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I. INTRODUCTION

Antitrust law has been with us since 1890, the year that Congress passed the Sherman Antitrust Act.[1] In the course of this extended period, antitrust law has achieved an exalted status in the pantheon of American jurisprudence.[2] Nevertheless, for decades, Sherman Act doctrines have been murky and confused.[3] This con-

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The opinions expressed in this Article are those of the author and do not necessarily represent the views of the Federal Trade Commission, the Bureau of Competition, or any individual Commissioner.

This Article has profited from the comments of those who have read earlier drafts. Among those contributing are Winston S. Moore, Robert Lande, Thomas Walton, Peter Metrinko, James Mongoven, and Howard Chang.

1. Act of July 2, 1890, ch. 647, §§ 1-7, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

2. The Supreme Court has heralded the Sherman Act as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the role of trade." Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958).

3. For an insightful overview and critique of antitrust doctrines, see H. PACKER, THE STATE OF RESEARCH IN ANTITRUST LAW (1963). Professor Packer perceived the doctrinal confusion of antitrust jurisprudence more clearly than most of his contemporaries:

> We need a critical re-examination of the leading cases with far more scrupulous attention to just what they did and did not decide than is manifested in, say, the Attorney General's Report. I do not think that the notion that we have a coherent and sym-

fusion was not, however, historically inevitable. When enacted, the Sherman Act had a clear focus. Fortunately, as the Sherman Act approaches its centennial, the Supreme Court has given encouraging signs that it is once again returning to the original focus of the statute.

As originally conceived, the Sherman Act prohibited two related offenses. Section 2 prohibited monopolization.[4] Section 1, the more important provision, prohibited combinations in restraint of trade.[5] As this Article demonstrates,[6] section 1 originally proscribed one, and only one, offense: cartelization, agreements among competitors to restrict their output.

The Supreme Court's failure to limit section 1 to a clearly articulated cartelization standard casts a shadow on the Sherman Act's original clarity. Instead of utilizing a specific cartelization standard, the Court judged challenged conduct under an unfocused "Rule of Reason" standard.[7] Applying this standard, the Court

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metrical law of antitrust would survive such an examination. . . . I think such a study would show that the Emperor lacks, if not any clothes at all, at least a wardrohe hefitting his rank and station.

Id. at 116-17.

4. Section 2 of the original Sherman Act provided:

Every person who shall monopolize, or attempt to monopolize, or comhine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreigu nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punisbed by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, ch. 647, § 2, 26 Stat. 209 (1890).

The current version of § 2 provides:

Every person who sball monopolize, or attempt to monopolize, or combine or conspire with any otber person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, sball be deemed guilty of a *felony*, and, on conviction thereof, shall be punished by fine not exceeding *one million dollars if a corporation*, or, *if any other person, one hundred thousand dollars*, or by imprisonment not exceeding *three years*, or by botb said punishments, in tbe discretion of tbe court.

15 U.S.C. § 2 (1982) (emphasis added to denote changes from original version).

5. Section 1 of tbe original Sberman Act provided:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or witb foreign nations is bereby declared to be illegal. Every person who sball make any such contract or engage in any such combination or conspiracy, sball be deemed guilty of a misdemeanor, and on conviction thereof, sball be punisbed by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by botb said punishments in the discretion of tbe court.

Act of July 2, 1980, cb. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)).

6. *See infra* text accompanying notes 59-112.

7. The Rule of Reason doctrine was first enunciated in Standard Oil Co. v. United States, 221 U.S. 1 (1911).

found a variety of conduct having little or no relation to classic cartelization to violate section 1.[8] The Court declared illegal any business arrangement that it deemed an "unreasonable" restraint on competition. Unlike cartelization, the concept of unreasonable restraint of competition is so ambiguous[9] that the Rule of Reason doctrine proved to be inherently amorphous.

