action against horizontal rival deemed reasonable and upheld). This suggests that the sharply different treatment some would accord "vertical" and "horizontal" boycotts is unwarranted. See, e.g., L. SULLIVAN, *supra* note 16, at § 92.

32. 359 U.S. 207 (1959).

33. 312 U.S. 457 (1941).

34. *Silver v. N.Y.S.E.*, 373 U.S. 341, 347-49 (1963).

requires some self-regulation.³⁵ Only then, as its third through fifth steps, will the court examine whether the defendants' particular action against the plaintiff accomplishes "an end consistent with the policy justifying self-regulation, is reasonably related to that end, and is no more extensive than necessary."³⁶ In what may be its sixth step, the court then examines whether the defendants afforded the plaintiff adequate procedures when they took the harmful action.³⁷ If the defendants prevail in all these inquiries, the court may³⁸ inquire, as its seventh through ninth steps, whether, despite the sufficiency of the reasons the defendants gave for their action, the defendants' "true" motive was in part "anticompetitive"³⁹ (for example, the plaintiff's price cutting), arbi-

35. See, e.g., *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.), cert. denied, 449 U.S. 826 (1980); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 653-54 (5th Cir. 1977); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166, 169 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir.), cert. denied, 373 U.S. 949 (1963).

36. *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1065 (C.D. Cal. 1971). Steps three through five often will involve more than three inquiries, especially when the defendants claim the plaintiff has violated one of their rules of general application. In some cases the court first identifies the defendants' asserted reasons for their action; for example, the plaintiff-real estate agent's failure to comply with the defendants' rule that multiple listing service members must be full time agents. The court then must evaluate the merits of those reasons; for example, whether the policy justifying self-regulation calls for (or, as some courts say, demands) the rule requiring agents to work full time. This step may require the court to evaluate whether the rule of general application overbroadly reaches firms or products that, in light of the policy justifying self-regulation, need not be reached. For example, is the full-time rule overbroad in applying to agents who have arranged some method for handling clients when those agents are not on the job personally? This step also may require the court to balance the dangers of the defendants' rule against its benefits. For example, does the full-time rule, despite being rationally related to a policy justifying self-regulation, cause more harm than good? The court next must evaluate the application of those reasons to the plaintiff. For example, did the defendants have a reasonable basis for concluding that the plaintiff was not working full time and did the defendants enforce their rule evenhandedly against all part-time agents? Finally, the court must explore the universe of less damaging actions that the defendant could have taken against the plaintiff and that also would have fulfilled the policy justifying self-regulation. For example, could the defendants have taken some lesser sanction, such as identifying the plaintiff as a part-time agent?

37. *McCreery Angus Farms v. American Angus Ass'n*, 379 F. Supp. 1008 (S.D. Ill.), aff'd mem., 506 F.2d 1404 (7th Cir. 1974).

38. *But see Hoover v. Ronwin*, 466 U.S. 558, 582 (1984) (Stevens, J., dissenting) (no need for inquiry into defendant's true motive).

39. E.g., *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118 (2d Cir. 1980), aff'd, 456 U.S. 556 (1982). To the extent possible, I will avoid using the word "anticompetitive" to describe defendants' conduct. Arguably, the adjective "anticompetitive" ought to apply only to conduct that reduces output, for example, conduct eliminating a rival whose underselling threatens to disrupt an ongoing price-fixing agreement. Unfortunately, courts often use the term to describe any conduct that hurts rivals by foul means and without any legitimate purpose. Used in this sense, the term is so broad as to be useless. Much business conduct, unilateral as well as concerted, that is governed by tort, contract, prop-

trary⁴⁰ (for example, the plaintiff's hair color), or otherwise unjustifiable⁴¹ (for example, the plaintiff's willingness to testify in medical malpractice cases against his fellow doctors).

A major effect of *Silver's* traditional approach is to deny the court a principled basis on which to dismiss an industry self-regulation case short of an expensive and lengthy trial.⁴² Assuming the plaintiff alleges that the defendants' action was "more extensive than necessary," resolving that allegation alone will require the court to conduct fact-finding about alternative, less damaging methods or actions available to the defendants. Assuming the plaintiff alleges an anticompetitive or arbitrary motive, the fact finder must evaluate witnesses' credibility in order to ascertain the defendants' "true" motive.

Silver's traditional approach reflects a degree of judicial hostility toward industry self-regulation that is rarely appreciated. In this respect, the facts⁴³ of the *Silver* case are instructive. The defendants, officers of the New York Stock Exchange's Department of Member Firms, withdrew private wire connections between exchange members and the plaintiff, a broker not a member of the Exchange. The Exchange was in essence an association of brokers and therefore was on the same horizontal level as the

erty, or fiduciary principles and that poses little threat to output then would be considered "anticompetitive."

As applied to defendants' motives or reasons for hurting a plaintiff, the term "anticompetitive" is equally ambiguous. Sometimes courts use the term to mean that defendants unreasonably are hurting a plaintiff's opportunity to compete, even though the defendants have some colorable justification for their act. Sometimes courts use the term to mean that the defendants are hurting a plaintiff unreasonably solely because of his commendable rivalry on the merits. Again, the term ought to apply only when the defendants' motive or reason for hurting the plaintiff is to reduce output, by, for example, enforcing a price fixing agreement.

40. *E.g.*, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

41. *See, e.g.*, *Areeda, Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 451 (1981).

42. *E.g.*, *Saez v. UIL*, 469 F.2d 1266 (5th Cir. 1972) (plaintiff's allegations render summary judgment inappropriate).

If the plaintiff only could prevail when he showed that the defendants possessed monopoly power, many cases could be dismissed short of trial because of the obvious absence of monopoly power. *Silver's* approach, however, did not clearly require monopoly power. Despite some hedging, the 1985 decision *Northwest Wholesale Stationers Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 289 (1985), requires at least *market* power but not, apparently, monopoly power.

43. Technically, *Silver* itself was not an industry self-regulation case, as that category is conceived here, because the New York Stock Exchange possessed some statutory authority to regulate the industry. *Silver's* stature as the leading boycott and industry self-regulation case derives from its dicta.

plaintiff. Withdrawing the wire connections hardly amounted to a "refusal to deal" as those unschooled in antitrust doctrine would use that concept. Member brokers remained willing to deal with the plaintiff for the purchase and sale of securities, and the plaintiff would not have used the wire connections at all in substantial dealings with other nonmember brokers. The Court, however, did not require a refusal to deal. Instead, the Court invoked the "group boycott" category merely because the inability to obtain quotations quickly, the inconvenience to other traders, and the stigma resulting from the defendants' disapproval imposed a significant competitive disadvantage on the plaintiff.⁴⁴ Ultimately, the Court upheld summary judgment for the plaintiff, finding the defendants' action a *per se*⁴⁵ violation of section one of the Sherman Act.

While the *Silver* opinion is most often cited for its accommodation of government regulation and antitrust policy, I believe its greatest significance lies in the Court's starting point. The Court held that any concerted action that puts a business at a significant competitive disadvantage and that occurs in a context free of federal regulation is a "group boycott" and a *per se* violation of section one:

It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in the context free from other federal regulation, constitute a *per se* violation of Section 1 of the Sherman Act. The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed to compete effectively as broker/dealers in the over-the-counter securities market. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457; *Associated Press v. United States*, 325 U.S.

44. 373 U.S. at 347-48.

45. The ambiguity of the notion of *per se* illegality has largely nullified its usefulness. The Supreme Court has construed the notion to mean that the defendants' behavior need not be shown to have affected price in any way, *Container Corp. of Am. v. United States*, 393 U.S. 333 (1969); that defendants' behavior need not be shown to have raised price or lowered output so as to harm consumer welfare, *U.S. v. Trenton Potteries Co.*, 273 U.S. 392 (1927); that defendants need not be shown to possess monopoly power or the capacity to reduce output, *Klor's v. Broadway Hale Stores*, 359 U.S. 207 (1959); that no evidence or argument about the ultimate goal of defendants' behavior (for example, the control of tortuous style privacy) will be admissible, *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941); that no evidence or argument about the efficiency-enhancing benefits of the defendants' conduct will be admissible, *United States v. TOPCO Assocs.*, 405 U.S. 596 (1972); that no evidence or argument about the non-economic benefits of the defendants' conduct will be admissible, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1979); that no evidence or argument of any kind in justification of defendants' behavior will be admissible, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). This Article avoids the ambiguous notion of *per se* illegality as much as possible and instead attempts to specify the evidence and arguments that the various approaches hold to be unnecessary or inadmissible.

1; *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656.⁴⁶

What a sweeping rule this is! It pays no attention to the reason for the defendants' action. It applies to actions based on ethical concerns, narrow housekeeping concerns (such as the plaintiff's failure to pay dues), cost-saving concerns, and quality control concerns, as well as to actions based on the defendants' dislike of the plaintiff's hair color, politics, or rivalry on the merits. It applies to actions affecting merely technical aspects of the services or products the plaintiff provides as well as to actions affecting the industry's economic organization. It applies to actions increasing output as well as to actions reducing output.

Furthermore, this sweeping rule does not distinguish between the various methods that can place the plaintiff at a significant competitive disadvantage. In *Silver* the defendants withdrew the plaintiff's wire connections to member brokers. The Court's language, however, would apply equally to any concerted action imposing a competitive disadvantage. For example, suggesting minimum educational standards for brokers or reporting a broker's past unethical practices also would place a broker at a competitive disadvantage. In other contexts, such concerted conduct as publicizing the results of product safety tests, promulgating standards designed to assure that complementary products will interconnect, or, indeed, ordinary trade association advertising also would place some rivals at a competitive disadvantage.

The Court could have interpreted the brace of famous cases cited in *Silver* short of this sweeping rule. In *Klor's*⁴⁷ and *Radiant Burners*,⁴⁸ for instance, the Court merely reversed summary judgments for the *defendants*, which had been entered despite the plaintiffs' allegations about the untoward circumstances surrounding the defendants' concerted action. To say, as *Klor's* and *Radiant Burners* do, that the plaintiff possibly may win depending on the circumstances surrounding the defendants' concerted action stops short of saying, as *Silver* does, that absent federal regulation or other justification, the plaintiff will win whenever he is hurt significantly by *any* concerted action. *Silver* creates a heavy presumption in the plaintiff's favor that the earlier cases did not.

After listing the business advantages of wire connections, the

46. 373 U.S. at 347.

47. 359 U.S. 207 (1959).

48. 364 U.S. 656 (1961).

Silver Court repeated its sweeping rule:

These important business advantages were taken away from petitioners by the group action of the Exchange and its members. Such "concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category," *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. at 212, of restraints which "because of their inherent nature or effect . . . injuriously restrained trade," *United States v. American Tobacco Co.*, 221 U.S. 106, 179. Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act.⁴⁹

Fortunately, lower courts have interpreted the "or otherwise" language in the last sentence, which grammatically could be understood to mean only a justification derived from the policy of another legislative or administrative enactment, to mean a justification derived from any consideration that seems compelling. Hence, industry self-regulation efforts have escaped instant judicial condemnation on various grounds, the most common being that the nature of the industry calls for some self-regulation. The United States Tennis Association avoided instant condemnation for banning the spaghetti-string racquet by citing the need to preserve the character of tennis.⁵⁰ The American Contract Bridge League avoided instant condemnation for banning the plaintiff's scoring system by claiming the system would reduce the convenience of play in ACBL tournaments.⁵¹ Although the *Silver* Court avoided instantly condemning the Exchange only by finding authorization for its self-regulation in the Securities and Exchange Act, a lower court today probably would reach the same result even in the absence of the Act. A lower court probably would accept for this limited purpose the Exchange's argument that its efforts to police the ethics and financial soundness of brokers with wire connections increases a potential trader's confidence in the Exchange. A lower court that followed the Chicago School would go further still and ultimately uphold any exclusion—even one based on the plaintiff's politics—if it increased the appeal and value of the Exchange, that is, increased the demand for what the Exchange has to offer. In general, considering *Silver's* facts without the escape provided by the Securities and Exchange Act underscores the severity of *Silver's* clear (albeit negative) implication: In the absence of the Act, the mere withdrawal of wire connections by

49. 373 U.S. at 348.

50. *Gunter Hartz Sports, Inc. v. United States Tennis Ass'n*, 665 F.2d 222, 228 (8th Cir. 1981).

51. *Bridge Corp. of Am. v. American Contract Bridge League, Inc.*, 428 F.2d 1365, 1370 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

the Exchange deserves instant condemnation, regardless of reason, motive, effect on output, or procedure.

Although defendants have avoided instant condemnation under this first step of *Silver's* rule,⁵² they still confront the eight remaining steps at which a plaintiff might prevail. These include, in particular, the requirement that the defendants' action be no more extensive than necessary to fulfill whatever policy justifies self-regulation. A mere reasonable relation between the defendants' action and the justifying policy apparently is insufficient. A plaintiff who can conceive of an alternative action that would have addressed the justifying policy equally well and hurt the plaintiff less will prevail. The possibility that the alternative policy may be more expensive to the defendants seems, incredibly, to be immaterial. Thus, *Silver's* approach creates a substantial risk of antitrust liability—with the attendant spectre of having to pay the plaintiff treble damages plus attorney's fees—whenever concerted conduct places one of the defendants' rivals at a significant competitive disadvantage. This spectre inhibits defendants from taking any action that might hurt a potential plaintiff and even from collaborating originally if that collaboration eventually may hurt a potential plaintiff.⁵³

Although earlier decisions did not mandate *Silver's* approach, *Silver* is no aberration. Its antecedents contain equally sweeping language about industry self-regulation, which courts still cite with approval. In *Fashion Originators' Guild of America v. FTC*,⁵⁴ for example, the Court held that a group of fashion designers could not agree to refuse to deal with style pirates or with manufacturers and retailers who dealt with the pirates. The Court declared the purpose of the agreement, namely the suppression of tortuous style piracy, to be irrelevant. Writing for the Court, Justice Black sweepingly condemned FOGA for creating an "extra-governmental

52. Lower courts increasingly were ignoring *Silver's* rule before the Court modified the rule in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). See, e.g., *Phil Tolkan Datsun v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982) (*Silver's* rule criticized); *United States Trotting Ass'n v. Chicago Down Ass'n*, 665 F.2d 781, 788-90 (7th Cir. 1981) (*Silver's* rule criticized).

53. *Silver's* approach will deter many individuals from participating in such private organizations and will deter those who do participate from taking actions that might hurt the plaintiff. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

The chilling effect on association activity is accentuated by the liberal rule for holding associations vicariously liable for the acts of their employees and members. See *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

54. 312 U.S. 457 (1941).

agency, which prescribed rules for the regulation and the restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute'⁵⁵

Justice Black's notion that private firms may not act in concert to judge and control other firms has an endearing place in the mythology of liberalism. The notion assumes that the only permissible regulator of business—the only rule-maker and rule-enforcer, especially on normative grounds—is the government. "Abide by the government rules," the notion tells the budding entrepreneur, "and you need worry only about the impersonal forces of demand and supply." Among other benefits, the notion tends to distract attention from the existence of entrenched private power and to suggest that liberalism's claim of entrusting all normative authority to the government carries significance. But no observer of the modern economic order can expect a trial judge to take the notion seriously. To be sure, private groups acting outside legal channels lack authority to imprison business rivals. As discussed below, however, private groups can and do routinely judge rivals and act in ways that put rivals at a competitive disadvantage. Implicit in any joint activity, from a merger, partnership, or joint venture, to a less complete integration like a trade association, standard-setting body, multiple listing service, or a single effort at joint advertising, is a judgment about rivals, which may put some, especially those not included, at a competitive disadvantage. Moreover, rivals often make the best judges of each other, thanks to their expertise and interest and to the efficiency with which they can reach and implement their judgments.⁵⁶ Whatever the merits of Justice Black's language in his populist vision of liberalism where only the government makes and enforces rules and where private groups never control another's opportunity to compete, we can see at a glance that his language would condemn without further inquiry all the concerted conduct in our original list of cases. In each case, the

55. *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 482 (1941). See also *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942); *FTC v. Wallace*, 75 F.2d 733 (8th Cir. 1935). The court in *Wallace* denounced extra judicial judgments about rivals in the same sweeping terms: "It is not a prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic and restrictive measures their conceptions thus formed." *Id.* at 737.

56. For the claim that a private rule may be more efficient than a public rule, see Landes & Posner, *Adjudication As A Public Good*, 8 J. LEG. STUD. 235, 257 (1979).

defendants were judging a rival or a potential rival and taking action that placed that rival at a competitive disadvantage.⁵⁷

The policy underpinnings of the traditional approach—with its hostility toward industry self-regulation—appear to spring from judicial commitment to at least five overlapping principles. One is an attempt to assure entrepreneurs equal opportunity, limited only by the impersonal forces of demand and supply rather than by the approval and acceptance of an entrenched private group.⁵⁸ This principle ignores the possibility that the entrenched private group, thanks to its coordination of effort and ability to exclude, may offer sellers or buyers subtle advantages that ultimately enhance efficiency. A second principle is the wish to retain civil and criminal law as the only police mechanisms for controlling private conduct. Private rulemaking and adjudication, therefore, is viewed with a jealous eye. This principle ignores the possibility that private adjudication, including the monitoring and policing of rivals, may provide an inseparable ingredient of and incentive for an efficiency-enhancing collaboration. A third principle is judicial fear of the potential for abuse in allowing businesses to decide a rival's fate. Thus, courts view with suspicion whatever salutary reasons defendants give for their actions and whatever apparently neutral rules they invoke. Defendants are suspected of using the reasons as a subterfuge to hide their true motive of disciplining or suppressing the plaintiff to keep him from legitimately diverting their business.

57. The Court is beginning to adopt a more realistic attitude toward the kind of vigilantism Black condemned: "[W]e would not expect that any market arrangements reasonably necessary to effectuate the [copyright] rights that are granted [by law] would be deemed a *per se* violation . . ." *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 19 (1979).

58. See A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES* 421-23 (1968); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 1, 53 (1955) (one purpose of the Sherman Act is to give a newcomer a fair opportunity to compete); Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy: In Defense of Antitrust*, 65 *COLUM. L. REV.* 377, 382-84 (1965).

The different temporal frames of *Silver's* traditional approach and the religion of opportunity, on the one hand, and the Chicago School approach and the logic of economic efficiency, on the other hand, help to explain the different approaches generally. Like much of tort law, the traditional approach insists on a narrow temporal frame that factors out events occurring before the plaintiff first appeared, attempted to compete, and then was injured by the defendants. Taking the plaintiff's perspective, the religion of opportunity commands that the plaintiff must *at that time* be assured an opportunity to compete for success on the competitive merits that is roughly equal to the opportunity of his rivals. In contrast, the Chicago School approach employs a broader temporal frame that takes the perspective of the defendants back when they were considering whether to undertake their original joint activity. See *infra* accompanying note 90.

In other words, the courts wisely ignore the economic postulate that a firm has no reason to care about the fate of a particular rival in a world of perfect competition. Instead, the courts recognize that imperfect competition and active rivalry between firms are the norm.⁵⁹ They recognize that firms may face a downward-sloping demand curve and have a keen interest in hurting a rival even when the firms, individually or collectively, do not possess "monopoly power" under the current legal standards for finding such power, and even when the firms are not planning or committing a substantive antitrust violation such as price fixing. A fourth principle is judicial reluctance to presume that the creation of a private association that gives a competitive advantage to its members is an acceptable form of rivalry on the merits and nothing else. A fifth principle is a judicial willingness to review and interfere with the business decisions of any private association that can be deemed a combination within the meaning of the Sherman Act; for example, the judicial deference given to an individual firm to pick its associates is not given to a combination. This principle ignores the fact that, as an economic matter, an efficiency-enhancing combination may deserve freedom from government interference no less than an individual firm.

This Article attacks both *Silver's* traditional approach and the commentators who call for a hostile approach toward defendants' conduct whenever defendants are the plaintiff's horizontal rivals.⁶⁰ By presuming illegal all concerted conduct that puts one of the defendants' rivals at a significant competitive disadvantage, the *Silver* approach operates at too high a level of generality to be useful. Attempting to find general principles that govern all concerted conduct putting a rival at a significant competitive disadvantage is a profitless endeavor.⁶¹ Such a generalized approach sweeps within its terms conduct that differs dramatically in its social value. In

59. By "active rivalry" I mean the activities that constitute "competition" in every day parlance: rivalry for sales by underselling identifiable, named rivals and by advertising a favorable comparison with those rivals, close watch of the actions of one's rivals; keen concern about the exit of old rivals, the entrance of new rivals, and the number of rivals within one's particular locale. Such active rivalry indicates imperfect competition.

In contrast, a perfectly competitive market is completely impersonal. With perfect competition, rivals do not behave "competitively" in the word's ordinary sense and, indeed, pay no attention to each other.

60. *E.g.*, L. SULLIVAN, *supra* note 16, at § 92.

61. Because of the extraordinary variety of conduct that the "group boycott" concept purports to govern, reviews of "group boycott" cases typically run more than one hundred pages in length. *E.g.*, Annot., 41 A.L.R. FED. 175 (1979).

addition, the *Silver* approach distracts attention from the wide variety of benefits and harms that defendants' concerted conduct presents. It also distracts attention from the method of concerted conduct by which defendants hurt the plaintiff. For instance, the *Silver* approach does not by its own terms distinguish between hurting the plaintiff through truthful advertising and hurting the plaintiff through deceitful manipulation of an apparently neutral testing service, between certification efforts that merely suggest minimum standards and standardization efforts that enforce standards by threatening to deny access to essential facilities.⁶² *Silver's* approach also hinders a lower court from concluding short of trial that the defendants' concerted conduct was appropriate. Instead, the approach allows a lower court to avoid an antitrust trial only by dismissing the plaintiff's case on grounds such as lack of an effect on interstate commerce, lack of a Sherman Act agreement, or lack of personal jurisdiction. Because so many industry self-regulation cases are resolved on such grounds, *Silver's* approach retards the evolution of guidelines that will indicate with increasing specificity what concerted conduct by rivals is appropriate.

B. *The Chicago School Approach*

The Chicago School faults *Silver's* approach because it is not tailored to condemn only concerted conduct that restrains output. By definition, conduct restraining output will disturb allocative efficiency and, unless offset by savings in productive efficiency, will reduce the gains from trade and reduce the sum of consumer and producer surplus.⁶³ By giving an antitrust action to an injured plaintiff when his injury does not restrain output, *Silver's* traditional approach protects competitors, not competition.⁶⁴

Major examples of output-restraining concerted conduct are horizontal mergers to acquire a monopoly and horizontal price fixing. Price fixing here includes bid rigging, horizontal division of customers or territories, and horizontal agreements to restrict output, but does not include resale price maintenance or any other

62. See Q. LAMB & C. SHIELDS, *TRADE ASSOCIATION LAW AND PRACTICE* 89-95 (1971) (current law fails to distinguish between suggesting and enforcing standards); See Monroe, *Trade and Professional Associations: An Overview of Horizontal Restraints*, 9 U. DAYTON L. REV. 479, 492 (1984).