The Court's substitution of a Rule of Reason standard in place of the cartelization standard that was contemplated by the language of the statute introduced an ambiguity to antitrust jurisprudence that eventually led to an almost total lack of coherence and consistency in section 1 case law.[10] Hostility to this growing confusion eventually provided the basis for a recent antitrust revolution whose dimensions are still not fully and accurately understood. The vanguard for this revolution came from academia. Beginning in the 1950's, the so-called Chicago school,[11] exemplified by the work of law school professors such as Robert Bork[12] and Richard Posner,[13] expounded a simple thesis: the antitrust laws should be

8. For example, at varying times courts have held all the following practices illegal under section 1 of the Sherman Act, often even illegal per se, even though such practices are unlikely to constitute cartelization in most cases: (1) territorial restrictions imposed by a manufacturer, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); (2) a publisher's imposition of maximum prices, Albrecht v. Herald Co., 390 U.S. 145 (1968); (3) a manufacturer's refusal to sell to customers that sold at discount prices, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); (4) block-booking of rights to films, United States v. Paramount Pictures, 334 U.S. 131 (1948); (5) tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947); (6) territorial restrictions in trademark licenses, United States v. Sealy, Inc., 388 U.S. 350 (1967); (7) a horizontal merger involving joint market share of less tban 15%, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); and (8) a patent license that restricted resale in bulk form, Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969), *aff'd in part and rev'd in part*, 410 U.S. 52 (1973).

9. For a discussion of the Rule of Reason standard, see *infra* text accompanying notes 33-42.

10. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 18 (1978) (Sherman Act doctrine "attained its most perfect form by 1911 but was then thoroughly misunderstood and has deteriorated since."); Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 VA. L. REV. 1457, 1457 (1981) (antitrust "rules are a jumble of pieces that simply do not fit together").

11. The Chicago school of antitrust thought developed out of "a continuing opportunity for lawyers and economists to spend some time at [the University of] Chicago to work on items of their choice in the general field [of antitrust]." H. PACKER, *supra* note 3, at 55. The general approach of the Chicago school derived from Edward H. Levi and Aaron Director, both of whom taught antitrust at the University of Chicago. *Id.*; *see also* R. POSNER, ANTITRUST LAW at x (1976).

12. *See* R. BORK, *supra* note 10; Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966). Robert Bork is now a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

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

interpreted as having only one goal, to promote the maximization of consumer welfare by invalidating business arrangements that reduce economic efficiency.[14]

Largely in response to the antitrust analysis originating from the Chicago school, the Burger Court began to reshape Sherman Act doctrine during the last decade.[15] The Court, however, has not adopted Chicago school doctrines unequivocally.[16] Because, in the final analysis, an economic efficiency standard is untenable as a basis for interpreting section 1, the Supreme Court wisely has refrained from a wholesale adoption of the Chicago approach. The language of section 1 does not support an economic efficiency standard. Section 1 speaks of agreements "in restraint of trade"; economic efficiency is not mentioned. Nor does the legislative history support the economic efficiency standard.[17] Further, because economic efficiency is impossible to measure, it could never supply a satisfactory legal standard. Indeed, even though Chicago school analysts assert that the goal of section 1 is the elimination of restrictions on economic efficiency, the legal rules that these analysts actually suggest usually focus on a challenged practice's likely effect on industry output as a proxy for whether the practice reduces consumer welfare.[18] Under a cartelization standard, a practice's likely effect on output is itself the legal issue.

Although the Court has shied away from outright adoption of an economic efficiency standard, it has, nevertheless, radically re-

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LAW: AN ECONOMIC PERSPECTIVE 147-67 (1967). Richard Posner is now a judge on the U.S. Court of Appeals for the Seventh Circuit.

14. *See, e.g.*, R. BORK, *supra* note 10, at 91 ("The whole task of antitrust can he summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.").

15. Although precursors came earlier, *see* United States v. General Dynamics, 415 U.S. 96 (1974), the important period of reinterpretation dates from the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), discussed *infra* in text accompanying notes 213-22.

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

17. One author has stated:

> [L]eading economists of the day [(1890)] had very little influence on the passage of the [Sherman] Act. It is unlikely, then, that the legislators who passed the early antitrust laws were aware that monopoly pricing led to allocative inefficiency. Nothing in the legislative history of the Sherman Act suggests that they were. No commentator has pointed to any economic testimony that referred to a concept resembling "allocative efficiency," nor is there the slightest evidence that any member of Congress was even remotely familiar with this type of welfare loss.

Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 88-89 (1982) (footnotes omitted).