63. Liebler, *Interbrand Cartels*, 30 UCLA L. REV. 1, 16 (1982).

64. *E.g.*, *Product Liability Ins. Agency Inc. v. Crum & Forster Ins. Co.*, 682 F.2d 660, 663-64 (7th Cir. 1982), *cert. denied*, 105 S. Ct. 3501 (1985) (criticizing traditional approach for not focusing on the danger to output).

vertical restraint.⁶⁵ Another major example is a horizontal agreement among rivals about the nonprice dimensions of their products or services, such as the design or composition of their products, credit terms, cancellation terms, marketing tactics, or the characteristics of eligible buyers. Like price fixing, such a horizontal agreement prevents the parties to the agreement from responding to consumer desires. If the parties have market power (and the Chicago School insists that market power be shown), the agreement will restrain output. When not justified by productive efficiency concerns, such an agreement on dimensions other than price often is categorized simply as an unreasonable restraint of trade.⁶⁶ *National Society of Professional Engineers v. United States*⁶⁷ provides an example. In that case the defendant engineers agreed not on the price of services but on the practice of not discussing prices until after the customer initially had selected an engineer. By preventing a customer from basing his initial selection of an engineer on price, the agreement interfered with the market's ability to respond to consumer desires. As a result, the market did not produce the services consumers most desired, the consumers did not spend their money on their highest valued use, and the gains from trade were reduced. In theory, the agreement reduced, however slightly, the output of engineering services. In order to emphasize the close theoretical relation between such conduct and price fixing, this Article will refer to such output-restraining concerted con-

65. *E.g.*, Liebler, *Book Review*, 66 CAL. L. REV. 1317, 1322-23 (1978) (review of R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*) (vertical restraints present no threat of reducing output).

The Chicago School's condemnation of price fixing is difficult to explain in light of the School's assumption of free entry and its adherence to price theory. As long as no entry barriers exist and entry is free, price fixing either should fail in its goal of reducing output and increasing profit or should succeed only because it provides efficiency-enhancing benefits that increase consumer welfare. There is no reason for condemning price fixing in either case. Dewey, *Antitrust and Economic Theory: An Uneasy Friendship*, 87 YALE L.J. 1516, 1518-23 (1978).

66. Philip Areeda's well-known textbook, *ANTITRUST ANALYSIS* (3d ed. 1981), sensibly put the cases involving this conduct in the chapter on horizontal restraints and in a section entitled "Unreasonable Restraints of Trade," immediately after the section on price fixing. Other examples of such concerted conduct are found in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (agreement about credit terms extended to customers); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (agreement to limit advertising); *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628 (D.D.C. 1979) (agreement not to solicit customers who may be contractually committed to another architect); *United States v. Texas Bd. of Pub. Accountancy*, 1978-1 Trade Cas. (CCH) ¶ 62,039 (W.D. Tex. 1978), (agreement to limit competitive bidding), *modified*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

67. 435 U.S. 679 (1978).

duct not justified by gains to productive efficiency as "concerted conduct related to price fixing."⁶⁸

Judge Posner has offered the most influential explanation of the Chicago School's approach toward the example cases. He explains that boycotts simply are "an enforcement device, a sanction (akin to ostracism),"⁶⁹ and "a method of self-help enforcement,"⁷⁰ rather than a substantive antitrust practice. As simply one of many tools for many possible ends, boycotts have no anti-trust significance.⁷¹ Courts therefore should attack a boycott only when a firm uses the device to enforce some other behavior, such as price fixing, that is itself a substantive antitrust violation.⁷² In

68. A more common term would be "cartel" conduct. But the term "cartel" is sometimes used to include any concerted behavior, thereby including conduct that has no tendency to restrain output and that may provide substantial gains to productive efficiency. The goal here is to find a general term for that conduct, other than price fixing, that Judge Posner would deem objectionable on the basis of substantive antitrust policy. *See supra* text accompanying note 29. Admittedly, the concept "concerted conduct related to price-fixing" is at once too vague and too narrow.

When concerted conduct related to price fixing occasionally is analyzed as a group boycott, it often is classified as a group boycott to improve the defendants' bargaining position in relation to buyers and sellers. This classification distinguishes this concerted conduct from the classic group boycott, which attempts to improve the defendants' competitive position in relation to rivals. *Compare* United States v. First Nat'l Pictures, Inc., 282 U.S. 44 (1930) (bargaining boycott) and Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (same) with Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914) (competitive boycott). M. HANDLER, CASES AND MATERIALS ON TRADE REGULATION, (7th ed. 1982). The traditional approach tolerated bargaining boycotts more than competitive boycotts. The Chicago School's approach reverses the preference.

69. R. POSNER & F. EASTERBROOK, ANTITRUST 724 (2d ed. 1980). Perhaps the most thorough application of Judge Posner's antitrust analysis to industry self-regulation cases appears in W. LIEBELER, ANTITRUST ADVISER § 1.32, at 45-59 (C. Hills ed. Supp. 1983).

70. R. POSNER, *supra* note 28, at 207.

71. R. POSNER & F. EASTERBROOK, *supra* note 69, at 734.

72. In his earlier works Judge Posner did not condemn boycotts only when the defendants were engaged in a substantive antitrust violation, but more generally when defendants were engaged in any practice objectionable on the basis of substantive antitrust policy:

Boycotts are properly attacked under the antitrust laws when and only when they are employed to enforce a practice that is objectionable on the basis of substantive antitrust policy. . . . The test of a boycott challenged under the antitrust laws is whether it is being used to enforce a practice that is contrary to the policy of those laws.

R. POSNER, *supra* note 28, at 210.

In a decision for the Seventh Circuit, Posner has written:

A boycott is illegal *per se* under the antitrust laws only if used to enforce a rule or policy or practice that is itself illegal *per se*. . . . If a rule of a private association is not illegal *per se*, neither is the enforcement of the rule. . . . as by expelling a noncomplying member—the normal method by which a private association enforces its rules. *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 600 (7th Cir. 1984). *See Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (9th Cir. 1983); *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 859-60 (1st Cir. 1982). Judge Posner has suggested further that a boycott would be illegal under the rule of reason if and only if the defendants' related rule, policy, or practice

effect, the plaintiff must show that the defendants are engaged in price fixing or related concerted conduct and that the defendants have acted against the plaintiff in order to ensure the conduct's success. Under this rule, the plaintiff does not succeed by showing merely that the defendants agreed to take the action that put the plaintiff at a competitive disadvantage. The defendants' concerted action against the plaintiff is in itself insignificant. The action at best is only evidence, and inconclusive evidence at that, of the defendants' illegal price fixing or other related concerted conduct. Judge Posner's rule puts the plaintiff in the same position as any person who buys from or sells to the defendants. The plaintiff must show that the defendants either fixed prices or engaged in other related concerted conduct that led them to act against him. If the plaintiff cannot prove such conduct, he is without a remedy.⁷³ In this dramatic departure from *Silver*, the court's attention focuses less on the defendants' action against the plaintiff and more on the defendants' formation of the private association or their other previous joint activity. It is not the defendants' immediate but their original action that counts.⁷⁴

Judge Posner's rule may allow defendants to escape liability even when their action facilitates oligopolistic coordination by keeping down the number of rivals in the industry. Conventional economic wisdom maintains that coordination of prices and other dimensions of rivalry becomes more possible, *ceteris paribus*, the fewer the number of rivals.⁷⁵ Thus, defendants may be tempted to handicap or exclude rivals in order to maintain an industry structure favorable for coordination. Defendants who use industry self-regulation for this end will escape condemnation under Judge Posner's rule. After all, oligopolistic coordination is not an antitrust violation; therefore, these defendants are not injuring the plaintiff in order to enforce a practice that is an antitrust violation.⁷⁶ Be-

is itself illegal under the rule of reason. *Vogel*, 744 F.2d at 604.

73. Some Chicago School members argue that the injured plaintiff would not have standing to recover when the defendants are engaged in price fixing because the harm to the plaintiff does not correlate with the degree of output restriction. Page, *The Scope of Liability for Antitrust Violation*, 37 STAN. L. REV. 1445, 1468 (1985) (the fact that the plaintiff's injury is a means by which the price fixing agreement was policed is irrelevant).

74. Although Judge Bork is associated with the Chicago School, he takes a more hostile view toward boycotts. Judge Bork believes boycotts adversely affect consumer welfare when they disrupt the plaintiff's optimal distribution pattern and deprive consumers of a preferred outlet. R. BORK, ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 332 (1978).

75. *E.g.*, F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1980).

76. Judge Posner may claim that although oligopolistic coordination is not a substan-

cause successful coordination restrains output in much the same way as price fixing, the defendants' escape represents a shortcoming of Judge Posner's rule. Although Judge Posner has suggested that he would expand the concept of "agreement" in order to include oligopolistic coordination as a Sherman Act violation, thus capturing these defendants,⁷⁷ those courts adopting his rule on boycotts have not expanded the concept of "agreement" accordingly.⁷⁸

The Chicago School might further criticize *Silver's* traditional approach because it discounts the productive efficiency gains from the defendants' joint activity, gains to which the injury to the plaintiff may be considered ancillary.⁷⁹ For example, the defendants' joint activity may reduce production or transaction costs or increase consumer demand. The joint activity may create or market a product that otherwise would not exist. Shopping malls, sporting leagues, private hospitals, real estate multiple listing services, and other joint activities may increase demand for the participants' products and thus may deserve to be considered efficiency enhancing. Whenever excluding additional firms helps the joint activity operate more efficiently (for example, by maintaining a number of teams in a sporting league that will maximize consumer demand) or helps to provide an optimum incentive for investment in the joint activity (for example, by eliminating free riders who originally did not invest in the joint activity), the exclusion properly can be considered ancillary to the efficiency-enhancing gains.⁸⁰

Silver's traditional approach does not ignore productive efficiency considerations entirely. The approach calls for a court to examine whether the defendants' joint activity that injured the

tive antitrust violation, it is a practice objectionable on the basis of substantive antitrust policy. Judge Posner's rule, therefore, would capture a boycott designed to enforce such coordination. R. POSNER, *supra* note 28, at 210.

77. Posner, *Oligopolistic Pricing Suits, The Sherman Act and Economic Welfare. A Reply to Professor Markovitz*, 28 STAN. L. REV. 903 (1976); Posner, *A Program for the Antitrust Division*, 38 U. CHI. L. REV. 500 (1971).

78. *E.g.*, *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 600 (7th Cir. 1984); *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983); *Bruce Drug, Inc., v. Hollister, Inc.*, 688 F.2d 853, 859-60 (1st Cir. 1982).

79. For the claim that the consumer welfare gains from a horizontal integration often will exceed the welfare losses, see Williamson, *Economics As An Antitrust Defense*, 25 U. PA. L. REV. 699, 707 (1977).

80. *E.g.*, *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.) (exclusion of some golfers from PGA events necessary to maximize the marketability of the product), *cert. denied*, 385 U.S. 846 (1966).

plaintiff is "justified by the policy of another statute or otherwise."⁸¹ Defendants who can explain how their productive efficiency gains constitute a justifying policy will avoid immediate condemnation. The burden for meeting this test, however, clearly falls on the defendants.⁸² Moreover, the traditional approach's eight subsequent inquiries⁸³ pay far too much attention to whether the plaintiff's injury was "fair" and pay far too little attention to the gains from the defendants' initial joint activity and to the effect of judicial intervention on the defendants' incentives to engage in that activity.

Under the Chicago School's approach set forth by Judge Posner, productive efficiency gains play a much more central role. As noted, the plaintiff must show that the defendants' original joint activity reduces output. Even then, however, the defendants will prevail by showing that the productive efficiency gains from that activity offset the reduction in output. By definition, a joint activity that yields a net increase in efficiency is not objectionable on the basis of substantive antitrust policy. Therefore, no later action against the plaintiff that is designed to enforce or maintain such an activity will be actionable. Moreover, in order to show productive efficiency gains, defendants apparently only need advance a plausible explanation of how their activity lowers costs, increases demand, or mitigates some market imperfection.⁸⁴

Because the Chicago School approach deemphasizes the defendants' action against the plaintiff, the approach does not focus attention on whether the injuring action "accomplishes an end consistent with the policy justifying self-regulation, is reasonably related to that end, and is no more extensive than necessary."⁸⁵ Defendants are spared the heavy burden of showing that their action was necessary to achieve some legitimate, justifying end.

81. *Silver*, 373 U.S. at 348-49.

82. For an alternative statement of this burden, see *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1972) (professional regulation allowed only if defendants show that it "contribute[s] directly to improving service to the public"), *cert. denied*, 434 U.S. 825 (1977).

83. See *supra* text accompanying notes 34-57.

84. For example, Professor Liebler apparently would allow a decisionmaker to reject a defendant's efficiency-enhancing claim only when "it becomes clear that such productivity-enhancing potential is not involved" in the joint activity. The type and amount of evidence required for this showing is left unclear, both in theory and in application to any particular case. Liebler, *Market Power and Competitive Superiority in Concentrated Industries*, 25 UCLA L. REV. 1231, 1283 (1978).

85. *Denver Rockets v. All-Pro Management, Inc.* 325 F. Supp. 1049, 1065 (C.D. Cal. 1971).

Thus, the plaintiff will not prevail merely by suggesting a plausible alternative action the defendants could have taken that might have achieved the same productive efficiency gains while hurting the plaintiff less.⁸⁶ Indeed, the Chicago School approach does not invite any inquiry into less restrictive alternatives. Its proponents are unwilling to let the judge and jury second-guess the defendants with some untested alternative business action. They appreciate the difficulty defendants may have in explaining and courts may have in appreciating why such alternatives are inferior.⁸⁷ The Chicago School assumes defendants possess the incentive and—at least compared to the courts—the acumen to take the most efficient action.⁸⁸

In addition to ignoring the less restrictive alternative requirement, the Chicago School approach ignores other factors central to the traditional approach. For example, the Chicago School approach does not inquire whether the defendants' action places the plaintiff at a competitive disadvantage. It does not inquire whether the defendants' action against the plaintiff is arbitrary, spiteful, unfair, or based on rivalry avoidance. It does not inquire whether the defendants hurt the plaintiff "unreasonably," as other branches of the law and *Silver's* traditional approach use the term. These inquiries are relevant, if at all, only to suits based on principles of tort, property, contract, fiduciary obligations, or the law of private associations.⁸⁹ Instead, the Chicago School approach tolerates the defendants' action against the plaintiff as long as the original joint activity's net effect on consumer welfare appears to be positive. The Chicago School approach strives to analogize the plaintiff's injury to the injury that any business suffers from its rivals' lower prices or better service. The approach also strives to analogize the defendants' joint activity, such as their formation of a private association, to individual businessmen's formation of a partnership. Just as a partnership does not face antitrust scrutiny when it excludes others interested in joining it, business associa-

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

87. The danger that courts will fail to appreciate the efficiency-enhancing potential of joint, horizontal activities is a genuine one. Professor Easterbrook has pointed out the failure of several courts to appreciate how maximum price-fixing, for example, may overcome the market imperfection from the moral hazard problem. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981). See also *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

88. W. LIEBELER, *supra* note 69, at 54 ("fine toothed examination of the breadth of these membership criteria [of a multiple listing service] seem misplaced").

89. *Id.* at 53-56.

tions should not face scrutiny when they exclude or injure rivals.

These features of the Chicago School's approach follow logically from the Chicago School's emphasis on viewing these cases *ex ante*. An *ex ante* view starts the relevant story, or statement of relevant facts, back at the moment when the defendants first contemplate the creation of their private association or the pursuit of their original joint activity. The Chicago School asks in essence: "What is the effect of our ruling on the incentive to engage in the joint activity?" The legal outcome will turn largely on the net welfare effect of the joint activity in the generality of cases, not necessarily in the plaintiff's particular case. The Chicago School naturally wants the law to encourage an activity that enhances efficiency. At least, the law should not discourage the joint activity by threatening to compel defendants to share their success with rivals, by threatening to reduce the defendants' gain from the activity, or by threatening to interfere with defendants' management of the activity.

The Chicago School approach does not begin the relevant inquiry in the plaintiff's suit at the moment when trouble among the parties breaks out—when the plaintiff is injured by the defendants' joint activity or, more likely, by his exclusion from the joint activity. The "temporal frame" of the *ex ante* view, to use a term of Mark Kelman,⁹⁰ renders irrelevant the circumstances surrounding the moment of the plaintiff's injury. For example, whether the defendants' action was arbitrary, discriminatory, or based on a rivalry-avoiding motive is irrelevant under the Chicago School approach. Similarly, the *ex ante* approach in Ronald Coase's famous example of a rancher's cattle trampling a farmer's crops insists on a "broad temporal frame" that focuses all attention on the earliest moment when the parties or their predecessors with perfect foresight might have reorganized their activities to minimize costs.⁹¹ As Bruce Ackerman has explained, Coase's *ex ante* approach renders irrelevant the circumstances surrounding the moment of trampling, for example, whether the trampling occurred by justifiable or unjustifiable mistake, by unavoidable accident, or by the rancher's deliberate efforts.⁹² Indeed, the *ex ante* approach renders irrelevant all doctrines, such as the doctrine of unconstitutional conditions, that focus attention on the *immediate*

90. Kelman, *Interpretative Construction in the Substantive Criminal Law*, 32 *STAN. L. REV.* 591, 593-94 (1981).

91. Coase, *The Problem of Social Costs*, 3 *J.L. & ECON.* 1, 25-31 (1963).

92. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 47-51 (1984).

reason for injuring a particular party.⁹³ The Chicago School never asks whether distribution of entitlements at or immediately after the moment of injury are fair, nondiscriminatory, and based on some ground other than a suspect criterion.

The plaintiff plays an insignificant role in the Chicago School's relevant story. When mentioned at all, he is depicted as a rival who was unwilling to incur the risks of the joint activity at its creation but who now wants the court to compel his admission and let him free ride on the defendants' past efficiency-enhancing efforts. Often, of course, the plaintiff did not exist when the joint activity was created and cannot now duplicate the joint activity except at seemingly prohibitive costs. Rightly or wrongly, such a plaintiff's dilemma touches upon liberalism's commitment to an equal opportunity for each businessman to compete. The Chicago School, however, ignores this commitment.

One shortcoming in Judge Posner's rule is its implicit overstatement that output never will be reduced by the plaintiff's injury as long as the defendants are not engaged in a substantive antitrust violation such as price fixing.⁹⁴ This overstatement ignores several possibilities. Others have demonstrated that a firm or group of firms facing a downward sloping demand curve (a finite elasticity of demand) may benefit themselves and reduce output through actions that raise their rivals' costs and that provide no efficiency-enhancing benefits.⁹⁵ Output may be reduced regardless

93. Cf. Easterbrook, *Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 19-21 (1984) (applying an *ex ante* approach to a prosecution of demonstrators in a National Park, an approach that ignored the immediate reason for prosecuting the demonstrators, namely, that they had attempted to sleep); *contra* *Sapiro v. Thompson*, 394 U.S. 618 (1969) (imposing improper conditions on government privileges violates the constitution).

94. R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS*, 732-33, 768-69 (2d ed. 1981).

95. For a diagrammatic explanation of this possibility, see Salop & Scheffman, *Raising Rival's Costs*, 73 AM. ECON. REV. 267 (1983); Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985). Salop and Scheffman demonstrate that a firm facing a downward sloping demand curve will profit from raising a rival's costs if the rival's extra costs lead it to prefer a lower output, thereby raising residual consumer demand for the firm's product. One proviso, however, is needed. The increase in residual demand must exceed the increase in the firm's costs that results from whatever action raised the rival's costs. In addition, the action that raised the rival's costs may reduce the combined output of the firms if the action so increases the firm's own marginal costs or so decreases the elasticity of the residual demand curve facing the firm that the firm actually prefers a lower output despite the increased residual consumer demand, and if the action also so increases the rival's marginal costs that the rival likewise prefers a lower output. In short, unless one knows how a firm's action against its rival will affect the residual demand and the elasticity of the residual demand facing the firm and how that action will affect the rival's marginal

of the rivals' and the defendants' relative costs and even when the finite elasticity of demand is due to factors other than any substantive antitrust violation. Moreover, in a world in which sellers face a finite elasticity of demand even when not engaged in an output-restraining antitrust violation and even when the firms collectively lack a monopoly, as that term currently is defined in the law, the elasticity of demand facing firms *may* turn on the number of their rivals. Excluding rivals, therefore, *may* decrease the elasticity of demand facing the remaining sellers.⁹⁶ Concerted action that reduces the elasticity of demand facing sellers enables the sellers to increase prices by reducing output.⁹⁷ The Chicago School model, however, contains no theory of how an increased number of rivals may affect the demand, or the elasticity of demand, that each seller faces.⁹⁸ The model instead allows only for two possibilities: perfect competition (an infinitely elastic demand curve facing each firm) at one extreme, or monopoly, cartel, or oligopolistic behavior by firms who together wield a monopoly at the other. As long as no hope of acquiring a monopoly exists (and the legal definition of a monopoly requires at least sixty percent of the relevant product

costs and preferred output, one cannot predict the action's effect on total industry output. Thus, Judge Posner's implicit assertion—that defendants' action against plaintiff never will affect output in the absence of price fixing or some other substantive antitrust violation—necessarily would be true only in a world of perfect competition, that is, only when each firm faces an infinitely elastic demand curve.

96. When sellers' output is limited, as the output of rival doctors is limited by the number of working hours available, an increase in the number of rivals per a given population of potential buyers ought to decrease the demand and increase the elasticity of demand that each rival faces. Sloan, *Physician Fee Inflation: Evidence for the Late 1960's* in *THE ROLE OF HEALTH INSURANCE IN THE HEALTH SERVICES SECTOR* 321-54 (R. Rosett ed. 1976).

97. The elasticity of demand facing sellers may vary between markets even when there is no collusion. The ratio of marginal revenue to price will vary similarly. This explains why prices will differ between geographic areas although the sellers' costs are the same. The phenomenon of a seller transporting his products from one area and dumping them at a low price in another area (while preventing resale of the items from the low-price area to the high-price area) takes advantage of the differing elasticities of demand. Accordingly, those who aim to assure consumers a competitive output and a price near the seller's cost ought to be concerned not only about price fixing, but also about any acts that may reduce the elasticity of demand facing the seller. Acts that eliminate rivals and thereby reduce the availability of substitute products or services may, therefore, be of concern.

98. Sometimes additional rivals actually will make the demand curve facing the existing producers less, rather than more, elastic. This may occur, for example, when the new rivals significantly increase consumer search costs. See Pauly & Satterthwaite, *The Pricing of Primary Care Physician's Services: A Test of the Role of Consumer Information*, 12 *BELL J. OF ECON.* 488, 491 (1981). Other times the new, additional rivals will lead existing sellers to persuade consumers to purchase more goods or services, thereby increasing demand. Evans, *Supplier-Induced Demand* in *THE ECONOMICS OF HEALTH AND MEDICAL CARE* 162-73, (M. Perlman ed. 1974).

and geographic market), each firm in the Chicago School model ought to be serenely indifferent to the fate of any particular rival. Thus, the model cannot explain why such a group of firms (with no hope of a monopoly and no wish to enhance efficiency) would ever want to injure or exclude a rival. Because the model does not allow for entry barriers,⁹⁹ it likewise is unable to explain how eliminating rivals may affect supply.

Judge Posner's rule also ignores the possibility that the plaintiff may enjoy lower long-run costs than his rivals, and, had the defendants' action been different, would have been able to expand his output while maintaining his lower costs. In this case as well, the injury to the plaintiff, like a tariff on a low-cost foreign producer, may reduce industry output. The irrelevance of the plaintiff's fate to industry output, therefore, is less certain than Judge Posner's rule implicitly assumes.

Equally pertinent is the sharp distinction that an economic approach maintains between means and ends. The Chicago School tends to assume that means or methods yield no value independent of the ends that they promote. Accordingly, the Chicago School shows no interest in distinguishing between approved and unapproved concerted methods of injuring a rival, at least when the injury is not designed to maintain an output-restraining agreement. Except for the effect on efficiency, the Chicago School is not concerned with whether the defendants injure the plaintiff through widely approved forms of rivalry on the merits, deceitful manipulation of natural monopolies, other dirty tricks (which are not yet independent civil wrongs), civil wrongs (which are not yet independent crimes), or crimes. *Silver's* approach, however, like the approach proposed in this Article, reflects an implicit judgment that means and methods matter. As Lawrence Tribe states: "In many realms of human experience, process is intuitively and widely felt to matter in itself"¹⁰⁰

The strongest argument against Judge Posner's rule, however, is probably historical.¹⁰¹ The rule ignores the traditional

99. The Chicago School approach recognizes that entry barriers may arise from *government* action. G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 67 (1968).

100. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315, 1339 (1974).

101. Another shortcoming of the Chicago School approach is the difficulty of applying it in particular cases. Whenever a restraint on output exists, the approach calls for a judge to balance the gains to productive efficiency against the loss in output in order to ascertain the net effect of the defendants' conduct on consumer welfare. Others have noted the difficulty, indeed the incoherence, of such an effort. Easterbrook, *supra* note 86, at 11-14; Kis-

approach's clear (albeit implicit) message that concerns other than allocative and productive efficiency need to be addressed.¹⁰² As Professor Coons has claimed: "In these grand legal fossils [such as *Klor's* and *FOGA*] inheres a respect for values other than those of the market."¹⁰³ Among these values is the social desirability of the defendants' conduct on noneconomic grounds. To be sure, *Silver's* traditional approach does not identify these values explicitly or suggest how courts should take them into account in specific cases. Nevertheless, these other values have been built into antitrust doctrine, however crudely, and a lower court determined to remain faithful to the thrust of the traditional approach cannot ignore them.¹⁰⁴

C. *The Traditional Approach Modified*—Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.

The 1985 Supreme Court decision *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*¹⁰⁵ modifies *Sil-*

sam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CAL. L. REV. 595, 661-62 (1983).

102. Behavior which does not threaten output, but threatens only to injure a rival has so often constituted an antitrust violation that output and productive efficiency cannot be said to be antitrust's sole concerns. See, e.g., *Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, 353 F.2d 618 (10th Cir. 1965) (defendants liable for conspiring to entice away rival's employees), cert. denied, 383 U.S. 1032 (1967); *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.) (defendants liable for conspiring with rival's employees to use rival's business records), cert. denied, 286 U.S. 552 (1932); see generally Note, *The Pick-Barth Doctrine: Should Unfair Competition Belong Under the Sherman Act?*, 31 BAYLOR L. REV. 253 (1979); Note, *Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act*, 58 TEX. L. REV. 415 (1980).

The debate about antitrust's proper goals is well known, see, e.g., Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977), and is beyond the scope of this Article. The legislative history of the Sherman Act and the continuing condemnation of behavior that does not threaten to reduce output require a lower court to acknowledge that the current goals are not merely allocative and productive efficiency. Among the other goals is the establishment of a code of conduct for concerted business behavior. H. THORELLI, *THE HISTORY OF THE SHERMAN ACT* (1966).

103. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 742 (1962).

104. In attempting to identify a few patterns of such concerted business conduct that have been condemned, this Article hopes to sharpen discussion generally about what concerted business conduct is proper, while also helping lower courts decide how to approach these cases. Once the concerns addressed by the "code of conduct" aspect of antitrust law are brought into the open, an ultimate policy maker, like the Supreme Court, will be better able to decide whether to discard this goal and the laws that reflect it. Should that Court reject a "code of conduct" goal for antitrust, state courts deciding tort cases may draw some guidance about undesirable concerted conduct from the discarded antitrust law.

105. 105 S. Ct. 2613 (1985).

ver's traditional approach and increases the plaintiff's burden in an industry self-regulation suit. The case involved the expulsion of an office supply retailer from a joint buying cooperative of retailers. The Ninth Circuit,¹⁰⁶ citing *Silver*, had found a per se violation of the Sherman Act based on the defendants' failure to give the plaintiff a reason for its expulsion or any procedural opportunity to challenge it. The Supreme Court reversed the holding on the narrow ground that the defendants' failure to afford the plaintiff procedural protection should not trigger per se condemnation.

More importantly, the Court held that per se condemnation is appropriate, at least for expulsion from a joint buying cooperative, only if the plaintiff shows that the cooperative possesses "market power or unique access to a business element necessary for effective competition."¹⁰⁷ Although these alternative requirements apparently are intended to assure that an expulsion might restrain output, in practice they serve mainly to increase the degree of injury that the plaintiff must incur for per se liability to attach. In contrast, the traditional approach requires only that the defendants place the plaintiff at a "significant competitive disadvantage," a standard often met by a relatively minor injury.¹⁰⁸

How the plaintiff is to show that the defendants possess "unique access to a business element essential for effective competition" is unclear. At one extreme, the plaintiff may need to show only that duplicating the defendants' "business element" would be costly. This test is similar to the old "significant competitive disadvantage" test. At the other extreme, the plaintiff may need to show that the defendants' "business element" cannot be obtained or duplicated at any price, now or in the future.¹⁰⁹ How, for example,

106. 715 F.2d 1393 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

107. 105 S. Ct. at 2621.

108. See *Silver v. N.Y.S.E.*, 373 U.S. 341, 348 (1963); *Associated Press v. United States*, 326 U.S. 1, 18 (1945).

109. The same uncertain meaning underlies the "essential facilities doctrine." The doctrine would give an action to a plaintiff who establishes four elements: first, control of an essential facility by a group with market power; second, a rival's inability practically and reasonably to duplicate the facility; third, denial of use of the facility to a rival; and fourth, the feasibility of the defendants' providing the facility to the rival. *M.C.I. Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); Note, *Unclogging the Bottleneck: A New Essential Facilities Doctrine*, 83 COLUM. L. REV. 441 (1983).

Whether the second element of this test means that the essential facility must be costly to duplicate, on the one hand, or impossible for some physical reason to duplicate, on the other, is uncertain. The terms of the second element do not necessarily call for inquiry into whether the essential facility stems from rivalry on the merits or from some natural monopoly. If it stems merely from rivalry on the merits by the defendants or their predecessors,

would the requirement apply to the famous *Terminal Railroad*¹¹⁰ case? The defendant-railroads in that case controlled access to the only available railroad bridge over the Mississippi in the St. Louis area. The fear was that they would deny access to rival railroads. Applying *Pacific Stationery* to these facts, what proof would show that the defendants "possessed unique access to a business element necessary for effective competition"?¹¹¹ Would it be enough for an excluded railroad to show that the standard price of using the defendants' facilities was less than its cost of building another bridge? Or would such a plaintiff be required to go further and show that to build another bridge would be prohibitively expensive (whatever that means), legally impossible under current laws, or physically impossible regardless of the laws or the cost?

Those plaintiffs who wish to invoke per se treatment, but who cannot show the defendants' "unique access to a business element necessary for effective competition," must show that the defendants together possess "market power." Despite the volumes written about "market power," the term's meaning is still unclear. In an economic sense, virtually every firm possesses market power because it can raise its price above the competitive level and still sell some of its output.¹¹² In other words, virtually every firm faces a finite, rather than infinite, elasticity of demand at a competitive price, and therefore possesses some power to restrict output. Clearly, the Court meant to require more than this minimal standard. But how much more? At the other extreme, the term "market power" could mean that defendants together possess "monopoly power," which has been defined to be at least sixty-four percent of the relevant product and geographic market.¹¹³ Presumably, the Court intended a meaning of "market power" between these two extremes. Justice Brennan may have signaled his

forcing the defendants to admit the plaintiff will reduce incentives for the original investment in the facility and frustrate productive efficiency. This uncertainty is separate from the intractable problem of deciding appropriate terms for plaintiff's access to the facility.

Some authors assume that the only danger that the essential facility doctrine addresses is the danger of price fixing or oligopolistic coordination among those who control the essential facility. Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986). That control of an essential facility threatens values essential to the religion of opportunity and also allows those in control to impose a "tariff" on a low cost producer apparently does not concern them.

110. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

111. *Pacific Stationery*, 105 S. Ct. at 2621.

112. A. ALCIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION COORDINATION AND CONTROL* 236-42 (3d ed. 1983).

113. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436 (2d Cir. 1945).

intended meaning of market power earlier in the *Pacific Stationery* opinion when he noted that previous per se rulings involved defendant associations that consisted of firms having a dominant position in the relevant market.¹¹⁴ Perhaps, therefore, a court will find market power whenever the defendants' private association consists of the industry leaders. The usual meaning in traditional antitrust law, however, and the position assumed by the government on its amicus brief, is that market power in this context simply means enough power to exclude a rival.¹¹⁵ This meaning redirects attention to the degree of injury to the plaintiff. Unfortunately, this common meaning of market power assumes incorrectly that the power to inflict sufficient injury on a rival to prevent its entering or remaining in business necessarily entails the power to restrict output. As other writers have emphasized, however, the mere ability of an association of otherwise competitive firms to exclude rival firms from the market does not establish the existence of power to restrict output.¹¹⁶ The power to restrict output depends on the elasticity of demand facing the defendants at a competitive price. It does not correlate with the power to exclude; it may not even correlate with market share. The power to exclude is at most a helpful precondition to restricting output; it alone is not sufficient. In any event, *Pacific Stationery's* requirement that the plaintiff prove market power sharply increases the plaintiff's litigation burden and may require him to establish the relevant product and geographic markets.

The most important feature of *Pacific Stationery* is that the case leaves intact a great deal of the traditional approach, contrary to the Chicago School's recommendations. The Court reaffirmed the famous and much criticized cases establishing the traditional approach, specifically *Klor's*, *FOGA*, *Radiant Burners*, and *Silver*.¹¹⁷ The Court ignored the justifications, such as *Klor's*' free-rider justification,¹¹⁸ that commentators have advanced to show that the defendants' action in those cases enhanced efficiency. Presumably, lower courts are to ignore similar arguments in the

114. *Pacific Stationery*, 105 S. Ct. at 2613.

115. *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 811, 814 (1946).

116. W. LIEBELER, *supra* note 69, at 54. The fact that membership in a private association (or access to some resource) is essential for a firm's financial success does not mean that those in the association (or those with access to the resource) restrict, or have the ability to restrict, output. See also Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State* 55 CAL. L. REV. 1247, 1254-55 (1967).

117. 105 S. Ct. at 2617-18.

118. See, e.g., Liebler, *supra* note 65, at 1323.

future.

Moreover, the Court continued to recognize the notion of an "anti-competitive animus," which if "necessarily implie[d]," would establish the "probability of an anti-competitive effect."¹¹⁹ For example, if the defendants' motive for excluding the plaintiff from the cooperative was to retaliate against his decision to operate as an independent wholesaler, this "anti-competitive animus" might doom the defendants under a rule of reason analysis. Thus, the time-consuming search for the defendants' "true" animus, invited by the traditional approach and rejected by the Chicago School, will continue.

Under a rule of reason analysis, *Pacific Stationery* also keeps at issue the relationship between the plaintiff's injury and the efficiency-enhancing benefits of the defendants' action. The Court left unclear how close this relationship must be and which party has the burden of proof regarding the relationship. As long as the relationship matters, however, the plaintiff may prevail by showing that the defendants' action was arbitrary, unnecessary, or otherwise unrelated to efficiency-enhancing benefits. This means the plaintiff can attempt to show less damaging, equally efficiency-enhancing, alternative business practices that the defendants might have used. Presumably, a jury would rule for the plaintiff if it were convinced that an alternative practice was feasible. The Supreme Court's other major antitrust decision of 1985, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,¹²⁰ reaffirms the Court's willingness to let the judge and jury decide that valid business reasons do not justify the defendants' practices and, thus, that those practices harm rivals unreasonably. The Chicago School approach, in contrast, would exclude evidence of possible alternative business practices that might have hurt the plaintiff less. According to that approach, appropriate deference to the defendants' decisionmaking freedom militates against any inquiry into alternative business practices.

As a general matter, the Court's assertion in *Pacific Stationery* that its holding addressed only the requirements for per se condemnation allows the traditional approach to govern rule of reason cases. The requirement that defendants possess either "market power or unique access to a business element necessary for effective competition," therefore, need not apply in a rule of

119. 105 S. Ct. at 2620.

120. 105 S. Ct. 2847 (1985).

reason case.

In summary, *Pacific Stationery*—although written narrowly to apply to expulsion from a joint buying cooperative—eliminates the presumption of per se illegality embedded in *Silver's* traditional approach. Moreover, the Court's language at times adumbrates the Chicago School's economic approach and its single-minded evaluation of harm to allocative efficiency and gain to productive efficiency. Nevertheless, many matters remain relevant that an economic approach discounts or does not consider. The traditional approach's tendency to protect a rival regardless of the effect on output survives.

One of the shortcomings of *Pacific Stationery's* approach is the lack of guidance it gives to potential defendants about permissible concerted conduct toward rivals. Except for the *Noerr*¹²¹ doctrine, which creates a safe harbor for concerted efforts to influence the passage of legislation, no safe harbor rules exist to inform trade associations or other business groups of permissible actions. The spectre of possible antitrust exposure looms over much of the conduct such groups might wish to undertake. Even the much litigated conduct in *Pacific Stationery*—expelling a rival from a purchasing cooperative—may yet be condemned when evaluated under the rule of reason.¹²² Merely ascertaining what conduct will be condemned per se requires private organizations to guess whether they possess "market power or unique access to a business element necessary for effective competition."¹²³ A per se rule is of little value when potential defendants cannot determine the behavior that will trigger the rule. This uncertainty may be an inevitable cost of antitrust law. If so, the uncertainty is nonetheless a substantial cost that the courts would reduce by developing guidelines for lawful concerted conduct toward rivals. By eschewing a high degree of generality, such guidelines should attempt to specify, for instance, the circumstances under which a joint purchasing cooperative could expel a member without fear of legal liability.

D. The Proposed "Tort" Approach

The best way to understand *Silver's* traditional approach is to recognize that it does not aim merely to balance allocative and pro-

121. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

122. The Supreme Court merely sent the case back to the lower courts to be resolved under the rule of reason. 105 S. Ct. at 2621.

123. *Id.*

ductive efficiency, but rather aims to develop some now-forgotten (and never fully developed) tort rules on a case by case basis. These rules reflect norms about proper concerted business conduct and about the meaning of equal opportunity for firms. In showing concern for firms' rights and not merely consumers' welfare, the judicial commitment to these norms smacks more of a religious conviction than a utilitarian assessment. Section 765 of the first *Restatement of Torts* exemplifies such a rule:

§ 765. CONCERTED REFUSAL TO DEAL.

(1) Persons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm, even though they would not be liable for similar conduct without concert, if their concerted refusal is not justified under the circumstances.

(2) In the issue of justifications under the rule stated in Subsection (1), the following are important factors:

(a) The objects sought to be accomplished and the interests sought to be advanced by the actors' conduct;

(b) the extent of the hardship caused to the persons against whom the actors' conduct is directed and his opportunities for mitigating the hardship;

(c) the appropriateness of the actors' conduct as a means of advancing their interest and the availability of less harmful means to that end;

(d) the relations between the actors and the persons against whom the conduct is directed and their relative economic power;

(e) the effects of the actors' conduct and of its objects on the social interest in business enterprise and competition.¹²⁴

The comments to section 765 clarify its concerns. For instance, the comments indicate that even when the defendants are seeking to advance a "laudable interest," their action is not justified if it goes beyond promoting that interest or is "unduly oppressive or otherwise prejudicial to a paramount social interest."¹²⁵ In determining whether the defendants' action is "unduly oppressive," an important factor is the defendants' and the plaintiff's relative economic power: "Disparity of economic power between the parties

124. RESTATEMENT OF THE LAW OF TORTS § 765 (1936) [hereinafter RESTATEMENT]. Section 765 was deleted from the *Second Restatement* on the ground that it covered a topic within the general field of trade regulation rather than torts. RESTATEMENT (SECOND) OF TORTS § 700 (introductory note at 2 (1977)) [hereinafter RESTATEMENT SECOND].

Tort commentators claim that the standards in the *Restatement* amount to the extraordinarily vague rule that concerted refusals to deal that hurt another are actionable if they are done either for an undesirable purpose, such as spite, or through undesirable methods, such as coercion. *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 929 (1964) (an unlawful purpose and method are the twin prongs of an actionable common-law conspiracy). Occasionally, a judge will indicate expressly that this tort standard is the appropriate test in an antitrust case. *E.g.*, *United States v. Associated Press*, 52 F. Supp. 362, 368-69 (S.D.N.Y. 1943).

125. RESTATEMENT, *supra* note 120, at § 765 (comment 1 at 45).

may result in undue oppression which would not exist if the power were more nearly equal."¹²⁶ When the defendants design their action to alter the plaintiff's behavior, the court appraises the action's oppressiveness not simply by the harm the action causes the noncomplying plaintiff, but also by the social desirability of the plaintiff's compliance with the defendants' wishes.¹²⁷ In short, section 765 was concerned less with consumer welfare than with the social desirability of a particular method of injuring another business. The section seeks to control the abuse of private power even when the defendants' action does not threaten consumer welfare.

Concerted conduct implicates tort concerns about abuse of private power more than unilateral conduct does. The comments to section 765 of the *Restatement* suggest three reasons for the heightened concern:

First, the harm to individual or social interests which a concerted refusal to deal may cause is ordinarily much greater than that which an individual's refusal threatens. The power of the individual is ordinarily smaller and there is greater likelihood of neutralization by the action of other individuals. Secondly, it is thought to be a more serious restraint upon personal liberty to require an individual to justify a refusal to deal than to require a combination of persons to justify a concerted refusal. . . . Thirdly, the purpose of a concerted refusal is ordinarily more definitely ascertainable than that of an individual's refusal.¹²⁸

A fourth reason comes from Professor Austin: "The mere existence of collective conduct carries with it the potential to effect substantial changes in entrenched social norms."¹²⁹

Although section 765 dealt with "primary" boycotts, section 766 and section 767 applied similar concerns to an even more despised form of business behavior, the secondary boycott.¹³⁰ Sec-

126. *Id.*

127. *Id.*

128. *Id.* at § 765 (comment 1 at 43-44).

129. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1325 (1970).

130. Relevant portions of these sections of the *Restatement* are as follows:

§ 766. GENERAL PRINCIPLE.

Except as stated in § 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

. . . (b) enter into or continue a business relation with another is liable to the other for the harm causes thereby.

§ 767. FACTORS IN DETERMINING PRIVILEGE.

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors: (a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the par-

ondary boycotts involve an attempt to induce a presumably neutral third person to refuse to deal with the plaintiff. Like other types of secondary pressure, secondary boycotts widen disputes, polarize society, and provide too potent a vehicle by which one group may acquire and exert power against another group. Because tort law aims to allocate power among private groups, as various authors have explained,¹³¹ we can expect tort law to concern itself with controlling secondary pressure. Fortunately for defendants, sections 766 and 767 assumed defendants imposed the secondary boycott through unilateral, rather than concerted, conduct. As harsh as these sections were, defendants would have been treated even more harshly if the *Restatement* editors had continued in this vein to create a section dealing with secondary boycotts through concerted conduct.

Silver's traditional approach incorporates into antitrust law the concerns underlying other business torts besides "concerted refusal to deal." Such torts include injurious falsehood (also known as trade libel or commercial disparagement), interference with prospective business advantage, interference with contractual relations, and several prima facie torts that modern courts have recognized. While not aimed at concerted action, these tort categories, of course, would extend to concerted action that satisfied the tort's normal elements. *Silver's* approach also overlaps in its aims and elements with the civil actions some states allow for civil conspiracy or for an association's mistreatment of its current and prospective members.¹³²

ties, (d) the interest sought to be advanced by the actor and, (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

RESTATEMENT, *supra* note 124, at §§ 766, 767.

131. Tort scholars from William Prosser to Duncan Kennedy acknowledge that tort law has set the ground rules for economic combat between groups. W. PROSSER, *TORTS* 26 (4th ed. 1971) ("[T]he law of torts is a battlefield of the conflict between capital and labor, between business competitors, and others who have conflicting claims in the economic struggle"); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 *Md. L. Rev.* 563, 567-572 (1982).

Occasionally, a perceptive court will acknowledge that antitrust law also has been used to allocate power between private groups. *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) (Hand, J.) (antitrust law requires a judge "to appraise and balance the value of opposed interests and to enforce [his] preference"). Antitrust law allocates power between private groups, for example, when the prohibition on price-fixing limits the freedom of action of price-fixing sellers and transfers wealth from sellers to consumers. As economists point out, *see* R. Posner, *supra* note 28, at 96, concern for output and efficiency does not require this wealth transfer insofar as the consumer's loss is the price-fixer's gain.

132. *See Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 549 (3rd Cir.

Like these tort categories, *Silver's* traditional approach displays concern about the social desirability of the defendants' conduct on both noneconomic and economic grounds. The approach seeks to establish a code of desirable concerted conduct toward rivals based largely on such tort considerations as appeasement, justice, deterrence, and compensation. Despite the lip service that *Silver's* approach pays to protecting consumers exclusively, the approach proceeds by inquiring whether the defendants' action intrudes upon certain legally protected interests of the plaintiff, such as his interest in working at his chosen trade free from unreasonable handicaps.¹³³ The traditional approach's often noted tendency to produce opinions that read like labor law opinions reflects its attempt to allocate power among conflicting groups.¹³⁴ Just as labor law specifies proper and improper methods for the struggle between unions and management or among unions and individual member or nonmember workers, *Silver's* boycott law has attempted to specify proper and improper methods for concerted groups in their dealings with other businesses, especially their rivals.

Silver's traditional approach, even as modified by *Pacific Stationery*, however, does not identify the factors that determine what concerted conduct will be socially desirable, nor does it help a lower court take such factors into account in a particular case. Thus, even a lower court determined to remain faithful to the policies underlying the traditional approach should not attempt to apply that approach as it currently is set forth.

Instead, the best course for a lower court committed to the policies underlying *Silver* is to eschew *Silver's* presumption about the illegality of industry self-regulation and to subject the defendants' conduct to the familiar analysis used in intentional torts, especially business torts. In other words, a court should view these

1979) (describing Pennsylvania's civil conspiracy law); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 1000, 1032 (1930) (citing actions allowed when trade associations expel members or refuse to admit applicants).

133. Protecting a person's ability to work at a lawful vocation was a major goal of the ancient common law action for restraint of trade. Case of Tailors of Ipswich, 11 Coke 53a, 77 Eng. Rep. 1218 (K.B. 1614) ("no man could be kept from working in any lawful trade, for the law abhors idleness, the mother of all evil"). This "right to work" notion, which often is flatly opposed to efficiency, continues to dominate the restraint of trade doctrine in the United Kingdom. *Nagel v. Feilden*, [1966] 1 All E.R. 689, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027; *Enderby Town Football Club v. Football Ass'n*, [1971] 1 All E.R. 215, [1971] Ch 591, [1970] 3 W.L.R. 1021.