18. *See infra* text accompanying notes 53-54.

formed antitrust jurisprudence during the last decade. Although the direction pursued by the Court's recent antitrust peregrinations may not be immediately obvious, by viewing the Court's antitrust decisions from an historical perspective, it is possible to delineate the boundaries of the course that the Court has been pursuing. Knowingly or not, the Court has virtually returned to the original Sherman Act standard. Close examination of recent Sherman Act opinions reveals that the Court now implicitly has adopted an approach to section 1 that displays all of the essential elements of a cartelization standard.[19] A long-awaited rationalization of historically confused Sherman Act jurisprudence may be at hand. The Court merely needs to announce explicitly the cartelization standard that it already implicitly has adopted. By explicitly adopting a cartelization standard, the Court can resolve the numerous doctrinal and practical problems that continue to plague Sherman Act jurisprudence.[20]

II. The Cartelization Standard in Perspective

The core of the Sherman Act is section 1, which provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade . . . is hereby declared illegal."[21] When Congress resoundingly[22] passed this statute in 1890, there was little question about its underlying principles. The nature of Congress' concern was so clear that Senator Sherman felt no need for an introductory statement to explain the meaning or purpose of the bill.[23] Congress was responding to the concern about "monopolies" and "trusts."[24] Section 2 attacked monopolies and proscribed

19. *See infra* text accompanying notes 213-70.

20. *See infra* text accompanying notes 271-332.

21. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1982)).

22. The Sherman Act passed the Senate by a vote of 52 to 1. 21 Cong. Rec. 3153 (1890). The House adopted the conference report by a vote of 242 to 0. 21 Cong. Rec. 6312 (1890).

23. When Senator Sherman originally introduced the bill, he made only a brief statement explaining the three sections of the bill. 20 Cong. Rec. 1167 (1889). Only after a lengthy speech by Senator George in opposition to Sherman's bill, 21 Cong. Rec. 1765-72 (1890), did Senator Sherman give a lengthy speech explaining and defending his bill. In the introduction of this statement Senator Sherman said:

> Mr. President, I did not originally intend to make any extended argument on this trust bill, because I supposed that the public facts upon which it is founded and the general necessity of some legislation were so manifest that no debate was necessary to bring those facts to the attention of the Senate.

21 Cong. Rec. 2456 (1890).

24. *See, e.g.*, W. Letwin, Law and Economic Policy in America 54 (1965) ("No one

monopolization.[25] Section 1 attacked trusts by proscribing combinations in restraint of trade, what we now call cartelization[26]—agreements among competitors that possess market power, formed with the intent or that have the necessary tendency to restrict the output of the cartel members.[27]

To most courts and commentators, the Sherman Act's basic principles are no longer clear. This obscurity has fueled a great debate regarding the proper social goals that should guide interpretation of the Act.[28] Despite the diversity of views concerning the proper goals, virtually all of the parties to the debate agree, albeit

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denies that Congress passed the Sherman Act in response to real public feeling against the trust . . . ."); R. POSNER, *supra* note 11, at 23 ("The framers of the Sherman Act appear to have been concerned mainly with the price and output consequences of monopolies and cartels . . . ."); H. THORELLI, THE FEDERAL ANTITRUST POLICY 165 (1954) (The Sherman Act derived from "a wave of reaction for which 'trusts' and 'monopolies' hecame outstanding catchwords.").

25. The original bill introduced by Senator Sherman did not mention monopolization. The Senate Judiciary Committee later added the current section 2. *See infra* text accompanying notes 110-12. Senator Sherman's bill focused on trusts and made unlawful "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles . . . ." S. 3445, 50th Cong., 1st Sess., *reprinted in* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, at 63 (1978). Senator Sherman apparently was attacking both monopolies and trusts, since he seems to have thought that a monopoly was achieved by combination. *See, e.g.*, 21 CONG. REC. 2460 (1890).

26. *See infra* text accompanying notes 59-112.

27. There is abundant literature on cartelization. Most basic economics texts provide a sufficient discussion of the theory. *See, e.g.*, R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 53-54 (5th ed. 1982); E. DOLAN, BASIC ECONOMICS 481 (3d ed. 1983); R. LIPSEY & P. STEINER, ECONOMICS 277-89 (6th ed. 1981); R. MILLER, INTERMEDIATE MICROECONOMICS 307-11 (1978).