134. *E.g.*, R. POSNER & F. EASTERBROOK, *supra* note 69, at 719.

cases purely as business torts that happen to be cloaked in the garments of antitrust.

Indeed, many industry self-regulation cases decided on anti-trust grounds are better understood as modifications of familiar business torts. For example, the *Hydrolevel*¹³⁵ case, in which the American Society of Mechanical Engineers suggested that the plaintiff's product did not satisfy the Society's safety standards, can be viewed just as if the plaintiff's suit was for trade libel or product disparagement. Although the elements of the tort action vary among jurisdictions, the essence of the action is that the defendants made a false statement of fact about the plaintiff's product with the intent to hurt him. Using the antitrust law modifies the tort action only by requiring concerted action¹³⁶ and an effect on interstate commerce, by not requiring "special damages," and by imposing treble damages.¹³⁷

135. 635 F.2d 118 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556, *cert. denied*, 456 U.S. 989 (1982). The *Hydrolevel* facts do not differ significantly from the facts in a number of trade libel or product disparagement cases. *See, e.g.*, *Testing Sys., Inc. v. Magnaflux Corp.*, 251 F. Supp. 286 (E.D. Pa. 1966) (defendant allegedly published a false claim that a government test showed plaintiff's product was only forty percent as effective as his); *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*, 68 N.D. 425, 280 N.W. 879 (1938) (defendant allegedly gave a lawyer a poorer rating than was warranted); *Norlund v. Consolidated Elec. Coop.*, 289 S.W.2d 93 (Mo. 1956) (defendant allegedly made libelous statements about the dangers in using plaintiff's "LP Gas").

Other plaintiffs whose action does not differ significantly from a trade libel action are the college denied accreditation, the plywood manufacturer whose product is found not to comply with the industry standard, or the gas burner manufacturer who is denied a seal of approval. *See also* VE-RI-TAS, *Inc. v. Advertising Review Council*, 411 F. Supp. 1012 (D. Colo. 1976) (weight-reducing salon's antitrust case against Better Business Bureau that criticized it), *aff'd*, 567 F.2d 963 (10th Cir. 1977), *cert. denied*, 436 U.S. 906 (1978). *See generally* Prosser, *Injurious Falsehood: The Basis For Liability*, 59 COLUM. L. REV. 425 (1925).

Doctors denied staff privileges or association memberships also have had their suits treated as tort suits. *E.g.*, *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961). Some courts find for the plaintiff by recognizing a fiduciary obligation on the private association's part to treat applicants and the members' rivals fairly. *E.g.*, *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 1 Cal. 3d. 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969). *See generally* Note, *Hospital Medical Staff: When are Privilege Denials Judicially Reviewable*, 11 U. MICH. J.L. REFORM 95, 105-09 (1977).

136. The need for concert of action comes from the language of section one of the Sherman Act. As Professor Handler has pointed out, however, in our example cases "the element of numbers seems, at best, but an adventitious factor." Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 208 (1936).

137. Because industry self-regulation cases are better seen as business tort cases, some will claim treble damages should not be awarded. This claim, however, assumes that allocative and productive efficiency are the only goals of antitrust law, an assumption that is outside the scope of this Article. To be sure, awarding treble damages for some business torts and not others, simply because some involve concerted action and affect interstate commerce, is difficult to defend.

Similarly, the famous case *Eastern States Retail Lumber Dealers Association v. United States*,¹³⁸ in which lumber retailers boycotted wholesalers who sold directly to consumers, can be viewed just as if the plaintiff's suit was for interference with prospective business advantage. In such a tort suit (and several have been brought on facts almost identical to those of *Eastern States*),¹³⁹ the defendants' boycott becomes actionable if it wrongfully interferes by threats or intimidation with the sales wholesalers would have made to member retailers, provided the defendants' action is not protected by the competition privilege. As in *Hydrolevel*, the essence of the action does not lie in harm to output or consumer welfare (if in fact such harm was possible), but in the defendants' interference with the opportunity of the boycott's target to compete without an unwarranted handicap.

Other industry self-regulation cases decided on antitrust grounds are better understood as establishing new prima facie torts. *Silver* itself offers one example and others are suggested in Part III below.¹⁴⁰ To handle these industry self-regulation cases, lower courts should proceed as if they must decide whether to establish new prima facie torts, and if so, what the elements of those torts should be. The new torts would be subsets of the overall tort category "business injury by improper concerted action."

A tort approach to industry self-regulation offers many advantages. Compared to antitrust law, tort law lends itself to a lower level of generality and tends to yield more specific, more qualified, and, therefore, more useful rules of concerted conduct. The tort approach is more likely to generate a common law of proper and improper concerted conduct that will help to guide prospective defendants and plaintiffs. It is much more likely to yield a principled basis for resolving some cases short of trial than is any standard dependent on such elusive elements as "market power." For example, the tort approach would produce guidelines of proper and improper behavior for hospitals that deny staff privileges. A guideline might evolve indicating, for example, how a hospital and its medical staff should allocate responsibility for determining staff privileges, what procedures should be followed, whether "neutral" experts should be used when available, whether the standards for a decision ought to be published in advance, what reasons for a neg-

138. 234 U.S. 600 (1914).

139. *E.g.*, *Jackson v. Stanfield*, 137 Ind. Rep. 592, 36 N.E. 345 (1894) (condemning conspiracy of retail lumber dealers against direct selling wholesalers).

140. *See infra* text accompanying notes 240-80.

ative decision are proper and sufficient, what reasons will be reviewed by a court, and the standard of such review.¹⁴¹

Safe harbor standards that would allow staff privileges cases to be resolved on summary judgment may develop. For instance, a safe harbor standard might allow a court to grant summary judgment to a hospital and its staff in a surgery staff privileges case provided experts from outside the area who do not compete with the applicant observed the applicant perform surgery a requisite number of times, recommended denial of privileges based on their observations, and indicated their reasons.

Under the tort approach, separate guidelines would evolve to govern professional sporting associations that discipline athletes; standard-setting organizations that disapprove products; and multiple listing services that exclude realtor applicants. This low level of generality seems the most useful. Searching for general rules to govern all these contexts already attempts too much. Section B(2) of Part III suggests various tort "dangers" to be considered in fashioning guidelines for concerted conduct in each of these contexts.

A tort approach also would allow the courts to be more sensitive to defendants' methods. For example, a tort approach could distinguish between certification efforts and standardization efforts. Certification efforts, as the term is used here, merely announce that the plaintiff has not met the defendants' minimum standards. Because certification efforts generate potentially useful information, implicate first amendment values, and involve no coercion, a tort approach may subject them only to a "minimum rationality" test. In contrast, some standardization efforts involve an attempt to enforce minimum standards by denying the plaintiff access to essential facilities. An example is the American Medical Association's pressure on hospitals to deny access to chiropractors.¹⁴² In part because these efforts produce an undesirable sec-

141. The tort approach would allow a court to take advantage of the substantial literature about the assignment of physician staff privileges. To some extent, this literature has produced a consensus about the appropriate substantive grounds and procedures for assigning privileges that hospitals should use. See Kessenick & Peer, *Physicians' Access to the Hospital: An Overview*, 14 U.S.F. L. REV. 43 (1979); Kissam, Webber, Biggs, & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595 (1982).

142. A certification case may turn into a standardization case simply because the certifiers agree not to deal with those not certified. In the famous case, *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Company*, 364 U.S. 656 (1961), for example, the members of the defendant American Gas Association agreed not to buy products denied the AGA's seal of

ondary pressure on neutral parties, a tort approach would subject standardization efforts to a more demanding test.¹⁴³ Accordingly, those seeking a higher but still useful level of generality for classifying industry self-regulation cases can break them into two groups: cases involving product certification, grading, and seals of approval, in which there is no attempt to enforce standards, on the one hand, and cases involving access to essential or advantageous facilities, on the other. The latter group could be classified further based on the type of facility to which access is denied, for example, hospitals, multiple listing services, trade fairs, auctions, shopping center developments, trade associations, and sporting associations.

The tort approach acknowledges that the defendants' concerted action raises concerns other than a reduction in output or the infliction of a competitive disadvantage on the plaintiff. The tort approach will lead judges to focus on the defendants' particular concerted action and its purpose, method, justifications, dangers, and alternatives, and to examine the reasonableness of that concerted action in light of economic and noneconomic considerations. The specific benefits and dangers to be assessed in applying a tort approach are discussed in Part III.

Adopting the tort approach also allows a court to discard a number of over-generalizations now governing industry self-regulation cases. An example is the rule that the purpose and method of the defendants' action are immaterial as long as their action is concerted and places the plaintiff at a significant competitive disadvantage.¹⁴⁴ The tort approach also reduces the disproportionate attention courts now pay to whether defendants are on the plaintiff's horizontal level. The approach also reduces the attention courts pay to whether defendants possess "market power," a matter economically significant but so indeterminant that the parties at the time they act cannot know whether they are subject to the obligations "market power" imposes.

Compared to *Silver's* approach, a tort approach aids defendants because it would not presume a violation merely from the

approval. Other commentators argue that the AGA's antitrust liability stemmed more from this second agreement than from the original joint denial of a seal of approval. Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 AM. GAS. A.J. 27, 31 (1968).

143. See G. LAMB & C. SHIELDS, *TRADE ASSOCIATION LAW AND PRACTICE* 89-95 (rev. ed. 1971) (explaining why certification efforts should be treated more leniently than standardization efforts).

144. *E.g.*, *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

plaintiff's injury and the presence of concerted action. It also aids defendants by not insisting that the defendants' action be required by some justifying policy or be the least restrictive method available to achieve that policy. Under tort law, any reasonable means for achieving a purpose the court considers legitimate probably would be acceptable. On the other hand, a tort approach would permit a plaintiff to attack any socially unreasonable concerted conduct that harms him. A plaintiff would not need to define the relevant market or to show a likely effect on price and output. Nor would a plaintiff need to convince a court to view the defendants as its horizontal rivals. In general, the tort approach throws attention immediately on the defendants' action and the possible justifications for it. It does not, however, necessarily force an inquiry into the defendants' state of mind. In tort law, judges commonly deem certain actions so desirable or undesirable in themselves that the actor's state of mind will not affect liability.¹⁴⁵ To some extent, the lower courts already are following this tort approach de facto, for they have been insisting neither that the defendants satisfy each step of the traditional approach nor that the plaintiff show a danger to output. Rather, they have been creating, under the guise of the Sherman Act, a federal common law of concerted business torts, based largely on the overall social desirability of the defendants' conduct.¹⁴⁶

Finally, thinking of industry self-regulation cases as tort cases becomes an exercise in value clarification. What patterns of concerted conduct trigger judicial intervention and why? What is the effect of the defendants' and the plaintiff's relative power? Why are courts willing to assist the plaintiff even when his injury is unlikely to affect output? What does the judicial hostility toward concerted private power suggest about our society's values? This Article now concludes with a lengthy discussion of the variety of benefits and harms industry self-regulation presents. The discus-

145. See W. PROSSER, *supra* note 131, at 23-24.

146. Others who have watched the results under the traditional approach have reached the same conclusion: "Whether a per se rule is properly applied to particular professional group conduct will be determined largely by how the trial court views the alleged justifications in connection with the totality of the circumstances surrounding the conduct: the character of the defendant, the nature of the restraint, and the probability that the defendant association acted in conformity with its stated purposes." Note, *The Professions and Non-Commercial Purposes: Applicability of Per Se Rules Under The Sherman Act*, 11 U. MICH. J.L. REF., 387, 401 (1978); cf. Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. CHI. L. REV. 171, 186 (1951) (suggesting that section one of the Sherman Act is just a device for striking down unacceptable concerted behavior).

sion aims to illustrate the shortcomings of the *Silver* and Chicago School approaches, to guide a court using the proposed tort approach, and to begin discussion of the questions just posed.

III. THE BENEFITS AND DANGERS OF INDUSTRY SELF-REGULATION

A. *The Benefits*

Although no statute authorizes or applauds industry self-regulation, the public and private benefits of such joint activities abound. The following survey suggests the wide variety of benefits.¹⁴⁷ Neither the *Silver* approach nor the Chicago School approach allows many of these benefits to be considered. Between the two approaches, however, the *Silver* approach, with its presumption against and close scrutiny of self-regulation, sacrifices these benefits to a much greater extent.

The private standards "industry," with groups such as the American National Standards Institute (ANSI) and the American Society of Mechanical Engineers (ASME), promulgates tens of thousands of voluntary standards to promote safety.¹⁴⁸ In the *Hydrolevel* case,¹⁴⁹ for example, the ASME's standards called for a particular type of cutoff device to prevent boiler explosions. Other examples of safety-promoting standards are those the American Water Works Association sets for the thickness and weld of pressure piping to prevent pipeline explosions,¹⁵⁰ those the American Society for Testing and Materials sets for polystyrene and polyurethane to prevent fires,¹⁵¹ and those the American Nuclear Society sets for the containment of nuclear materials during transport to prevent radiation escape.¹⁵² These standards alert manufactur-

147. In discussing the benefits of individual self-regulation, I am ignoring that the defendants' actual motivation may be to forestall a public outcry that would lead to government regulation. I am comparing the situation that exists with self-regulation with the situation that would exist with no regulation at all. Insofar as the alternative to self-regulation may be government regulation, however, this comparison may mislead.

148. AMERICAN SOCIETY FOR TESTING AND MATERIALS, *THE VOLUNTARY STANDARDS SYSTEM OF THE UNITED STATES OF AMERICA* 22 (1975).

149. *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118 (2d Cir. 1980).

150. American Water Works Association (AWWA) C 900-75: AWWA Standard for Polyvinyl Chloride Pressure Pipe, 4 line through 12 line for Water (1st ed. approved June 8, 1975).

151. See AMERICAN SOCIETY OF TESTING AND MATERIALS, *Policy Definition of Fire Hazard Standards Limiting the Scope of Properties—Describing Standards and Establishing a Committee on Fire Hazard Standards* (Sept. 18, 1973); *Facts About Committee E-39 on Fire Hazard Standards*, ASTM Standardization News, April 1974, at 38F.

152. FEDERAL TRADE COMMISSION, *STANDARDS AND CERTIFICATION: PROPOSED RULE AND STAFF REPORT 228* (1978) (describing the testimony of George Wessman of the American

ers to safety concerns and assist them in altering products to reduce danger. A closely related goal, protecting the public health, supports hospitals' efforts to screen doctors who apply for staff privileges. The standards the National Sanitation Foundation (NSF) sets for steel used in refrigerators¹⁵³ also are intended to reduce health hazards. Failure to comply prevents a manufacturer from obtaining the NSF's seal of approval, thus placing the manufacturer at a severe competitive disadvantage. A third related goal, protecting the environment, is promoted by, for example, the emission control standards the American Chemical Society promulgates for sulfur plants. These health, safety, and environmental protection goals call for high standards. When legislators address industry self-regulation at all, they typically encourage standard setting and fault private standard setters' efforts only because the privately set standards are insufficiently demanding or inadequately enforced.¹⁵⁴ In contrast, the traditional approach's antitrust goals implicitly call for low standards in order to minimize the number of rivals disadvantaged by a failure to comply.

Of course, an economist can translate all these benefits into economic language in order to characterize the defendants' action as efficiency enhancing. For instance, the collusion involved in setting safety standards may be characterized as an integration to reduce the consumer's search costs.¹⁵⁵ It also could be characterized as a method of overcoming free riders on product safety, thereby creating incentives for optimum investment in product safety. The argument for the latter characterization posits that consumers who cannot evaluate a product's safety are unable to reward safe products with higher prices. Thus, prices reflect the average safety of all similar products—the safe and the unsafe—and each seller has an incentive to free ride on the safety of

Nuclear Society to the FTC).

153. See, e.g., *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir.), cert. denied, 449 U.S. 826 (1980).

154. NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY, 48, 52 (1970). This Report stated that many industry standards do not address all foreseeable hazards, that insufficient consideration was given to "human factors such as predictable risk taking, juvenile behavior, illiteracy or inexperience," and that "levels of allowed exposure to electrical, thermal, and mechanical and other energy exchanges are frequently too high." *Id.* at 48. The Consumer Product Safety Commission has recognized the contributions that industry standards have made to increased consumer product safety. Hamilton, *supra* note 11.

155. Carlton & Klamer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. CHI. L. REV. 446 (1983) (explaining efficiency-enhancing gains from coordination).

the other products. The result is underinvestment in safety, which, in some cases, only the elimination of the unsafe product may correct.¹⁵⁶ This economic approach, however, does not begin to capture the many reasons why courts might support a safety standard, one of those reasons being a paternalistic wish to reduce injuries regardless of consumers' choices about the most desirable products.¹⁵⁷ Accordingly, I prefer to explain the benefits of self-regulation in noneconomic language.

Another benefit of industry self-regulation is improved quality control. The American Petroleum Institute's standard for the minimum octane rating of gasoline and the International Organization for Standardization's standard for the minimum ductility of a mild steel are examples.¹⁵⁸ These standards typically take the form either of a design standard or a performance standard. A design standard usually specifies the method by which a product should be made or the characteristics the product should possess in order to perform satisfactorily. Performance standards usually specify the minimum performance levels for products, however made, that are designed for specific functions.¹⁵⁹ In economic language, setting the standard reduces overall transaction costs by reducing the consumer's cost of evaluating products and the manufacturer's cost of competitive imitation. Of course, those firms whose products fail to comply with the standards often will incur a competitive disadvantage.

Industry self-regulation also may help to lower the cost of production more directly. Conspicuous examples include standard-setting efforts to assist manufacturers in producing interconnecting or interchangeable parts. These standards assure a manufacturer that if his product conforms, the product will interconnect with complementary products or interchange with rival products of similar

156. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

157. Although the decision in *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), suggests that only economic factors should be considered, some lower courts continue to consider additional factors. See *Wilk v. American Medical Ass'n*, 719 F.2d 207, 224 (7th Cir. 1983) (noneconomic factors must be considered), *cert. denied*, 467 U.S. 1210 (1984).

158. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, STANDARD 2531, TABULATION OF VOLUNTARY STANDARDS AND CERTIFICATION PROGRAMS FOR CONSUMER PRODUCTS, U.S. DEP'T OF COMMERCE, NBS TN 948 (1977).

159. See generally Hamilton, *supra* note 11, (describing distinction between design and performance standards); see also FEDERAL TRADE COMMISSION STANDARDS AND CERTIFICATION: PROPOSED RULE AND STAFF REPORT (Dec. 1978) (submitted by J. Mooney, R.J. Schroeder, D.C. Graybill, W.W. Lovejoy).

specifications.¹⁶⁰ Indeed, the need for interchangeable parts was one of the original reasons for the development of the modern standards industry. The joint development and use of these standards can be conceptualized in economic terms as an integration to reduce a supplier's search cost—one type of transaction cost. Interchangeability standards also widen markets. A consumer with a flat tire, for example, is not tied to one or two tire companies, but may turn to any company making a standard size tire. Moreover, the existence of many suppliers reduces a consumer's risk that supplies will be unavailable because of a particular seller's business failure or because of delivery delays or production snags. Interchangeability, therefore, provides a type of insurance. It also enables a tire producer to predict with confidence that the potential market for a standard size tire will be wide. By widening the producer's potential market, the interchangeability standard assists the producer's entry into the market. The standard also may lower the tire producer's costs by making possible a longer production run for those few standard varieties of tires.¹⁶¹ Yet those whose products do not comply with the standards, like the screw thread manufacturer whose product did not comply with the interchangeability standards of the ANSI, will be disadvantaged in competing for the patronage of buyers who want products already found to be interchangeable.¹⁶²

In theory, standards also could lower costs by informing manufacturers when their products are adequately safe in the view of the standard maker and of those jurisdictions that adopt the private standards as mandatory. Manufacturers then could avoid unnecessary experimentation and overinvestment in safety. For instance, the National Sanitation Foundation's standard directing that refrigerators have covered corners and be composed of non-galvanized steel assures the manufacturer that these measures are likely to satisfy all government safety requirements and, if the

160. Another example of the same benefit is the agreement on the standards for electronic funds transfer systems. The agreement attempts to facilitate communication between data networks. Horizontal location agreements also may provide similar efficiency-enhancing benefits, despite the harsh antitrust treatment afforded them. An example is a location agreement between rivals who ship to each other and whose location, therefore, affects each other's costs. See Koopman & Beckmann, *Assignment Problems and The Location of Economic Activities*, 25 *ECONOMETRICA* 53 (1957).

161. D. HEMINWAY, *INDUSTRY WIDE VOLUNTARY PRODUCT STANDARDS* 37-38 (1975).

162. Hamilton, *supra* note 11, at 1374 (describing of the Johnson Gauge Case, in which the American National Standards Institute found that a type of screw was not threaded as suggested by ANSI's standard).

standard makers can be believed, also are likely to keep the product relatively safe over its normal lifetime compared to its rivals.¹⁶³

Industry self-regulation also helps consumers evaluate products and services by providing information about the seller's qualities and characteristics. In economic language, these efforts represent another integration designed to overcome information asymmetry and to reduce search and information costs, specifically the average cost of quality assurance.¹⁶⁴ The film boards that rate films "G," "PG," "PG-13," "R," or "X," for instance, are providing information that reduces the consumer's search costs and enables the consumer to avoid unwelcome surprises.¹⁶⁵ The integration, therefore, perfects the market and increases consumer demand for films, the gains from trade, and net consumer welfare. The testing organizations that grade products, such as Underwriters' Laboratories, and the private accrediting associations that evaluate colleges provide the same benefit. Although no concerted action is involved, the magazines *Consumer Reports* and *Good Housekeeping* supply perhaps the most well-known examples of this benefit when they evaluate and recommend products. As the extent of industry advertising and the difficulty of controlling deceptive advertising increases, the need for some group to evaluate products and to pass that evaluation on to the consumer similarly increases.¹⁶⁶ In each case, the consumer benefits only because one group of private firms was willing to establish itself as an extrajudicial court whose judgments, rarely ratified by the government, would hurt other firms, including, perhaps, their rivals. Yet, as discussed above, the traditional approach, at least as stated by Justice Black, condemns in blanket terms extrajudicial decisionmaking about rivals.¹⁶⁷

Industry self-regulation that provides consumers with information about product quality also may help small companies compete with larger ones. Grading products, for example, reduces the value of a company's past efforts to build up its product's reputation. In economic language, grading reduces the scale advantages in

163. *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980).

164. Elzinga, *The Compass of Competition for Professional Services*, in *REGULATING THE PROFESSIONS* (R. Blair & S. Rubin eds. 1980).

165. *Hughes Tool Co. v. Motion Picture Ass'n of Am.*, 66 F. Supp. 1006 (S.D.N.Y. 1946).

166. Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 *COLUM. L. REV.* 1486, 1488 n.22 (1966) (the need for private testing increases with the danger of consumers being misled by deceptive advertising).

167. See *supra* note 55 and accompanying text.

quality assurance. As a result, grading reduces one advantage of product differentiation and ought to make the demand curve facing the larger sellers more elastic.¹⁶⁸

By characterizing defendants' collaboration as an efficiency-enhancing joint venture, the Chicago School approach helps to identify further possible benefits. Defendants' action may facilitate a desirable collaboration that exploits economies of scale and thus develops a new and more marketable product. The collaboration needed to develop a shopping mall may be impossible if the organizers must accept every party who applies to participate. The collaboration needed to form a multiple listing service may be more expensive if the service must accept more than the optimally efficient number of members. Thus, the self-regulation entailed in excluding some applicants may contribute to the economic and noneconomic benefits of the collaboration and correctly can be considered "ancillary" to the benefits.¹⁶⁹ Nonetheless, the collaboration may place the excluded business at a significant competitive disadvantage.

Self-regulation also can be characterized as efficiency enhancing in instances when it helps to lead to an industry output more closely approximating that of the competitive model. For instance, the regulations on membership, selling time, and space needed to operate a commodity exchange may encourage trade under optimum market conditions.¹⁷⁰ Similarly, a trade association rule requiring members to submit generalized data about their production and inventory may make possible a system of centralized information exchange. Provided that neither implicit nor explicit collusion is feasible in the particular industry, the information could help each member plan future production and help the industry as a whole produce the optimum competitive output.¹⁷¹

Other instances of self-regulation may benefit an industry by enhancing its reputation and, therefore, the consumer demand for the industry's goods and services.¹⁷² For example, a multiple listing

168. Auerbach, *Quality Standards, Informative Labelling and Grade Labelling as Guides to Consumer Buying*, 14 L. & CONTEMP. PROBS. 362, 366 (1949).

169. See Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1247 n.188 (1973).

170. Note, *supra* note 166, at 1492-93 (rule helped commodity exchange form a better market); see also *Rogers v. Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957).

171. *Cf.*, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

172. Even when the efforts do not appear likely to increase demand, I suspect courts would consider the public image of the industry to be a valid concern of the industry member. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. &

service that excludes a real estate agent with an insufficient credit rating avoids the harm to the member realtors' reputations that might result if the excluded agent harms his clients.¹⁷³ The FTD's exclusion of an existing member suspected of overcharging and providing inferior flowers also relies for justification on the potential damage to the group's reputation and the concomitant reduction in demand for the group's products that might result from failing to exclude the suspected florist.¹⁷⁴ The self-regulation that the American Medical Association and the American Bar Association practice in excluding unqualified applicants serves to protect the associations' reputations as well as to assure the consumer that practitioners possess a minimum level of quality and competence.¹⁷⁵ Many of the purely ethical rules that various groups impose similarly protect the group's reputation and the public interest. *Silver's* traditional approach, however, pressures such groups to accept the derelicts of the industry in order to avoid putting rivals at a competitive disadvantage.¹⁷⁶

Economic language can describe this ethical self-regulation as a joint activity to prevent the plaintiff from free riding on the defendants' reputation-enhancing efforts.¹⁷⁷ Only by hurting the plaintiff and internalizing the cost of his reputation-harming activities can the defendants create disincentives for investment in such activities. In other words, internalizing the benefits from reputation-enhancing activities—by eliminating free riders on those activities—creates incentives for the optimum level of investment in those desirable activities. By overcoming the free rider problem, therefore, the defendants' exclusion of the plaintiff enhances effi-

MARY L. REV. 703, 728 (1977).

173. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1349 (1970).

174. *Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n*, 371 F.2d 263 (7th Cir.), cert. denied, 387 U.S. 909 (1967).

175. See Note, *The Professions and Non-Commercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J.L. REV. 387, 395 (1978); see also, Hoover v. Ronwin, 466 U.S. 558 (1984) (American Bar Association's efforts at self-regulation upheld); First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978).

176. An implicit premise of Justice Black's hostility to all self-regulation is the belief that government regulation preempts any private regulation. For example, if the government certifies real estate brokers to sell real estate, the defendants' concerted action ought not take any further measure in an attempt to assure competency or reliability. I consider this response ingenuous. To assume the government has done all the regulating and grading from which consumers may benefit is to ignore, among other factors, the government's severely limited resources.

177. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 338-39 (1983).

ciency through a more complete specification of property rights. Again, however, this economic interpretation does not consider the possibility that some courts will approve of ethical self-regulation simply because it deters conduct deemed undesirable on moral and ethical grounds.¹⁷⁸

A sporting league's regulations that promote a desirable contest also can be seen as a joint activity designed to increase demand for the league's product. For instance, the National Football League's (NFL's) rules against gambling rely for justification on the NFL's need to preserve public confidence in the players' efforts to compete to the best of their ability.¹⁷⁹ Similarly, the United States Tennis Association's (USTA's) ban on use of the spaghetti-string racquet in USTA events relies on the need to preserve the character of the game; allowing use of the racquet allegedly would slow down the game or otherwise decrease demand for USTA events and products.¹⁸⁰ The plea that the regulation helps to produce a good contest also may justify the Bowling Proprietors Association of America's refusal to accept scores from a bowling center suspected of falsely reporting high scores ("sandbagging"),¹⁸¹ the United States Trotting Association's refusal to admit into an official race a horse that has not passed a blood test,¹⁸² and the American Contract Bridge League's refusal to approve the use of a scoring computer that might disrupt the conditions of play.¹⁸³

Supporters of the traditional approach might argue that the courts should never acknowledge any benefit to the public from this industry self-regulation. After all, the judgment that the current character of the game of tennis ought to be preserved over a slower and different game, for example, seems arbitrary and sub-

178. Professor Coons would add to any calculus of defendants' action the promotion of noneconomic social advantage through group action. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705 (1962). He would have the outcome turn largely on whether the group's purpose coincides with public policy. *Id.* at 749. See also *Boddiker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir.) (self-regulation acceptable only if it promotes the public interest), *cert. denied*, 434 U.S. 825 (1977).

179. Weistart, *supra* note 172 at 728-29..

180. *Gunter Hartz Sports, Inc. v. United States Tennis Ass'n, Inc.*, 665 F.2d 222 (8th Cir. 1981).

181. *But see* *Washington State Bowling Proprietors Ass'n, Inc., v. Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir. 1966) (condemning the bowling association's efforts to prevent sandbagging).

182. See *United States v. United States Trotting Ass'n*, 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio May 18, 1960).

183. *Bridge Corp. of Am. v. American Contract Bridge League, Inc.*, 428 F. Supp. 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

jective. Moreover, finding objectively demonstrable evidence that the self-regulation enhanced efficiency will be difficult. Usually no empirical evidence is available to show, for example, that box office receipts will decline if the United States Tennis Association sanctions the spaghetti-string racquet for play. Accordingly, the traditional approach demands that horizontal rivals acting in concert, such as the rival racquet manufacturers on the USTA's testing committee, not be allowed to take actions, such as the refusal to sanction spaghetti-string racquets, that necessarily put one of their rivals at a severe competitive disadvantage. In contrast, the Chicago School approach applauds the defendants' self-regulatory action. Like any other business, a sporting association should be encouraged to act to increase the demand for its product—the sporting events it produces. The USTA should be allowed to rely on its own judgment about the best method for promoting its events and should not need to consider the incidental harm to spaghetti-string racquet manufacturers or to other businesses.

The Chicago School's approval of association action that increases the marketability of the association's products renders immaterial the reason for the increase in marketability. In the sports discipline context, for example, the Chicago School would approve the exclusion of any player whose participation would diminish the sport's appeal, without regard to the reason why the player's participation had this effect.¹⁸⁴ The USTA properly could exclude an uncommonly dominant athlete, like Martina Navratilova, on the ground that the marketability of its tennis events might increase without her. Likewise, the USTA could exclude a player with a bad reputation regardless of whether the player had done anything to warrant the bad reputation. Because one measures demand not by counting fans but by counting the dollars offered for a given amount of the league's product, the league rationally might exclude players who are generally well accepted, but who decrease the appeal of the league's product among particularly wealthy fans. That such an exclusion might encroach on a player's "right" to play a sport for which he meets the game-related qualifications means nothing to the Chicago School. Their view of anti-trust law allows no room for any such "right" to compete in a chosen field. Thus, the judicial concern evident in past sport discipline cases about whether the plaintiff was "reasonably" disciplined indicates that the courts are evaluating more than purely economic

184. See generally Gerhart, *supra* note 177, at 332.

concerns.¹⁸⁵

Self-regulation also benefits the public by achieving some goals of criminal and civil law. Self-regulation deters conduct that would be universally considered undesirable, but that, for other reasons, the civil or criminal law does not prohibit.¹⁸⁶ An example is cheating in sporting contests.¹⁸⁷ Cheating may not give rise to civil or criminal liability because it is not considered sufficiently serious or because an identifiable injured party who may bring suit is unlikely to appear. The defective manufacture of a product whose dangerous character does not draw the government's attention or result in provable civil liability provides another example.¹⁸⁸ In this case the safety standards suggested through industry self-regulation exert at least some pressure on the manufacturer to reduce the hazard.¹⁸⁹ In addition, self-regulation may supplement criminal or civil law by deterring conduct that is illegal, but that rarely is attacked through legal channels. Undue violence in sporting contests offers an example here. Prosecutors reportedly are reluctant to prosecute professional athletes for such violence, and juries reportedly are reluctant to convict.¹⁹⁰ As a result, industry

185. See, e.g., *Molinas v. National Basketball Ass'n*, 190 F.Supp. 241 (S.D.N.Y. 1961) (court considered whether defendants' discipline of plaintiff was "reasonable," using the term in a non-economic sense); *United States v. United States Trotting Ass'n*, 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio May 18, 1960). (court considered whether defendants' discipline of plaintiff was "reasonable," using the term in a non-economic sense).

186. On occasion the Court has recognized the efficacy and legality of this type of industry self-regulation: "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law." *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 598 (1936).

187. See Weistart, *supra* note 172, at 727-28, for the difficulty of attacking cheating through methods other than industry self-regulation.

188. See, e.g., *Borrie, Laws and Codes for Consumers*, 1980 J. Bus. L. 315, 322 (self-regulation often covers those parts of business life that the law does not reach); *Farrar, Recent Developments in New Zealand Company Law*, 1980 J. Bus. L. 296, 298.

189. In the United Kingdom, the legality of defendants' self-regulation is influenced heavily by the ability of some other government or nongovernment entity to provide the benefit that defendants claim to provide. See *In re Federation of British Carpet Mfrs.' Agreement*, [1957-59] L.R. 1 R.P. 472 (1959), discussed in *Malin & Lawniczak, A Comparison of the American Sherman Antitrust Act and the British Restrictive Trade Practices Act: The Trade Association Experience*, 59 U. DET. J. URB. L. 147, 163 (1982).

190. See Weistart, *supra* note 172, at 728-29 n.91. As the author observed:

League enforcement may in fact be preferable to that administered through the criminal process. The league is in a better position to define and enforce specific rules of conduct than are the courts, from which standards could emerge only from a case-by-case interpretation. Also, the range of conduct that the league might wish to control may well include actions of a sufficiently minor nature that public prosecution would

self-regulation may provide the only meaningful deterrent.¹⁹¹ Again, however, those supporters of the traditional approach who take as an article of faith the premise that the civil and criminal law should be the only methods for controlling undesirable conduct never will applaud industry self-regulation that seeks to perform this police function. Nor will the Chicago School, which applauds only activities deemed efficiency enhancing, necessarily acknowledge a benefit from private efforts to supplement enforcement of the civil and criminal law.

The benefits of industry self-regulation come into sharp relief when self-regulation is compared with one likely alternative—government regulation. The technical expertise of the staff of most government regulators cannot match that of an industry's members. In the *Hydrolevel* case, for instance, the members of the ASME's Boiler and Pressure Vessel Committee were more likely than any government agency's staff members to possess the necessary technical expertise both to develop safety standards for a fuel cutoff device and to apply the standards to a particular device.¹⁹² Compared to industry members, government staff members have little reason to become familiar with a specialized field. When a safety issue arises only occasionally, it is impractical for a government agency to obtain the needed expertise to develop safety standards. If a government agency nevertheless attempts to set standards, those standards are likely to be less specific in focus than those produced by the more knowledgeable, and perhaps more

be unwarranted. Thus, a system of league control may be more encompassing than that which would be found on the public side. Moreover, a league system is likely to be more even-handed, since it relies upon central administration, and thus avoids the variance which might be reflected in the enforcement practices of individual prosecutors. Finally, the league has interests that are not likely to be considered fully in a public enforcement action. Concern for preserving the athletic contest as the primary focus of the fans' attention, concern for the individual club's responsibility to pay the medical expenses of players, and concern for the cost of crowd control are matters which are not typically taken account of in public prosecutions. This analysis does not suggest, however, that it is not proper to use the public criminal law to control particular kinds of violence.

Id.

191. Granted, one reason the activity is not prohibited by law may be that industry self-regulation is sufficient. If industry self-regulation were not possible because of the anti-trust laws, legislative action against the activity may be more likely. Nevertheless, at present industry self-regulation plainly serves some of the deterrence purposes shared by the criminal and civil law.

192. *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118, 120-121, (2d Cir. 1981), *aff'd*, 456 U.S. 556 (1982).

interested, industry members.¹⁹³ Furthermore, even given equal technical expertise, greater familiarity with the plaintiff may place industry members in a superior position to apply the standards. No government regulator, for instance, is likely to be in as good a position to evaluate an applicant for hospital staff privileges as the existing medical staff, which has been able to observe the applicant's performance over time.¹⁹⁴ In such cases, deferring to industry self-regulation may be the only way to permit the most knowledgeable judgment to prevail.

Industry standard setters intimately familiar with current industry developments also are better able than the government to update standards in light of technological developments. For instance, one study¹⁹⁵ attributes the Occupational Safety and Health Administration's delays in updating its health and safety standards, including its notorious standard against ice in drinking

193. Farrar, *supra* note 188, at 298 (self-regulation typically is more specific in focus and more flexible than government regulation).

194. *Cf.* Dolan, *Law and the Maverick Health Practitioner*, 26 St. Louis U.L.J. 627, 686 (1982) (doctors who have seen applicant are in a better position to evaluate him than is any other decisionmaker).

195. See the OSHA-financed study by the consulting firm, Lester B. Knight and Associates, Inc., 7 O.S.H. REP. (BNA) 307 (1977). See also COMPTROLLER GENERAL OF THE UNITED STATES, THE CONSUMER PRODUCT SAFETY COMMISSION NEEDS TO ISSUE SAFETY STANDARDS FASTER, H.R. Doc. No. 3, 95th Cong., 1st Sess. 6 (1977). The Comptroller General points out that it took the Consumer Product Safety Commission (CPSC) an average of 834 days to develop each of three mandatory standards, in contrast to the 330 days that Congress specified. *Id.*

Professor Hamilton has summarized the procedures the CPSC must follow: Section 7 of the Consumer Product Safety Act, 15 U.S.C. § 2056 (1976), prohibits CPSC from developing mandatory product safety standards internally. Rather, CPSC must invite publicly persons from outside CPSC to offer to develop a standard for the agency. An "offeror" may be any interested member of the public, including industry or consumer groups. CPSC may contribute to the offeror's cost of the development of the standard.

After an offeror has drafted a standard and submitted it to CPSC, the agency may revise the standard if it appears inadequate. After review and revision, CPSC may promulgate the standard following the procedures set forth in 15 U.S.C. § 2058 (1976), or it can terminate the proceeding. This procedure requires publication of a proposed standard, an opportunity for public comment, an oral hearing, and a final notice of the promulgation of the rule.

CPSC may omit the offeror process if a person responding to an invitation for offers submits an existing standard (*e.g.*, a voluntary standard) covering the same product for which CPSC has proposed a mandatory standard. If the agency decides that the existing standard, if promulgated, would eliminate or reduce the unreasonable risk of injury associated with the product, it may proceed immediately with the procedure set forth in 15 U.S.C. § 2058, omitting the offeror process. It may also omit the offeror process if there is no response to CPSC's original invitation.

Hamilton, *supra* note 11, at 1401 n.233.

water, to factors that are less likely to impede private regulators, such as extensive statutorily mandated procedures, externally imposed requirements of environmental and economic impact statements, internal problems, an inability to fill high level vacancies, and lack of support from high officials. These difficulties may impede both the initial development and the revision of standards. In general, industry self-regulators can act more swiftly and more subtly than a government bound by due process standards and can avoid the bureaucratic intrusiveness of a government police force.¹⁹⁶

The immediate concern is not whether self-regulation is preferable to government regulation, but whether the benefits of self-regulation effectively argue against the traditional approach's hostile presumption. Even if self-regulation only serves as an initial or threshold method of regulation, its value is still significant. When self-regulation merely duplicates government regulation, self-regulation still gives an alternate recourse to those aggrieved who cannot inspire the government regulators to remedial action.

Another benefit of industry standard setting, especially in health and safety, is that the government may be able to use the standards to reduce the cost of or improve its own regulation. For instance, at least eight federal agencies have incorporated by reference the National Fire Protection Association's fire prevention codes.¹⁹⁷ The Consumer Product Safety Commission and OSHA also have used industry standards extensively. In the words of one commentator, "utilization of voluntary standards on a more or less permanent basis may improve the overall effectiveness of the agency in carrying out its broad statutory mandate."¹⁹⁸ Regardless of whether the government should rely on industry standards, those standards, by assisting the government, perform a service that courts cannot ignore.

Because self-regulation often involves a private group selecting its members, self-regulation also gains support from the value his-

196. Note, *Antitrust Problems of Trade Association Product Safety Standardization*, 55 IOWA L. REV. 439 (1969) (self-regulation more efficient than government regulation).

Of course, government regulation has major advantages of its own, such as the increased chance that a point of view other than the industry's will be considered in developing and applying the standards. The point here is not that individual self-regulation is better than government regulation, only that the comparison illustrates some of the benefits of self-regulation.

197. Hamilton, *supra* note 11, at 1481.

198. *Id.* at 1402, 1407 (industry's cost of developing standards less than the government's); cf. 16 C.F.R. § 1031.2 (1986) (recognition of role of voluntary standards).

torically placed on assuring a group autonomy from the government. The right to choose one's associates enjoys constitutional recognition despite many inroads in recent years.¹⁹⁹ This right implies that persons who voluntarily form groups, knowing they will need to associate with the other members, should be able to control a member's admission without government interference. The realtors who form a multiple listing service, for example, not only will rely on fellow members' representations about property, but also may work with fellow members more regularly and closely than with nonmembers. Accordingly, realtors may have a personal interest in excluding some applicants unrelated to any economic concern or to any public policy. The pressure from *Silver's* traditional approach to accept all comers collides with this associational interest as well.²⁰⁰

This survey suggests that industry self-regulation produces benefits besides those that may be called efficiency enhancing. Admittedly, the progress of economics and especially of the theory of the firm provides efficiency-enhancing rationales for an increasing variety of business conduct and for an increasing number of benefits not thought to be economic in character.²⁰¹ Nevertheless, many of the benefits surveyed here, such as the protection of health, safety, and the environment, the promotion of proper ethical behavior, the deterrence of widely condemned, if lawful, conduct, and the supplementary enforcement of the civil and criminal law support self-regulation regardless of whether they are characterized properly as efficiency enhancing. To be sure, a judge must engage in a host of value judgments in order to deem these goals beneficial and to see them as legitimate ends for private concerted action. After all, no constitution explicitly gives private groups police power to seek these ends. The value-laden nature of the judge's decision may account for the Chicago School's unwillingness to acknowledge that these benefits' noneconomic aspects have

199. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); (groups freedom to select its members is limited); Note, *Development in the Law Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 990-91 (1963).

Professor Chafee called the members' resentment of judicial action that forces them to associate with others the "hot potato" argument against such judicial action. Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993, 1026-27 (1930).

200. The benefit to the members of being able to rely on each other's representations also can be characterized as efficiency creating because it reduces search and evaluation costs.

201. See O. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975) (explaining efficiency enhancing benefits of integration).

influenced industry self-regulation cases.²⁰² The Chicago School seeks to characterize all benefits solely in economic terms. These benefits then can be seen as legitimate without any judicial value judgment beyond a deference to the importance of consumer welfare. Hence, a judge accepting the Chicago School approach can acknowledge the economic benefits, evaluate self-regulation in economic terms, and still play the scientist, who need not resort to frankly political judgments about the proper role of private concerted power. As Holmes said, claiming a scientific basis for decisions allows the courts the "illusion of being above the fray of groups striving for power."²⁰³

When practices become institutionalized and commonplace, discussion of their legality becomes superfluous. For many years over four hundred standard-setting organizations have operated in this country, each promulgating and interpreting hundreds of standards that affect the products of rivals.²⁰⁴ Academic institutions are accustomed to being judged and influenced by accrediting organizations composed of members of competing institutions. Businesses and professionals are accustomed to being disciplined by groups of fellow businessmen and professionals with whom they

202. Admittedly, the Supreme Court in *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978), ruled out of consideration the non-economic benefits of industry self-regulation. The Court's rule flies in the face of too many previous decisions to be applied generally. As others have pointed out, the statement indicates that the non-economic purposes of the restraint are immaterial. See Note, *The Requirements for ABA Approval of Law Schools: An Antitrust Analysis of the Means of Accreditation*, 83 DICK. L. REV. 147 (1979). In upholding the American Medical Association's policy of opposing dealings between medical doctors and chiropractors, the Seventh Circuit has emphasized that noneconomic matters must be considered despite the Supreme Court's statements in *NSPE*:

If it should be determined eventually in this case that the Sherman Act was violated, that determination should not rest on insistence that the Act is indifferent to, or even hostile to, the value of permitting medical doctors to honor in their practice what they perceive to be scientific method, or indifferent to or hostile to the value of encouragement, from within the profession, to its members to honor scientific method by declining to associate with those thought to dishonor it. A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds.

Wilk v. American Medical Ass'n, 719 F.2d 207, 227 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

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

204. Private groups spend more than \$500 million annually on the development of standards. U. S. DEP'T OF COMMERCE, VOLUNTARY STANDARDS AND TESTING LABORATORY ACCREDITATION, AN ANALYSIS OF PROBLEMS, ISSUES AND ALTERNATIVES FOR FEDERAL ACTION 8 (July 1977). See generally Curran, *Industrial Standards, Antitrust and the Logic of Public Health*, 17 DUQ. L. REV. 717 (1979).

could be or actually are competing. Probably none of the examples of self-regulation in our original list of cases would seem abnormal to persons in the industry. In short, the notion that persons will be regulated and judged by rivals and put at a competitive disadvantage by an adverse judgment is an accepted part of commercial life. One reason already noted is that no one else is likely to have the knowledge, capacity, or interest to regulate. Thus, Justice Black's generalizations²⁰⁵ about the illegality of rivals judging rivals will war against reality.

B. *The Dangers*

Different instances of industry self-regulation present a wide variety of dangers, economic and noneconomic, that may arouse judicial hostility. While a complete review of such dangers is beyond the scope of this Article, this section surveys some specific dangers that may support the traditional approach and upon which those faithful to the thrust of that approach should focus attention. The variety of dangers itself bears some messages. It suggests that no one danger, especially the danger of reduced output, adequately explains the traditional approach. It cautions against striving for a general rule to resolve all these cases. Thus, it argues for the low level of generality of this Article's proposed approach.

1. Dangers to Output

a. *Maintaining Price Fixing, Related Concerted Conduct, or Oligopolistic Coordination*

One danger to output from industry self-regulation is that the defendants' action, whatever its asserted justification, actually may be a tactic for maintaining output-restraining conduct such as price fixing or other related concerted action.²⁰⁶ The danger is that the conspirators will use industry self-regulation to discipline or destroy rivals, such as the plaintiff, who would thwart the output-restraining concerted conduct by deviating from it.²⁰⁷ The classic

205. See *supra* text accompanying note 55.

206. A similar danger arises when one company has monopoly power, for then it also may preserve its reduced monopoly output and artificially increased price by excluding the plaintiff.

207. Condemnations of industry self-regulation often start by citing Adam Smith, who warned that rules created by associations of rivals should be greeted "with most suspicious attention . . . and ought never to be adopted till after having been long and carefully examined." A. SMITH, *THE WEALTH OF NATIONS* 250 (1933). The historical stereotype of in-

example is that of price-fixing defendants who attack a plaintiff because of his lower prices (or extra services) to buyers, or his higher prices (or fewer demands for service) to sellers.²⁰⁸ In this case the plaintiff's rivalry on the merits threatens the defendants' gains from and ability to continue their output-restraining price fixing.

Industry self-regulation also may threaten output when it is used to enforce an agreement between rivals fixing nonprice dimensions of their products or services. A standard setting agreement between rivals that is intended to render their products uniform or of standard quality provides an example of such an agreement.²⁰⁹ As discussed above, although such an agreement is not condemned as immediately as price fixing, it interferes with the free play of market forces and may reduce gains from trade. If the agreement does not aid productive efficiency in some way, such as by lowering costs or increasing demand, it, along with any attempts to enforce it by destroying deviating rivals, should likewise be condemned.

At least two features of this danger to output are worth noting at the outset. First, and most important, the defendants already are violating the antitrust rules against price fixing and other related concerted conduct even before (and regardless of) their action against the plaintiff. These existing antitrust rules, therefore, ought to be the only rules needed to address this danger. In other words, full enforcement of the well-established rules against price fixing and other related concerted conduct should eliminate this danger to output. No need exists for anything like *Silver's* separate "group boycott" rule. Thus, a major simplification of antitrust doctrine is possible. In making this point, the Chicago School serves as Occam's razor, slicing away the needless special rules for

industry self-regulation is the medieval craft guild, which used criminal sanctions to enforce compulsory licensing requirements in order to preserve local price-fixing agreements. This stereotype evokes the worst danger from industry self-regulation, but, as discussed *infra* text accompanying note 210, the danger is one the rules against price fixing and other related concerted behavior adequately address.

208. The temptation for defendants to abuse self-regulation in order to maintain a price-fixing agreement is greatest when the defendants are the plaintiff's horizontal rivals. This may be one reason for emphasizing the horizontality of the boycott. See L. SULLIVAN, *supra* note 16.

209. *E.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 405 (1927) (agreement not to make second grade pottery); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 145 (1912) (agreement not to make inferior "seconds"); *United States v. Institute of Carpet Mfrs.*, 1940-43 Trade Cas. ¶ 56,097 (S.D.N.Y. 1941) (agreement to make only standard rugs and carpets).

“group boycotts.”²¹⁰ Second, whether the defendants hurt the plaintiff by a concerted refusal to deal rather than by some other method is immaterial to this danger. A concerted refusal to deal is just one of many tactics for enforcing a price-fixing agreement against a price cutter. Extortion, arson, sabotage, bribery of the plaintiff’s employees, theft of trade secrets, and other methods of harassment also may be used. In short, as the Chicago School has emphasized, no reason supports treating a “concerted refusal to deal” as a category of conduct that warrants separate antitrust treatment or a separate conceptual category.²¹¹ A more appropriate category would be “concerted efforts to maintain price fixing or other related concerted conduct.” If we ignore the harm to the plaintiff, a more general category could be simply “price fixing or other related concerted conduct.”

Were the maintenance of such output-restraining conduct the only danger to output, industry self-regulation cases would not need to be considered “boycott” cases at all. Clearly, then, the danger to output would call for Judge Posner’s rule condemning boycotts only when they are used to enforce an output-restraining practice that is objectionable on the basis of substantive antitrust policy.²¹² The court’s attention could focus entirely on whether the defendants were otherwise engaged in such a practice, not on the defendants’ action toward the plaintiff. Of course, this approach gives the plaintiff much less than the traditional approach does. For example, no presumption against the legality of the defendants’ concerted conduct arises merely because the conduct places a rival at a competitive disadvantage.

In the vast majority of industry self-regulation cases, however, the plaintiff cannot show the defendants are engaged in price fixing or other related concerted conduct. What danger to industry output does the defendants’ action present in those circumstances? Although the defendants’ action certainly has harmed the plaintiff, economic theory no longer provides such a clear basis for claiming that the defendants’ conduct has restrained industry output and imposed a welfare loss on society.

Oligopoly theory, however, suggests two situations in which the defendants’ conduct, by increasing the chance of oligopolistic coordination, would threaten to reduce output: when the defend-

210. R. POSNER, *supra* note 28, at 217.

211. *Id.* at 200.

212. *See supra* note 72 and accompanying text.

ants' conduct reduces the number of rivals to a number that makes coordination more likely and when the conduct helps to maintain agreements that facilitate coordination. The first situation arises only when coordination is a serious possibility²¹³ in light of the small number of rivals, the homogeneity of products, and other factors that make coordination feasible.²¹⁴ In this situation, the argument runs, courts should condemn the defendants' action in order to provide a prophylactic measure against an oligopolistic industry structure. As discussed above,²¹⁵ Judge Posner's rule ignores this problem. His rule effectively requires the plaintiff to show that the defendants are engaged in a substantive antitrust violation that they attempt to enforce through their action against the plaintiff. Oligopolistic coordination itself, however, is not an antitrust violation. Defendants, therefore, would not subject themselves to attack merely by eliminating a rival and thereby creating an industry structure more amenable to successful coordination.

Injuring the plaintiff also could help to maintain agreements that facilitate coordination. For example, an agreement to announce price increases publicly weeks in advance of the increase's effective date facilitates price coordination by assisting rivals in coordinating their own increases and by reducing the risk of being the first to increase.²¹⁶ The plaintiff's failure to comply with the agreement may unsettle this coordination. Handicapping or excluding the plaintiff through industry self-regulation may be a rational way for the defendants to maintain their output-restraining coordination.

The important point, however, is that the danger of the defendants' attacking the plaintiff in order to maintain an agreement facilitating coordination does not require *Silver's* special rule for boycotts any more than the danger of price fixing does. The injured plaintiff already may sue under existing authority condemning concerted action that unduly facilitates oligopolistic coor-

213. The "incipiency" notion posits that eliminating a rival poses an incipient threat of reducing output even when the number of remaining rivals is far too numerous for coordination or collusion to be feasible. See, e.g., *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959). The incipiency notion has been dismissed summarily by others, however. See R. BORK, *ANTITRUST PARADOX* 205-06 (1978).

214. For a list of such factors, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 157-82 (1970) and R. POSNER & F. EASTERBROOK, *supra* note 69, at 101-07.

215. See *supra* text accompanying notes 74-76.

216. E.g., *Universal Lite Distrib. v. Northwest Indus.*, 452 F. Supp. 1206, 1217 (D. Md. 1978), *aff'd in part*, 602 F.2d 1173, 1174-75 (4th Cir. 1979).

dination. The combination to injure the plaintiff could be analyzed in the same way as combinations to exchange price, cost, and product information,²¹⁷ combinations to engage in artificial product standardization,²¹⁸ or combinations to use delivered price systems.²¹⁹ This analysis balances any efficiency-enhancing benefits of the defendants' concerted action against the action's danger to output from action facilitating coordination. Once again, the danger to output does not explain or appear to be the predicate for *Silver's* separate rule for "group boycotts."

Silver's rule might be acceptable if the defendants' action created an inference that defendants probably are engaged in price fixing that the plaintiff for some reason is unable to prove. If so, any concerted conduct that hurts a rival could be condemned—or at least presumed illegal—as a safeguard against this other likely, but unprovable, output-restraining conduct. Such an inference, however, is not warranted. As noted in the discussion of benefits, defendants not engaged in price fixing might rationally hurt the plaintiff for a number of reasons. To condemn the defendants because their action is presumed to signify unlawful price fixing is to ignore the many other reasons that may prompt the action.

Some, nevertheless, may claim that a court ought to condemn the defendants' action against the plaintiff—at least in the absence of obvious efficiency-enhancing benefits—because of the mere possibility that the action was taken to enforce unprovable price fixing. This argument assumes that the gain in output that results from inhibiting occasional instances of unprovable price fixing outweighs the loss that results from inhibiting the wide variety of joint activities that may hurt the plaintiff. The assumption seems groundless, at least when defendants do not, together, possess the monopoly power needed to reduce industry output significantly. But without knowing how much unprovable price fixing or other related concerted conduct exists, how often industry self-regulation signals this conduct's presence, and what the resulting output loss is, disproving the assumption is difficult. To forego the subtle efficiency gains provided by some joint activities because the activities *might* be helping to enforce unprovable conduct that restrains out-

217. *E.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969).

218. *E.g.*, *National Macaroni Mfgs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952).

219. *E.g.*, *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

put seems, on balance, an indefensible choice.

The erroneous assumption underlying *Pacific Stationery*²²⁰ is that the defendants' behavior threatens output whenever the defendants have sufficient power to exclude or handicap seriously the plaintiff. What this assumption overlooks is that the mere ability to injure the plaintiff seriously is not at all the same as the ability to reduce output. Defendants may have the power to hurt the plaintiff severely only because their joint activity has lowered costs or increased demand substantially. Yet these defendants just as clearly may lack the capacity to reduce output by collusion or coordination because of the large number of rivals or because of other factors. In general, the defendants' ability to exclude the plaintiff depends on the plaintiff's ability to function successfully despite the defendants' action. In contrast, the defendants' ability to restrict output depends on the elasticity of demand facing them at a competitive price. To be sure, rivals attempting output-restraining conduct are assisted by their ability to exclude others from the market. As some commentators have explained, however, the capacity to exclude is at most a helpful condition for reducing output, not a sufficient one.²²¹ To condemn the defendants' action whenever the power to exclude exists is to admit de facto that other concerns besides output are operating.

b. Dangers to Output in the Absence of Price Fixing, Related Concerted Conduct, or Oligopolistic Coordination

Suppose, however, that neither price fixing, related concerted conduct, nor oligopolistic coordination is a plausible concern in light of the many rivals on the plaintiff's horizontal level, defendants' meager market share, or other facts apparent to the court.²²² What danger to output does the defendants' action against the plaintiff present in this situation?

This is the single most difficult question our example cases present. On one hand, it is axiomatic that the defendants would not devote any resources to excluding, handicapping, or raising the costs of the plaintiff unless the defendants believed it was benefi-

220. Brief for government, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613 (1985). The government attorneys argued, without explanation, that the defendants' ability to exclude served as a measure for the danger to output.

221. See W. LIEBELER, *supra* note 69, at 50-54.

222. I am attempting to posit a case where a plaintiff cannot prove, or at least will be hard pressed to prove, that the defendant will ever possess monopoly power or, for that matter, any significant influence over industry output and price.

cial for them to do so. The benefit, however, could spring from a host of sources, as the previous subsection demonstrated. It also seems axiomatic that the defendants who display the "anticompetitive animus" referred to in *Pacific Stationery*, that is, the defendants who hurt the plaintiff solely to avoid the plaintiff's rivalry, must believe that their market either is not or will not be perfectly competitive and that handicapping or eliminating the plaintiff will affect output. On the other hand, the continued existence of many other rivals on the plaintiff's horizontal level, against whom output-restraining conduct cannot be shown, suggests that in most cases the effect on output will not be significant. It also suggests that the defendants may well have some efficiency-enhancing motive for their action, even if they cannot articulate it.

One can too easily infer a danger to output from finding that the defendants acted with an anticompetitive animus, that is, acted solely in order to avoid the plaintiff's rivalry. Assuming the defendants are not willing to pay to satisfy their spite, this finding means only that the defendants anticipate gaining more from injuring the plaintiff than that action cost. A great many businesses rationally can anticipate short-term gain from injuring a rival,²²³ regardless of whether their action provides efficiency-enhancing benefits. Even businesses in a competitive market may gain if a rival's entry is impeded.²²⁴ The operation of a rival, for example, may increase another's selling cost or impose other externalities. To take an example from door-to-door selling, the more homes that one salesman visits in a neighborhood, the lower the probability that any customer will buy from a rival salesman.²²⁵ Thus, the danger to output does not necessarily warrant the Vesuvian reaction of courts on finding anticompetitive animus. The difficulty of assessing the magnitude of an output effect and the many possible efficiency-enhancing benefits of defendants' action tempt one to ignore the danger to output altogether. Judge Posner's rule, by absolving defendants unless they have otherwise engaged in price fixing or other output-restraining conduct, seems to yield to

223. Nevertheless, many commentators agree with the Chicago School and suggest that rivals have no incentive to combine in order to exclude an equally efficient rival unless they are engaged in price fixing or related output-restraining conduct. See, e.g., H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 275-76 (1985).

224. See *infra* note 226.

225. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 Nw. U. L. REV. 736, 738-39 (1984) (one's business activity can increase rivals' costs by imposing externalities).

this temptation.

To see no danger to output whatsoever from the defendants' action, however, overstates the point at least a little. This view ignores the possibility that actions that reduce the number of rivals *may* decrease the elasticity of demand for the defendants' products (may make the demand curve more negatively sloped) even without price fixing or other related concerted conduct. Although economists have no validated analysis of the effect of lower elasticity on output, lower elasticity at least tends to make possible output restriction by enabling defendants to force up price by offering a smaller supply. To be sure, a small number of rivals does not imply necessarily a low elasticity of demand. A few rivals producing the same or similar product can render the demand for another's products highly elastic, provided the rivals can expand their supply quickly in response to a price increase. The practical difficulties of directly measuring demand elasticity make any generalization suspect. Nevertheless, a positive relation between the number of rivals and the demand elasticity facing each of them still is widely presumed.²²⁶ The possibility that injuring the plaintiff will decrease the elasticity of demand facing plaintiff's rivals may have no policy implications, however. A court has no way to identify those industry self-regulation cases in which this possibility exists. The presence of low elasticity of demand itself tells little, for it could be the result of lower costs or a more highly valued product.

Seeing no effect on output from the defendants' action also overlooks the possibility of improving output through judicial intervention. For instance, the excluded plaintiff, if allowed to share the advantages of those in the defendants' group (or if otherwise protected from the harm produced by the defendants' action), might prove to be a more efficient, lower-cost rival. In other words, the plaintiff not only would operate at a lower cost than his rivals, but would expand his output while maintaining his lower costs. Thus, if the defendants favored the plaintiff rather than hurt him, the plaintiff's rivalry and that of other low-cost producers might increase industry output. The defendants' action is thus analogous to imposing a tariff on a lower-cost, foreign producer.²²⁷

226. See L. REYNOLDS, *MICROECONOMICS* 77 (1973).

227. A. ALCHIAN & W. ALLEN, *supra* note 112, at 151-57. Others have claimed that industry self-regulation may retard the rate of which low-cost firms replace high-cost firms. L. SCHERER, *INDUSTRY MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 12-13 (2d ed. 1980); Pitofsky, *The Political Content of Antitrust* 127 U. PA. L. REV. 1051 (1977).

Defendants' fear of a low-cost rival may explain many industry self-regulation cases. Defendants and other rivals of a low-cost plaintiff, although pricing at *their* marginal cost, rationally may seek to hurt the plaintiff through industry self-regulation, even though they realize that they will continue to face rivalry from other, high-cost rivals. This may explain, for example, why the AMA seeks to bar chiropractors from hospitals by threatening the hospitals with loss of accreditation.²²⁸ Assuming that the AMA neither is motivated entirely by scientific concerns nor is orchestrating a huge price-fixing conspiracy, the AMA may fear that chiropractors, who have lower long-term costs, will be able to price at or above their marginal costs and still undersell medical doctors. The AMA may believe that the total cost of denying the chiropractors access to a hospital, including the extra revenue from the hospital that is foregone in return for the hospital's promise to boycott the chiropractors, will be trivial compared to the costs in lost sales, market share, and profits if chiropractors were not so handicapped.²²⁹

To be sure, defendants may defend their action on the ground that the lower-cost plaintiff always can prevail financially by duplicating the defendants' joint activity. For example, the especially efficient doctor who has been denied staff privileges can build or buy a rival hospital, and the efficient real estate agent who has been denied access to the defendants' multiple listing service can organize his own service. If the defendants' joint activity is viewed strictly as a type of rivalry on the merits, courts have no warrant for compelling the defendants to admit a rival, regardless of his

228. See *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

229. The wish to handicap the low-cost rival also may explain the defendants' behavior in the famous case, *Eastern States Retail Lumber Dealer's Ass'n v. United States*, 234 U.S. 600 (1914). The defendant retailers agreed to circulate to each other the names of lumber wholesalers suspected of selling directly to consumers. This agreement induced retailers to refuse to deal with the direct-selling wholesalers. The retailers' behavior easily could be explained if they were fixing prices, but the court did not claim that they were. How then can we explain the retailer's behavior? Again, the explanation may be the retailers' fear that the direct-seller's wholesalers would be lower cost rivals at the retail level. The defendants may have believed that their cost in letting these low-cost rivals compete as retailers unmolested exceeded their total cost of conducting the boycott.

To be sure, the defendants' strategy should only succeed in select circumstances. R. POSNER & F. EASTERBROOK, *supra* note 69, at 718-721. For instance, if the volume of direct sales is sufficient to support a wholesaler at an efficient level of production, the boycott eventually should fail. The fact that such boycotts appear so frequently in the lumber industry suggests, however, that the various circumstances needed for success commonly coalesce there.

costs. Indeed, compelling defendants to admit anyone will create suboptimal incentives for investment in the defendants' joint activity. At a theoretical level, this reply is unanswerable. Consumers may be better off in the long run if the excluded doctors or real estate agents are compelled to duplicate the defendants' joint activity. At a practical level, however, the reply often will seem ingenuous in light of the difficulty of duplicating the defendants' joint activity, and in light of our culture's commitment to giving each individual an equal opportunity to compete. A court's temptation to intervene on behalf of the low-cost rival whose unimpeded (or equally benefited) performance would increase output is likely to be irresistible. In other words, forcing the defendants to share their joint actions' efficiency-enhancing advantages with rivals like the plaintiff might appear to be an opportunistic way for a court to increase output, especially when the plaintiff is the special low-cost rival. That this judicial action will distort the incentive for investment in the defendants' efficiency-enhancing joint activity may seem too attenuated a concern.

With perfectly functioning judicial machinery, a careful anti-trust rule could address the danger of excluding the low-cost rival. The rule could require the injured plaintiff to show, first, that he had lower costs than his rivals; second, that he could expand his output to supply a substantial share of the market while maintaining his lower costs; and third, that duplication of the defendants' joint activity is not a realistic possibility. Of course, even an opportunistic court willing to interfere in the defendants' joint activity then should take into account the need to preserve incentives to undertake the joint activity. For instance, a plaintiff-realtor that a court allowed into a multiple listing service should be required to pay an amount that would help to insure an appropriate incentive for the creation of the service.

Such a cost-based test, however, does not lend itself to judicial administration. Nor does there seem to be any other feasible way to identify the low-cost rival. No group of industry self-regulation cases seems so likely to involve a low-cost plaintiff as to warrant a presumption against the defendants once the plaintiff shows his injury. In light of the risk of judicial error and the cost of litigation, a cost-based test would sacrifice unduly the benefits of industry self-regulation discussed in the preceding section. Arguably, therefore, the possibility that the plaintiff is a special low-cost rival should not affect the choice of the most appropriate legal approach. This may explain why Judge Posner's rule generally ig-

noses the danger to output from injuring the low-cost rival.²³⁰

If the defendants' industry self-regulation enhances efficiency, its exclusionary effect can be viewed as identical to the exclusionary effect of offering lower prices or better quality. If one believes that the defendants' industry self-regulation provides no efficiency-enhancing benefits at all, however, it could be said to pose the same type, if not the same degree, of danger to output that government regulations such as occupational licensing pose.²³¹ Like the industry self-regulation discussed in this subsection, occupational licensing hurts a potential rival, but still leaves a sufficient number of rivals to render price fixing or oligopolistic coordination implausible. Yet economists claim that occupational licensing restrains output for various reasons, each of which also may apply to industry self-regulation.²³²

First, occupational licensing increases all rivals' costs by a

230. R. POSNER, *supra* note 28, at 207-11. Posner may mean only that his rule is the most appropriate proxy for the danger to efficiency in light of the costs of litigation and judicial error. That is, he may admit his rule, by allowing defendants to handicap the low-cost rival, will impair efficiency in some instances. He may believe, however, that any other rule will condemn or inhibit too many efficiency-enhancing joint activities. The best net result is reached, therefore, by adopting his rule and accepting occasional losses.

231. "The combination of inadequate information and professional values [give industry self-regulation] a standardizing effect equivalent to one imposed by legal requirements." Robbins, *Allied Health Manpower*, 7 *INQUIRY* 55, 56-57 (1969-70); see also, Kissam, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 *WIS. L. REV.* 1, 48; Handler, *Recent Developments in Antitrust Law: 1958-59*, 59 *COLUM. L. REV.* 843, 864 (1959) (boycott analogized to a private licensing system).

232. *E.g.*, Gellhorn, *The Abuse of Occupational Licensing*, 44 *U. CHI. L. REV.* 6 (1976); Maurizi, *Occupational Licensing and the Public Interest*, 82 *J. POL. ECON.* 399 (1974) (licensors adjust entry standards to protect income of established practitioners). Most economists associated with the Chicago School oppose occupational licensing, which they believe often stems from the industry members' anti-competitive efforts. See Moore, *The Purpose of Licensing*, 4 *J.L. & ECON.* 93 (1961); Stigler, *supra* note 19 (regulation is a means of transferring wealth to those being regulated); Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976) (same). Yet they view private certification and registration, which may impose a similar effect, much more favorably. *E.g.*, Elzinga, *supra* note 164, at 114. They tend to emphasize the lack of formal coercion and the possible efficiency-enhancing benefits of such industry self-regulation. Although this toleration of private self-regulation may appear flagrantly inconsistent with the Chicago School's opposition to government regulation, a defense for the different stances exists. Industry self-regulation can be seen as evolving from consumers' wishes as expressed in the market place. Arguably, the self-regulation would not continue unless consumers wished it, that is, unless the market supported it. Self-regulation's success in the market provides a guarantee that it is in fact efficiency enhancing. In contrast, government regulation enjoys no similar guarantee. Of course, this defense also would call for toleration of price-fixing agreements that continued over time. The continuation of such agreements supplies equally solid evidence of their efficiency-enhancing character. Yet, the Chicago School remains opposed to them.

least the amount needed to satisfy the licensing authorities. Similarly, industry self-regulation efforts that entail a type of certification will increase rivals' costs by the amount needed to acquire whatever certification the defendants are offering. The cost of certification also may fall more heavily on small firms because the cost is not likely to increase with additional units of output. Thus, large firms may use industry self-regulation to impose a greater percentage increase in the small rivals' costs than they incur themselves. Of course, the cost of private certification may be less than the cost of governmental licensing to the extent that the private certification is not, practically speaking, mandatory.

Second, by raising the costs of all rivals, occupational licensing restricts entry into the industry. A basic economic postulate maintains that entry by a new producer will increase output at least slightly. The entry will produce an income transfer by causing existing producers to lower prices as well as a real output gain, most of which the entrant captures.²³³ Some of the existing producers' resources then will be released for other uses. Even the entry of a higher cost rival will increase output if consumer demand for the good has increased. This postulate helps explain why firms like our defendants' have an incentive to use industry self-regulation to exclude even those rivals who are no more efficient than they.²³⁴ The firms may be seeking to avoid the short-term costs of losing their existing sales and market share. These costs might include the cost of moving to a different geographic or product market. Whenever these costs of tolerating a plaintiff's entry exceed the cost of excluding the plaintiff through industry self-regulation, the latter becomes a rational strategy.

Third, occupational licensing reduces the supply of traders. If the remaining traders are for some reason unable to expand their output, the reduction in the supply of traders may reduce industry supply and thus industry output. Reduction in output, of course, is more likely to occur when the traders remaining in the industry are individuals rather than firms, because firms presumably are able to expand output indefinitely.²³⁵ Thus, the exclusion of indi-

233. A. ALCHIAN & W. ALLEN, *supra* note 112, at 151-57.

234. Many who study business management believe a business invariably has an interest in using industry self-regulation to injure or exclude a rival. The successful use of industry self-regulation to this end is one part of "domain management." See, e.g., Kotter, *Trade Associations and Environmental Strategies*, 4 ACAD. MGMT. REV. 87, 90 (1979)

235. See Kiche, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J. L. & ECON. 285 (1971).

viduals usually creates more danger to output than the exclusion of products.²³⁶ The amount by which occupational licensing reduces output also will depend on the number of individuals excluded. In general, the greater the number excluded, the greater the threat to output. Of course, industry self-regulation does not reduce the supply of traders as obviously as does a flat legal ban. Compared to government licensing, its methods for reducing supply, such as the denial of access to essential facilities, are more easily seen to resemble rivalry on the merits.

Fourth, occupational licensing also can restrain the use of efficient methods by industry producers.²³⁷ The promulgation of a mandatory design standard (or a performance standard that functions as a design standard), for example, freezes technology. Mandatory standards inhibit firms from making differently designed products. Even when a new product better fulfills the regulator's objectives, the product must incur the costs of satisfying the regulator of that fact. The voluntary standards imposed by standard setters, such as the American Society of Mechanical Engineers, also will impose a cost on noncompliers, which tends to freeze technology in much the same way.²³⁸

What policy implications, however, follow from believing that industry self-regulation threatens output even in the absence of price fixing or other related concerted conduct? To some extent, the threat to output supports *Silver's* traditional approach of erecting a presumption in the plaintiff's favor whenever concerted conduct seriously injures him. The defendants then will bear the burden of showing that their conduct enhanced efficiency. But what a broad rule this would be! After all, many types of conduct other than industry self-regulation seriously injure rivals, but have not been thought to raise antitrust concerns. Bribing a rival's employees to sabotage the rival's operations, bribing government reg-

236. S. BREYER, *REGULATION AND ITS REFORM* 212 (1982).

237. *Id.* at 115-16.

238. An additional danger of self-regulation not mentioned in the text is its historic tendency to lead to government regulation. States often adopt as mandatory the standards of private standard-setting organizations, thus creating the danger to output traditionally associated with government regulation. See, e.g., *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 273 F.2d 196, at 200 (7th Cir. 1959) (private standards accepted by the government), *rev'd*, 364 U.S. 656 (1961); Note, *Compliance with Due Process: A Solution to Strict Liability for Private Standard-Setting Organizations under A.S.M.E. v. Hydrolevel*, 48 ALB. L. REV. 146, 150 (1983). Some believe the very presence of the private standards invites the legislators to regulate. See L. BENHAM & A. BENHAM, *The Informers' Tale*, in *REGULATING THE PROFESSIONS* 317 (R.D. Blair & S. Rubin eds. 1980).

ulators to interfere with the rival's operations or increase his cost, misinforming the Internal Revenue Service about his tax payments, intimidating his customers, spying upon and publicizing his trade secrets, erecting a blank sign to block his advertising sign are all examples. Some of this behavior may not even be tortious. Yet each example poses the same threat to output as the industry self-regulation considered in this subsection.

Moreover, gauging the threat to output that the defendants' particular action poses will require a more refined tool than those available to courts. Surely a trial court is in no position to ascertain, for example, whether a plaintiff's rivals will be able to increase their output, thereby eliminating the danger that the plaintiff's exclusion will reduce industry output. Nor does a court have any basis for ascertaining how many firms the defendants must attack before a significant danger to output arises.²³⁹

The uncertainty of the danger to output and the inability of the judicial system to resolve that uncertainty through litigation both counsel against a generalized approach to these cases based on the danger to output. In particular, the danger to output does not justify the harsh presumption against the defendants' conduct established by *Silver's* traditional approach, especially in light of the chance that the defendants' action will provide some efficiency-enhancing benefits. The substantial risk that a court will fail to appreciate these benefits when they do exist makes *Silver's* approach even more troubling.

The traditional approach's emphasis on the reason for the defendants' injuring the plaintiff further suggests that the approach is not geared to the danger to output. The traditional approach seems to treat as a smoking gun any evidence showing that the defendants' true reason was dislike of the plaintiff's lower prices, better quality product, or other efforts at rivalry.²⁴⁰ In contrast, evidence that the defendants injured the plaintiff because of his unethical and criminal acts elicits a less hostile judicial reaction.²⁴¹ Explaining this different judicial reaction on output grounds is difficult. As discussed above, the "anticompetitive" mo-

239. I am ignoring here Professor Dewey's argument that, given the degree of industry concentration, profit rates measure whether output is at a competitive level. Dewey, *Industrial Concentration and the Rate of Profit: Some Neglected Theory*, 19 J. L. & Econ. 67 (1976).

240. *E.g.*, *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, at 664, 665 (E.D.N.Y. 1979), *aff'd*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982).

241. *E.g.*, *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961).

tive itself does not prove price fixing or other related concerted conduct. Defendants not engaged in such illegal output-restraining conduct may fear the plaintiff's rivalry on the merits for many reasons. The defendants may fear that the plaintiff will be that special low-cost rival whose unimpeded operation would reshape the industry. They may fear externalities from the plaintiff's operation, the elimination of which actually would enhance efficiency.

The fact finder's conclusion that the defendants injured the plaintiff arbitrarily seems to produce a judicial reaction almost as hostile as that produced by a finding of "anticompetitive" motive. Again, however, the defendants' arbitrariness has little relation to output. *United States v. Terminal Railroad Association of St. Louis*²⁴² often is cited as an example of concern for arbitrary exclusions. In this case a railroad association obtained control over the railroad terminal and transfer system at the only feasible point for crossing the Mississippi River near St. Louis. The Court feared the association arbitrarily might deny use of the system to railroads that were not originally members of the association. Clearly, the exclusion would put these railroads at a severe competitive disadvantage on some routes. As long as there was full utilization of the system, no price fixing or related concerted conduct by those with access to the system, and no reason to think the excluded railroads were or would be lower-cost rivals, however, the arbitrariness or reasonableness of the exclusion should be immaterial.²⁴³

242. 224 U.S. 383 (1912).

243. Professor Areeda would condemn industry self-regulation that arbitrarily excludes a plaintiff. For example, he would condemn a group of one hundred producers who gang up to prevent the 101st firm from entering their market:

The hypothetical boycott should be condemned by antitrust law for three overlapping reasons. First, the 100 firms would be acting irrationally to devote any resources to excluding the 101st firm from the market, unless they believed it helped their profits to do so. That is, they must be assuming that there would be a price output effect. (Perhaps they are protecting the public from a crook, but that is a different issue.) Given that certain proof of anything is both difficult and socially costly, it is both convenient and sensible to assume that business people are acting in their own self-interest and to assume that an unambiguously exclusionary purpose tends to indicate an anti-competitive effect. Second, as a general proposition, entry opportunities free of private restraint are critical to the achievement of economic efficiency. Third, when a challenged restraint is of a type that generally impairs competition and no offsetting redeeming values are offered, it is prudent for antitrust law to condemn it without burdening the legal system with having to prove a detrimental power or effect. The strong fairness claims of allowing access to markets is entirely congruent with economic efficiency and not opposed to it.

Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536-37 (1983).

This argument ignores the possibility that defendants may have an efficiency-enhancing reason for their action that they are unable to articulate or that the court is unable to

In short, no reliable inference about the harm to output can be drawn from the reason for the defendants' action. At most, the defendants' reason for acting will shed light on whether their action is likely to produce efficiency-enhancing benefits. The emphasis that courts place on the defendants' reason betrays their concern with matters other than output.

c. Conclusions About the Danger to Output

The danger of reduced output that the defendants' action presents does not begin to justify applying *Silver's* rule to our original example cases. The danger to output is most acute when defendants are engaged in unlawful cartel behavior or when defendants' actions help to maintain agreements that facilitate oligopolistic coordination. In these very instances, however, *Silver's* approach is not needed. Other well-established lines of authority give the plaintiff an adequate basis for suit. In other instances, the danger of the defendants' action reducing output is highly uncertain and thus would not warrant an approach as hostile and as sweeping as *Silver's*. On one hand, the glib assumption that defendants' actions never pose any danger to output except when defendants with monopoly power fix prices or other terms of sale is unwarranted.²⁴⁴ On the other hand, however, the factors that determine the existence and severity of the danger are not likely to be measurable or identifiable in a litigation setting. Nor do any useful "proxies" for the danger to output appear. As is often the case, the issue becomes how courts should proceed in the face of uncertainty. To understand why courts have proceeded as they have, that is, to understand why *Silver's* approach has prevailed, requires a search for dangers other than the danger of reduced output.

appreciate. Economics study continues to identify efficiency-enhancing aspects of conduct that formerly were not appreciated. *E.g.*, O. WILLIAMSON, *MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS* (1975). In general, Areeda's argument, by presuming a business practice illegal even in the absence of demonstrable power or effect as long as no redeeming values for the practice are offered, reflects the inhospitality tradition in antitrust.

244. For example, Professor Liebler, a major proponent of the Chicago School, begins with the premise that the possibility of price fixing or related concerted conduct is the *only* danger to output from the reduction of rivals and the resulting high concentration of a market. Liebler, *Market Power and Competitive Superiority in Concentrated Industries*, 25 *UCLA L. Rev.* 1231, 1235-37 (1979).

2. Dangers Unrelated to Output

Because the danger to output alone does not explain *Silver's* rule, what other dangers might a court see in the defendants' self-regulation? The language of the cases gives little guidance. A need and an opportunity for some speculation arise.

Merely listing the other dangers likely to cause judicial concern will show that they are dangers more commonly thought to lie within the province of tort law. They are dangers thought to be addressed less by antitrust laws than by the tort of unfair competition or other torts that also trace their origin to that primitive tort, "the intentional (and unjustified) infliction of temporal injury on another."²⁴⁵ This standard for liability invites the courts to fashion a general code of conduct for concerted business behavior that is not based solely on concern for output. Such a code aims to indicate, for example, proper and improper methods for a combination's use of its influence. Under this standard, whether the defendants' action warrants liability depends less on its threat to output and more on considerations of morality, ethics, convenience, compensation, equity, and the allocation of power between groups.²⁴⁶

Some of these dangers unrelated to output also underlie existing business tort categories. As already noted, arbitrary, negligent, or otherwise unreasonable product certification poses the same dangers addressed by the torts of injurious falsehood and trade libel.²⁴⁷ In *Structural Laminates v. Douglas Fir Plywood Association*,²⁴⁸ for example, the defendant association promulgated

245. See *Aikens v. Wisconsin*, 195 U.S. 194, 199 (1904); *Mogul Steamship Co. v. McGregor, Gowen and Co.*, 23 Q.B.D. 598, 613 (1889), *aff'd*, A.C. 25 (1891).

246. "Power" is used here in the more general, dictionary sense, not in the narrow sense of monopoly power.

So pervasive was hostility to concerted private power in traditional antitrust law that Professor Neale identified the control of private power, rather than efficiency, as the unifying goal of antitrust. A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 487 (2d ed. 1960).

Ian Macneil believes the hostility to private power extends to unilateral power as well: "American legal rules and institutions, common law and others, limit unilateral power in contractual relations of all kinds, whatever may be its source, overcoming all policy considerations, including economic efficiency, where other policy considerations are deemed to lead to excessive unilateral power." Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 Nw. L. Rev. 1018, 1060 (1981).

247. See *supra* text accompanying notes 89-91; see also *VE-RI-TAS Inc. v. Advertising Review Council of Denver*, 411 F. Supp. 1012 (D. Colo. 1976) (Better Business Bureau's criticism of weight-reducing salon seen as antitrust rather than trade libel case), *aff'd*, 567 F.2d 963 (10th Cir. 1977), *cert. denied*, 436 U.S. 906 (1978).

248. 261 F. Supp. 154 (D. Or. 1966), *aff'd per curiam*, 399 F.2d 155 (9th Cir. 1968),

Commercial Standard forty-five providing that only five-ply plywood consisting of five pieces of veneer was acceptable for one-half inch sheathing. The Department of Commerce adopted Commercial Standard forty-five with the result that the plaintiff could not represent his three-ply plywood as meeting the Department of Commerce standard, a serious competitive disadvantage that probably contributed to the plaintiff's withdrawal from the business. In court the plaintiff presented substantial evidence that the defendant association knew three-ply plywood performed as well as five-ply plywood. Viewing Commercial Standard forty-five as a statement that three-ply plywood is not acceptable and recognizing that this statement of these defendants would be credited far more than a similar statement by a single rival suggests the close similarity to trade libel. The special characteristics of this trade libel case include: (1) concert of action, (2) by a group of the plaintiff's rivals, (3) who gain substantial influence through the widespread belief that they are acting impartially, scientifically, and with specialized knowledge.

Other dangers are not addressed so clearly by existing business tort categories. Concerted conduct that harms a rival because of his price cutting, for example, does not fit an existing tort category, but probably would be found objectionable even when the plaintiff can show no effect on output. Because the rival's price cutting may be considered appropriate and desirable conduct that should be encouraged, the court will encourage the conduct by condemning private action that imposes an unnecessary cost or penalty upon it. Jury service illustrates analogous, desirable conduct that courts protect by recognizing a tort cause of action against certain private parties, like employers, who would penalize it.²⁴⁹ Moreover, the defendants' injury to the plaintiff because of his rivalry seems a flagrant abuse of the power the defendants gain from their collaboration. In short, the bases for the suit are the inequity inflicted on an appealing plaintiff, the defendants' apparent abuse of power, and the judicial wish to encourage what the court deems to be a desirable form of rivalry. Let us dub this danger "improper concerted response to proper rivalry." The deliberate vagueness of "improper" and "proper" reminds us that the focus of concern is on the desirability of the defendants' method of responding to the plaintiff's rivalry. The impulse for concern is the belief that the

cert. denied, 393 U.S. 1024 (1969).

249. *See, e.g.,* *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

plaintiff's method of rivalry, for example, lower prices, better services, higher quality, better marketing, or other types of rivalry on the merits, is preferable on economic and noneconomic grounds to the defendants' concerted behavior against him. Courts may entertain this belief, wisely or not, even when economists properly see the defendants' conduct as a subtle form of efficiency-enhancing rivalry on the merits.²⁵⁰ A more general label for this danger, such as "unfair competition," is less accurate and specific. The label is less accurate because it suggests that the unfairness to the plaintiff is the sole concern; it is less specific because it does not convey that the reason the defendants attacked the plaintiff was his proper rivalry.

A more severe example of "improper concerted response to proper rivalry" arises when the defendants give as a subterfuge some other reason for injuring the plaintiff. In this case the defendants' ploy and the defamation-like harm their counterfeit reason causes the plaintiff aggravate the defendants' abuse of power. The case now resembles an aggravated form of trade libel. In *Hydrolevel*,²⁵¹ a standard-setting case, the individual defendants obtained responsible positions in the American Society of Mechanical Engineers and used those positions to suggest, in the name of the ASME, that the plaintiff's safety device did not satisfy the ASME's safety standards. The jury found that the defendants acted to protect their company from the plaintiff's rivalry and without regard to the safety of the plaintiff's device. The defendants appeared to be industry leaders acting in the public interest to keep the market free from dangerous products by examining products impartially and publishing the findings. In reality, the defendants were using their influence and opportunity to act in concert to place the plaintiff at a competitive disadvantage to their corporate employer. Moreover, the court probably realized that the plaintiff's defamation-like injury would be especially difficult to repair. The hypocrisy and deception involved in the defendants' misuse of their positions, their "ganging up" on the plaintiff,²⁵² and

250. In *Klor's, Inc v. Broadway-Hale Stores*, 359 U.S. 207 (1959), for example, the Court may have deemed Broadway-Hale's attempt to persuade suppliers to stop selling to Klors as an improper response to Klors' proper price cutting. Yet, others have explained that Broadway-Hale's action was an efficiency-enhancing attempt to overcome a free-rider problem.

251. *Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs*, 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982).

252. The editors of the *Restatement* imposed special limits on concerted action in § 765 and explained in the comment why they did so. See *supra* text accompanying note 119.

their power over the plaintiff from this collaboration against him are emotionally charged features of the defendants' conduct. These features may explain the hostile judicial reaction to this conduct better than the danger to output does. Indeed, in *Hydrolevel* there was no claim of price fixing or other related concerted conduct, and thus a clear danger to output would arise only if the defendants' employer had monopoly power that the plaintiff's continued operation threatened. Let us dub the special concern presented when defendants give a false reason for injuring the plaintiff as the danger of "concerted deception from an impartial position." This label suggests that the concern arises both from the defendants' deception and from the influence the defendants possess because they appear to be acting impartially and in the public interest.

Focusing explicitly on the method by which defendants hurt a plaintiff helps explain the results lower courts have reached under *Silver's* traditional approach. For example, in *Feminist Women's Health Club v. Mohammed*²⁵³ the plaintiff doctors associated with an abortion clinic won a preliminary injunction against the staff doctors who had recommended that the hospital deny the plaintiffs staff privileges. The court suggested that the result might be different if the doctors merely had set standards for obtaining privileges.²⁵⁴ These doctors, however, had taken concerted action to prevent the plaintiffs from meeting the standards. Specifically, the defendant-doctors refused to provide aftercare services at the abortion clinic. As a result, the clinic did not meet the relevant standard for aftercare services, and the plaintiff-doctors associated with the clinic thereby failed to qualify for staff privileges. Other cases draw a similar distinction between defendants who suggest and report standards that the plaintiff does not meet, on the one hand, and those who attempt to enforce those standards through a variety of otherwise legal avenues, on the other. In *American Medical Association v. United States*²⁵⁵ the AMA tried to suppress group health medical plans by denying hospital privileges in the District of Columbia to doctors who participated in the plans. The Circuit Court distinguished the AMA's concerted efforts at persuasion from this attempt by the AMA to enforce its beliefs.²⁵⁶

253. 586 F.2d 530 (5th Cir. 1978), cert. denied sub nom. *Palmer v. Feminist Women's Health Center*, 444 U.S. 924 (1979).

254. *Id.* at 546-47 ("[D]efendants not only sought to enforce a certain standard for aftercare, but conspired to assure that the clinic would be unable to meet that standard").

255. 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).

256. *Id.* at 250; see also *American Medical Ass'n*, [1979 Transfer Binder] TRADE REG.

Neither the language of *Silver's* traditional approach nor that of the Chicago School's approach, however, allows for such a distinction.²⁵⁷ The best explanation for the distinction is that the courts, on tort grounds, approve of one form of concerted conduct and disapprove of the other.²⁵⁸ Let us dub this danger "improper enforcement of standards" in order to focus attention not on the standards themselves, but on the methods taken to enforce them.

The AMA's efforts to deny renegade doctors access to hospitals in the District of Columbia offer an example of an association enforcing standards through denial of access to an essential facility. This enforcement method is one that often raises the spectre of abuse of power and the ire of courts. One can even see this enforcement method at work in *Mohammed* because the aftercare services of the defendant doctor can be looked upon as a facility essential to the plaintiff-doctors. Another example of a suspect enforcement effort is granting a special status, such as valuable certification, to customers who buy only from firms that comply fully with the defendants' standards. Standard-setting associations may grant valuable certification to buyers who purchase only that equipment the association approves. Those buyers in turn may gain from advertising the certification.²⁵⁹ Unlike the mere certification of products, granting a special status to complying buyers may seem such an effective marketing device that disadvantaged rivals view the tactic as unfair or coercive.

One subset of improper enforcement methods includes what could be called "concerted secondary pressure not required by rivalry." "Secondary pressure" here means pressure on neutral parties to take sides in a dispute that does not concern them di-

REP. (CCH) ¶ 21652 (restrictions on partnerships between doctors and nondoctors found to violate FTC Act § 5).

257. Indeed, the methods differ only by degree and have no economic significance. Note, Developments in the Law, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1048 (1963) (only degree separates the reporting of standards and test results from the enforcement of those standards).

258. Compare the defendant's victory in *Roof Fire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963), in which the defendants merely suggested standards, to the plaintiff's victory in *Radiant Burners Co. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961), in which the defendants took an action that they knew would prevent the noncomplying plaintiff from competing successfully.

259. *Moore v. Boating Indus. Ass'n*, 754 F.2d 698 (7th Cir. 1985) provides a recent example. The BIA's refusal to certify the plaintiff's boat light meant that those buying from the plaintiff also would be denied the BIA's seal of approval. The added pressure on the plaintiff's customers may have contributed to the plaintiff's antitrust victory.

rectly in order to induce the neutral party to act against the plaintiff. The most well-known analogy is to secondary boycotts in labor disputes. Examination of labor,²⁶⁰ antitrust,²⁶¹ and unfair competition²⁶² cases reveals a deep-seated tradition of judicial hostility toward concerted secondary pressure that is based on several grounds: the concerted secondary pressure is an effective way for one group to wield its power against rivals; it tends to polarize society by increasing the number of people aligned in a dispute and by highlighting the existence of social conflict; and it entails more coercion of a neutral party than seems to be economically necessary.²⁶³ Of all the types of abuses of power addressed by traditional

260. *E.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); *see generally*, Note, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811 (1984). Professor Coons has described the severe treatment of secondary boycotts in labor law and believes the same impulse operated in cases like *FOGA. Coons, Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 731-38 (1962).

261. Statements denouncing secondary boycotts are legion in antitrust opinions. *E.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945); *see also* Note, *The Use of Economic Sanctions By Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962).

262. Pressuring neutrals to refrain from dealing with a rival or enemy has often been deemed a tortious interference with business. *E.g.*, *American Mercury Inc. v. Chase*, 13 F.2d 224 (D. Mass. 1926) (defendant's threatening distributors with prosecution if they distributed certain books deemed illegal); *Yoder v. Helmuth*, *Chicago Daily News*, Nov. 5-11 (1947) (C.P., Wayne County, Ohio) (defendant Amish leaders tortiously urged others not to deal with plaintiff).

The *Restatement Second* sets out the factors now used when a business prevents a rival from entering a contract and the courts must distinguish proper rivalry from tortious secondary pressure:

§ 768 Competition as Proper or Improper Interference.

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the others relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

RESTATEMENT SECOND, *supra* note 124, at §§ 766(B), 767, 768.

These tort rules may seem too generalized to give lower courts and parties guidance about permissible concerted conduct. Yet, as the *Restatement* editors argue, "factual patterns develop and judicial decisions regarding them also develop patterns . . . that begin to evolve . . . rules defining conduct that is not improper." RESTATEMENT SECOND, *supra* note 124, at § 767 (comment b).

263. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) (secondary boycotts widen disputes); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 617-18 (1980) (Blackmun J., concurring) (pressuring neutrals is itself contrary to public policy). Other tort contexts also reveal judicial hostility to secondary pressure. For

tort law, secondary pressure is one type that courts condemn most quickly and consistently. Not surprisingly, the Supreme Court's antitrust opinions containing the most hostile language toward industry self-regulation, *Klor's* and *FOGA*, involved secondary pressure. In *Klor's* a rival of the plaintiff pressured the plaintiff's suppliers into refusing to deal with the plaintiff.²⁶⁴ In *FOGA* style pirates' rivals pressured the pirates' customers and suppliers into refusing to deal with the pirates.²⁶⁵ The incredible rule emerging most clearly from *FOGA*, but implicitly from *Klor's* as well, is that self-regulation, at least when it involves an agreement to refuse to deal, is unlawful despite the defendants' purpose or justification. This rule, the predecessor of *Silver's* rule, can be explained best by recognizing that secondary pressure triggers the most virulent and unqualified judicial condemnation. Like the publication of false and libelous statements, secondary pressure arouses such hostility that courts in tort cases will condemn it without inquiry into the defendants' purpose or justification.²⁶⁶

The judicial concern about secondary pressure also helps to

instance, one way a collection agency or creditor attempting to collect a debt will subject itself to liability is to enlist the debtor's employer, relatives, neighbors, or the public in the controversy. The courts consider this behavior so "outrageous" that it warrants liability even when the only harm is emotional distress. *E.g.*, *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 242 N.W. 25 (1932); *Booti v. American Fin. Corp.*, 224 So. 2d 512 (La. App. 1969); *Quina v. Roberts*, 16 So. 2d 558 (La. App. 1944); *LaSalle Extension Univ. v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Moore v. Savage*, 359 S.W.2d 95 (Tex. Civ. App. 1962), *writ of error refused*, 362 S.W.2d 298 (1962). For other references to the long hostility toward secondary boycotts, see *Bilder, East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 893 n.246 (1972).

264. *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

265. *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 456 (1940).

266. Secondary pressure imposed for religious reasons creates a close legal question. *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) (reversing lower court dismissal of plaintiff who was excommunicated and shunned by church). Whether secondary picketing on behalf of civil rights and consumer interests is permitted may turn on whether the nature of the dispute or the solution sought to be imposed by the plaintiff touches on a public interest. See generally *Hersbergen, Picketing by Aggrieved Consumers—A Case Analysis*, 59 IOWA L. REV. 1097 (1974); see also *Madison, Mississippi's Secondary Boycott Statutes: Unconstitutional Deprivations of the Right to Engage in Peaceful Picketing and Boycotting*, 18 How. L.J. 583 (1975); *Sandifer & Smith, The Tort-Suit for Damages: The New Threat to Civil Rights Organizations*, 41 BROOKLYN L. REV. 559 (1975). Exceptions may be created for other situations when secondary pressure implicates first amendment values.

The best approach to analyzing these cases is to recognize that secondary pressure is presumed illegal and to ask whether the defendants' use of the tactic is within the ambit of a privilege secured to the defendants by the common law, by legislation such as that regulating labor disputes, or by the first amendment.

clarify some of the bizarre language for which the *FOGA* and *Klor's* decisions are famous. For instance, in *Klor's*, Justice Black condemns the agreement between Broadway-Hale and its suppliers not to supply *Klor's* on the ground that "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgement."²⁶⁷ The statement cannot be explained by the Court's concern about output or by the usual standards for determining whether the manufacturer's refusal to sell to *Klor's* was voluntary. To make sense of this statement, the secondary pressure not to supply *Klor's* that Broadway-Hale imposed on the manufacturers must be seen as an evil in itself. It is such secondary pressure, Justice Black seems to say, that cripples the manufacturer's freedom to trade in accord with its judgement. Whenever such secondary pressure does not seem to be a necessary feature of a sale, like the sale between the manufacturers and Broadway-Hale, Justice Black would condemn it.

Of course, in economic terms secondary pressure is a part of rivalry. Each seller tries to persuade a potential buyer to buy from him and, to that extent, boycott his rivals. A seller may exert this pressure by means of the appeal of a higher quality product or service, a lower price, or easier credit terms. The members of a joint venture whose products compete in this way could be said to be engaged in "concerted secondary pressure." In order to exempt the commendable secondary pressure involved in obvious forms of rivalry on the merits this danger is dubbed "concerted secondary pressure not required by rivalry." This danger has not necessarily been evaluated properly; indeed those who point out that the defendants' action in *Klor's* was an attempt to overcome the free-rider problem insist that the secondary pressure enhanced efficiency.²⁶⁸ Nevertheless, the *Klor's* opinion is best understood as reflecting the Court's hostility to what it perceived as unnecessary concerted secondary pressure.

A danger arising less from defendants' method than from their action's effect is the danger of allowing defendants to enforce an orthodoxy not required by any public policy. The fear, for instance, is that the only doctors denied staff privileges or disci-

267. 359 U.S. at 212 (quoting *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1950)).

268. Liebler, *Book Review*, 66 CAL. L. REV. 1317, 1323-33 (1978) (review of R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978)).

plined by medical disciplinary boards will be the mavericks²⁶⁹ who undersell colleagues, operate abortion clinics, or employ innovative or unconventional methods. Deferring to defendants on the ground that they alone possess the expertise needed for these judgments creates the danger that defendants will impose an unwarranted orthodoxy on the entire industry.²⁷⁰ As a result, the choices offered to the public are decreased. The fear that defendants will establish an unwarranted orthodoxy again is a concern about allowing one private group too much power to determine its rivals' fate. Let us dub this the danger of "concerted enforcement of orthodoxy." Again, the danger may be unrelated to output, and judicial reaction to this danger may reflect nothing more than a judicial unwillingness to accept the narrow range of choices that survive the struggle of the marketplace.²⁷¹ The religion of free opportunity insists on more toleration of and support for mavericks and eccentrics than the logic of economic efficiency produces.

A closely related danger more expressly embraced by the courts is that the defendants' self-regulation amounts to an extra-judicial agency encroaching on the judicial and legislative domains. The concern is that highly self-interested defendants may arrogate to themselves quasi-governmental police functions that should belong, according to the courts, only to the government.²⁷² Part of this concern could be called the "jealousy" impulse—the unrealistic notion that only the government should possess the power to control business conduct. A related impulse is the judicial hostility toward vigilantism—a private group's attempt to make and impose behavioral rules on others.²⁷³ Let us dub this danger "unreasonable

269. Some research suggests medical disciplinary boards direct their energy not at the incompetent or the corrupt, but primarily at the mavericks. The standard of "unprofessional conduct" provides a cover for these attacks. Dolan, *The Law and the Maverick Health Practitioner*, 26 ST. LOUIS ULJ. 627, 664, 667 n.153 (1982).

270. Professor Chafee recognized the difficulty of meaningful judicial review of technical determinations by industry members and warned judges against entering this "dismal swamp." Note, *Developments in the Law, Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 999 (1963).

271. If consumers preferred the services of the mavericks, the market presumably would ratify that choice. Eventually the maverick's product would prevail despite the actions of defendants.

272. Black's opinion in *FOGA*, 312 U.S. at 465, is a classic statement of this concern: "[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" *Id.* (quoting an earlier antitrust case, *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211, 242 (1899)).

273. The holding in another industry self-regulation case *American Medical Ass'n v.*

concerted encroachment on the government domain."²⁷⁴ This danger accounts in part for antitrust law's long concern with "exclusionary" behavior, a concern that rarely can be defended on economic grounds.

The "jealousy" concern becomes especially acute when defendants injure a plaintiff in order to discourage conduct that the legislature and the courts have expressly approved or at least tolerated. An example is *Silver* itself, in which the suspected reason for the defendants' action against the plaintiff was the plaintiff's lawful, left-wing political beliefs and associations.²⁷⁵ In contrast, the courts resent encroachment on their domain less when defendants attack a plaintiff for conduct that the government, had it considered the matter, probably would have condemned. An example is *Molinas v. National Basketball Association*, in which a court approved the NBA's lifetime exclusion of an athlete for betting on athletic events.²⁷⁶ For the same reason, disciplinary action that a sporting league takes against an athlete for undue violence during a contest also would receive lenient judicial treatment. Disciplinary action based on an athlete's unpopular but lawful political beliefs or lifestyle probably would produce a much more hostile judicial response. Yet, in economic terms, if an athlete with unpopular political views diminishes the marketability and appeal of the sporting league's product more than the athlete who is unduly vio-

United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) denounced defendants as vigilantes:

Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands . . . [A]lthough persons who reason superficially concerning such matters may find justification for extra-legal action to secure what seems to them desirable ends, this is not the American way of life.

130 F.2d at 249.

274. Another type of concerted conduct that resembles encroachment on the government domain is a concerted threat to arrest the plaintiff. Here the defendants are claiming that the plaintiff's conduct is not merely socially undesirable, but illegal. Perhaps because such threats (unlike the mere publication of the defendants' evaluation of the plaintiff's actions or products) imply an element of coercion, courts have considered them tortious. See *Dearborn Publishing Co. v. Fitzgerald*, 271 F. 479 (N.D. Ohio 1921); *New Am. Library of World Literature v. Allen*, 114 F. Supp. 823 (N.D. Ohio 1953); *Bantam Books, Inc. v. Melko*, 96 A.2d 47, 25 N.J. Super. 292 (1953), *modified*, 103 A.2d 256, 14 N.J. 524 (1954); see also Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326 (1957).

275. *Silver v. N.Y.S.E.*, 373 U.S. 341, 365 (1963).

276. *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1960). Even when the plaintiff's conduct is criminal, however, courts often have condemned private concerted efforts against the plaintiff. *E.g.*, *Nails v. Commonwealth*, 228 Ky. 838, 16 S.W.2d 474 (1929).

lent, the judicial reaction should be just the reverse.²⁷⁷

Another factor that affects the "jealousy" concern is whether the plaintiff has consented previously to the defendants' extrajudicial rule. For example, those who join trade associations, boards of trade, or other joint ventures knowing that they thereby subject themselves to the rules of a majority of the venture elicit less sympathy when those rules injure them. Professor Areeda has suggested, for example, that the dress designers in *FOGA* whom the *FOGA* membership found guilty of style piracy were better able to attack *FOGA*'s extrajudicial rulemaking because they were outsiders who had no relation to *FOGA* itself.²⁷⁸ In contrast, the commodity brokers who were members of the Chicago Board of Trade and who were injured when a majority of fellow members passed the "call" rule against price negotiations after the close of the trading session could expect less judicial sympathy.²⁷⁹ The restraint imposed when one has been outvoted by a majority of his fellow group members, Areeda seems to suggest, lacks the aura of coercion that surrounds the imposition of a private rule on an outsider.

Finally, the concern about encroachment on the government domain becomes most acute when the defendants' action clearly mocks the religion of fair opportunity and the distinction between the proper spheres of private and public power. This distinction, central to liberal ideology, distracts attention from the entrenchment and pervasive presence of private power and strives to promote the myth that an individual's opportunity for economic success is limited only by his talents, the impersonal forces of demand and supply, and the laws of public officials. Industry self-regulation that seems to proclaim the emptiness of this myth frustrates one of the law's most important ideological goals. For example, industry self-regulation that threatens to prevent a person from laboring at a vocation for which he has long trained—such as the exclusion of an athlete from a sporting league—constitutes a greater encroachment on the government domain than industry self-regulation that merely denies a product a seal of approval. The two cases may be indistinguishable economically, but the religion of free opportunity will subject the first kind of industry self-regulation to greater scrutiny and will oppose such self-regulation found to be arbitrary

277. See Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 330 (1983).

278. P. AREEDA, *ANTITRUST ANALYSIS* § 375a, at 511 (3d ed. 1981).

279. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

or unreasonable.²⁸⁰ The religion of free opportunity helps to explain the law's ancient commitment to the notion that private power should not prevent a person from working at his vocation. After all, the religion of free opportunity looks at the world through the eyes of the individual person or firm. It adopts his time frame. It ignores the past. It insists that the individual firm be given opportunity more or less equal to that other firms enjoy even though the other firms may have gained their current advantages through many generations of attempts to craft efficient governance structures.

Another danger is that of "concerted injury through unreasonably insufficient procedures." This umbrella category includes a variety of specific dangers that stem from the insufficient procedures defendants have followed. One specific danger is that the defendants (such as the members of a shopping mall) have used a biased decisionmaker (like one of the plaintiff's immediate business rivals) in deciding to exclude the plaintiff from the mall when they cheaply and easily could have used a more neutral decisionmaker. As a result, the defendants have increased unreasonably the substantive dangers already discussed, such as the danger of "improper concerted response to proper rivalry." A second specific danger is that the failure to afford available inexpensive procedures, like a statement of the reasons for the defendants' action, unreasonably prevents a court from determining whether the other dangers mentioned here arise.

Recognizing industry self-regulation's noneconomic dangers helps to explain *Silver's* concern about the reason for the defendants' action. This concern leads courts to condemn not only acts responding to the plaintiff's rivalry, but also arbitrary acts and acts motivated by a reason not in accord with public policy. Denying hospital staff privileges to a doctor because of his hair color is an example of an arbitrary action. Denying staff privileges because the doctor is willing to testify against fellow doctors in medical malpractice suits is an example of an action contrary to public policy. In effect, *Silver* calls for courts to review the reasonableness of the concerted action of private groups just as they review the reasonableness of some governmental actions.

Identifying and labeling the dangers other than those to out-

280. Professor Chafee called the judicial tendency to intervene when the defendants effectively controlled access to a vocation the "strangle-hold policy." Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 1000, 1021-23 (1930).

put that self-regulation presents necessarily suggest factors that a faithful follower of the traditional approach ought to consider in deciding whether the defendants' conduct is actionable. A lower court, however, also would want to know how much weight to give each danger. For example, the intense hostility towards concerted secondary pressure reflected in earlier cases suggests that such conduct should be actionable without more once the court is satisfied that the secondary pressure is neither an inseparable part of normal rivalry nor efficiency enhancing. Thus, the defendants' motives would be immaterial. The plaintiff would not need to prove that the defendants had monopoly power or that the concerted secondary pressure was likely to exclude the plaintiff from the market entirely.²⁸¹ The recent case of *Wilk v. AMA*²⁸² illustrates the utility of this approach. In that boycott case the American Medical Association, the Joint Commission on Accreditation of Hospitals, and related groups were charged with having committed a variety of acts that hurt the plaintiff-chiropractors. Many of the acts consisted merely of speeches, publications, and advertisements inveighing against chiropractic primarily on the ground that it is unscientific. One act, however, was the Joint Commission on Accreditation of Hospitals' pointed threat that any hospital that allowed a chiropractor to use its facilities would lose its accreditation. Unlike the AMA's speeches, this threat and the defendants' willingness to act upon it represented a tactic to which the chiropractors could not respond. Not surprisingly, nothing in other anti-trust approaches, or at least nothing in the formal rules emerging from those approaches, gave the court a basis to distinguish this threat from the defendants' many other acts. The approach proposed here, on the other hand, would allow a court to condemn this act alone. If the act were insufficiently related to efficiency concerns, it plainly would fit the description of "concerted secondary pressure." Although there may be no economic justification for treating this act differently from the defendants' other acts, this act more acutely raises the tort dangers of "concerted secondary pressure."

Most of the tort dangers identified here, however, do not elicit

281. Perhaps courts would create an exception based on first amendment values when consumers exert concerted secondary pressure. Examples would be the consumer boycott of retailers that sell certain brands of grapes or the consumer boycott of convention facilities in states that have not passed the Equal Right Amendment. *E.g.*, *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

282. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

the unqualified judicial condemnation given "concerted secondary pressure." When the defendants' conduct raises these other dangers, the traditional tort inquiry—which asks whether the defendants' conduct constitutes a privileged method for intentionally injuring the plaintiff—will be more complex. The inquiry will require judicial assessment of the defendants' purposes and justifications and of the defendants' and the plaintiff's relative power.²⁸³ The inquiry further requires assessing the degree of danger the defendants' conduct presents. The previous discussion identified some factors affecting the degree of danger. The danger from conduct involving "concerted encroachment on the government domain" increases when Congress expressly has authorized or at least decriminalized the plaintiff's conduct. The danger from conduct involving "concerted deception from an impartial position" depends upon the plaintiff's ability to challenge the counterfeit reason the defendants give for their action and upon the extent to which the defendants claim to be and generally are viewed as acting impartially in the public interest. When suppliers and consumers see defendants as rivals promulgating standards in their own interest, the danger probably should be ignored.

Although courts could approach many industry self-regulation cases under existing or newly created tort categories, many other industry self-regulation cases avoid easy categorization. In the sports discipline context, for example, a player expelled from a league for life for a past drug conviction may want to claim that the penalty was unreasonably disproportionate to the offense. Yet such a claim would not fit into any tort category. While a court could posit a specific tort category to address this danger—perhaps "unreasonably banning a person from his vocation"—at some point attempting to specify further categories of tortious action becomes futile. A better approach may be simply to evaluate whether the defendants' conduct fits in the broad tort category "business injury by improper concerted action."²⁸⁴

Those who claim that antitrust's only goal is the balancing of allocative and productive efficiency will deny that any of these other dangers should affect the antitrust treatment of industry

283. W. PROSSER, *supra* note 131, at § 50.

284. The dangers described are specimens of a genus. They are specimens of the noneconomic dangers from centralization of private power. Many other specimens of this danger exist, but the dangers described in the text are the ones industry self-regulation most clearly presents. Naming these dangers may help to illustrate the noneconomic concerns that have been built into traditional antitrust doctrine.

self-regulation cases. Fair enough. Discussing what the goals of antitrust ought to be is a profitless endeavor. I contend only that *Silver's* traditional approach reflects some of these dangers and cannot fully be understood or applied if these dangers are ignored. The legislative history of the Sherman Act and the judicial system's methodological inability to assimilate economic policy make the influence of these dangers understandable. Moreover, when the efficiency consequences are difficult to predict, one should expect these noneconomic dangers to be weighed more heavily. The difficulty of predicting economic consequences is a striking feature of industry self-regulation cases, at least when defendants are not able to articulate an efficiency-enhancing benefit, yet neither possess monopoly power nor are engaged in price fixing or related concerted conduct.

I suspect further that if the antitrust laws never had been passed, either the law of business torts, the law of private associations, or the law of common-law conspiracies²⁸⁵ would have developed in order to address these dangers explicitly and would have condemned more of the behavior (although without treble damages) than *Silver* now condemns. Unfortunately, but not surprisingly in light of *Silver's* treble damage bonanza, the current law of business torts, especially the law governing concerted action injuring a rival, is seriously underdeveloped.²⁸⁶ Much business behavior that arouses the courts' ire does not fit comfortably into any current business tort category. Nor will appropriate business tort categories develop as long as *Silver* survives. For under *Silver* each plaintiff will prefer to have his case treated as an antitrust violation. Thus, a court would need to consider whether to announce a new business tort without assistance from counsel.

The difficulty of announcing new types of torts is exacerbated because industry self-regulation cases so often are brought in federal court with jurisdiction grounded on the antitrust laws. As a result, a court faced with such a case would have no jurisdictional

285. For example, Pennsylvania's common-law tort action for conspiracy could be applied to much industry self-regulation that now is attacked under *Silver*. See *Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 549 (3rd Cir. 1979) (describing Pennsylvania's civil conspiracy law); see generally W. HOLDSWORTH, *HISTORY OF ENGLISH LAW, THE COMMON LAW AND ITS RIVALS* 385-92 (1926); W. PROSSER, *supra* note 131, § 46, at 293 (elements and limits of the common-law action for conspiracy).

286. Note, *The Pick-Barth Doctrine: Should Unfair Competition Belong Under the Sherman Act*, 31 BAYLOR L. REV. 253, 260-1 (1979) (explaining the limited viability of business torts). See also Note, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 YALE L.J. 65 (1953).

difficulty in dealing with an antitrust claim under *Silver*. In order to announce a new type of business tort, however, a federal court would need to find pendent jurisdiction over the tort action and would need to hold that the relevant state court, if faced with the defendants' action, likewise would create the same business tort. Whether the case is labelled "antitrust" or "tort," however, this Article contends that these cases ought to be viewed as tort cases in substance and approached accordingly.

IV. CONCLUSION

Silver's traditional approach toward industry self-regulation cases assumes that the law should impose a constraint on private concerted power. It assumes businesses should not be able to band together to inflict economic harm on a rival without some system of checks and balances like those deemed necessary to control the government. It assumes that a "fair" opportunity to compete requires access on more or less equal terms to essential support facilities. The originators and defenders of *Silver's* approach have some reason for embarrassment. Nothing in the Constitution insists on their assumptions. Their best legal source lies in the common law of torts, a field that at least in the eyes of perceptive commentators always has lent itself to checking abuses of private power and to allocating power between private groups. Another source lies further afield—in that reflex of the liberal tradition to limit all aggregations of power, public or private, in whatever form.

In refreshingly sharp opposition to *Silver's* traditional approach is the Chicago School approach. Save in the relatively rare instance when the private group possesses monopoly power and clearly threatens to reduce output, the Chicago School rejects entirely any *a priori* postulate that law ought to constrain private concerted power. It sees no inherent reason for greater judicial scrutiny when the act that hurts a rival is concerted rather than unilateral. Indeed, concerted activity that injures a rival is either efficiency enhancing or an attempt to enforce output-restraining activity that already is an antitrust violation. In either case, such concerted activity does not itself warrant special judicial interest or a separate judicial approach. In the absence of a clear loss in consumer welfare, the antitrust laws ought to be serenely indifferent to the allocation of private power. They ought to allow all private associations to act toward their rivals with the same uninhibited freedom a single business enjoys. They ought not strive to reset the clock for each entrepreneur in order to obliterate the

advantages that others gain from their past collaborations. Rather than controlling private groups, however powerful, the antitrust laws ought to encourage them to become more efficient.

Seeing this clash between different visions of liberalism gives little comfort to a trial judge faced with an industry self-regulation case to be decided under the current law. A judge who is alert to the wide variety of benefits and dangers industry self-regulation presents will see that the "group boycott" concept is too general to be of use. He rightly will suspect any general approach that attempts to govern all concerted conduct placing a rival at a significant competitive disadvantage. Moreover, the search for a less general approach to govern subsets of such conduct has not progressed far enough. For instance, the division of these cases into "horizontal" and "vertical" boycotts still operates at too high a level of generality and also fails to focus on the factors intuitively felt to be critical. What is needed, instead, is an approach that recognizes two points. First, the history of industry self-regulation cases shows concern with the desirability of the defendants' conduct on noneconomic as well as economic grounds. Second, what all parties need is to have courts get on with the business of identifying permissible and impermissible concerted conduct in the most specific manner possible, dealing candidly with economic and noneconomic considerations. By adopting a tort approach, courts will see the need to classify these cases more extensively based on the particular industry context and on the particular conduct. They will see the need to evolve standards that provide guidance to prospective parties and that enable some of these cases to be resolved short of trial. They will see the need to abandon the generalities that continue to substitute for thought.