28. According to the prevailing view, achieving economic efficiency is the primary or exclusive objective of the antitrust laws. *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 103-04, 111-12 (1978); R. BORK, *supra* note 10, at 91-104; R. POSNER, *supra* note 13, at 8-22; Taylor, *A Talk With Antitrust Chief William Baxter*, Wall St. J., Mar. 4, 1982, at 28, col. 3 (remarks of William Baxter, Assistant Attorney General, Antitrust Division, United States Department of Justice: "The sole goal of antitrust is economic efficiency."). Others have identified redistributive concerns as central. *See, e.g.*, Lande, *supra* note 17, at 65. Still others stress a view of antitrust that incorporates a variety of goals, including decentralization of power and freedom for individual businesses. *See, e.g.*, R. HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 199-200 (1965); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 1-2, 5 (1977); Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-84 (1965); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1214, 1218-21 (1977); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060-65 (1979); Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

erroneously, on at least one underlying premise:[29] the language of the Sherman Act provides little or no interpretive guidance, and the Supreme Court was essentially correct when, in its 1911 *Standard Oil*[30] decision, it stated that the language of section 1 was "broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce."[31] To the contrary, as discussed below, both the Sherman Act's language and legislative history indicate that Congress originally intended that section 1 proscribe a limited, relatively well-understood type of conduct: cartelization, combinations of competitors that restrained trade or restricted output.[32] Most, if not all, of the confusion that has surrounded section 1 jurisprudence can be traced to the Court's failure explicitly to recognize this legislative limitation in the early stages of its interpretation of section 1.

In place of the language of section 1 itself, the Court substituted the Rule of Reason,[33] an interpretation under which agreements are illegal if they unreasonably restrain or suppress competition. Conceptually, the Rule of Reason approach may sound unobjectionable.[34] In practice, however, the Rule of Reason has provided little coherency or guidance. The concept of unreasonableness lacks inherent content and, therefore, enables courts to exercise vast discretion.[35] While the concept of promoting competi-

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29. *See, e.g.,* R. BORK, *supra* note 10, at 33-37; L. SULLIVAN *supra* note 28, at 174.

30. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

31. *Id.* at 60.

32. *See infra* text accompanying notes 70-112.

33. The Standard Oil opinion referred to both "the standard of reason" and "the rule of reason." 221 U.S. at 60, 66. The Supreme Court institutionalized the Rule of Reason terminology in its next antitrust case. *See* United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

34. One of the first major commentaries on antitrust law was the report of THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS (S. Barnes & S. Oppenheim Co-Chrm. 1955). It was a virtual paean to the Rule of Reason. According to the report: "A modern view of the Sherman Act can start with *Standard Oil Co. of New Jersey v. United States.*" *Id.* at 5. Most subsequent commentary has been similarly favorably disposed toward the Rule of Reason approach. *See, e.g.,* 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 44-45 (1973); E. ROSTOW, PLANNING FOR FREEDOM 279 (1959) ("On the whole, [the Rule of Reason] has served the law well."); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination,* 79 COLUM. L. REV. 685, 694-96 (1979); Bork, *supra* note 12; Elman, *Petrified Opinions and Competitive Realities,* 66 COLUM. L. REV. 625, 626-27 (1966); McGee, *Commentary: A Return to the Rule of Reason,* 58 WASH. U.L.Q. 763 (1980); NEW YORK STATE BAR ASS'N, 1982 ANTITRUST L. SYMP. 15 (comments of Ira M. Millstein).

35. *See, e.g.,* H. PACKER, *supra* note 3, at 16 (The *Standard Oil* decision "prescribed a policy and, within very broad limits, gave the court a blank check on which to draw in carrying out that policy."); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Re-*

tion contained some potential for providing specificity and predictability, the concept of restraining competition has been subject to various and conflicting interpretations. Courts have viewed business conduct as restraining or suppressing competition in varying circumstances: when economic, social, and political decision-making has been centralized;[36] when rivalry of competitors has been reduced;[37] when freedom of individual economic entities has been abridged;[38] when allocative efficiency has been reduced;[39] or when consumers' wealth has been unfairly transformed into business profits.[40] Once the Court decided that the language of section 1 provided no siguificant guidance and, consequently, imposed no significant constraints on its interpretation, the Court was free to manipulate the concept of unreasonably restraining competition and to develop its own antitrust doctrines, reflecting its own judgments of optimal social, political, or economic policy.[41] In support

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vised National Antitrust Policy, 50 MICH. L. REV. 1139, 1151 (1952) ("the Rule of Reason opens the way to reliance upon a broad range of discretion").

36. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966) (The Sherman Act was designed "to prevent economic concentration in the American economy hy keeping a large number of small competitors in business."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (The Court stressed "the maintenance of fragmented industries and markets" and the protection of "viable, small, locally owned husinesses," despite "occasional higher costs and prices."); United States v. Aluminum Co. of Am., 148 F.2d 416, 428-29 (2d Cir. 1945) (Congress sought "to put an end to great aggregations of capital because of the helplessness of the individual before them" and "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units.").

37. *See, e.g.*, Blue Shield v. McCready, 454 U.S. 962 (1982); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 n.14 (1977).

38. *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 458 U.S. 1128, 1130 (1983) ("the central interest is in protecting the economic freedom of participants in the relevant market"); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 68-69 (1977) (White, J., concurring) ("while according some weight to the businessman's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency, this principle is without question more deeply imbedded in our cases"); United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (the Sherman Act is "the Magna Carta of free enterprise," and "the freedom guaranteed each and every business . . . is the freedom to compete").

39. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 20 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978); *GTE Sylvania*, 433 U.S. at 51-53.

40. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (antitrust damages "as a means of protecting consumers from overcharges resulting from price-fixing"); *In re* Allied Corp., 101 F.T.C. 721 (1983) (Comm'r Clanton) ("preventing such transfers is one of the goals of the antitrust laws").

41. For examples of the expansion of section 1 of the Sherman Act, see *supra* note 8. Courts perceived that in the antitrust field they had "by common consent, an authority they have in no other branch of enacted law." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Commentators of all

of expansive interpretation, the Supreme Court merely has cited the multiple, vague, and general goals that the Sherman Act supposedly was designed to achieve.[42]

The Chicago school has questioned these ever expanding Sherman Act doctrines. While accepting the premise that the language of the Sherman Act provides little guidance to its proper interpretation[43] and that Sherman Act doctrines must be defined by reference to the statute's goals,[44] the Chicago school has challenged head on the concept that the Sherman Act had multiple goals. According to the Chicago school, the antitrust laws have only one goal: to enhance consumer welfare by invalidating private conduct that impairs productive and allocative efficiency.[45] Alternative considerations such as suppression of rivalry, transfers of wealth, centralization of economic or political power, and impact on competitors are simply irrelevant.

The Burger Court has adopted much of the Chicago school outlook. The Court has cited with approval Robert Bork's contention that the Sherman Act is a "consumer welfare prescription,"[46] and the Court has rejected the "view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen."[47] Nevertheless, the Supreme Court "has not explicitly endorsed the consumer welfare model [of the Chicago

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persuasions have agreed that courts have had vast discretion in evolving antitrust doctrines under the Rule of Reason. *See supra* note 35.

42. Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958), contains the classic judicial statement expounding the perceived broad goals of the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition.

43. *See, e.g.*, R. BORK, *supra* note 10, at 57 ("The bare language of the Sherman Act conveys little . . . .").

44. *See, e.g.*, *id.* at 50 ("Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.").

45. *See supra* note 14.

46. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing R. BORK, THE ANTITRUST PARADOX 66 (1978)).

47. *GTE Sylvania*, 433 U.S. at 53 n.21.

school]."[48] Indeed, the Court has continued to emphasize other benefits of competition that are unrelated to the single-minded pursuit of allocative efficiency. The Burger Court has noted that "[c]ompetitive economies have social and political as well as economic advantages"[49] and has emphasized that anticompetitive practices deny individual competitors the freedom to compete, potentially eliminating competitors from the market.[50]

Although the Supreme Court has been influenced strongly by the Chicago school, the Court deliberately has refrained from an unequivocal endorsement of the Chicago school doctrine that economic efficiency is the only goal of the Sherman Act. The Court may have been influenced by other participants in the debate over the goals of the Sherman Act, who have insisted, with support from the legislative history, that the promotion of economic efficiency was not Congress' sole purpose in passing the Sherman Act.[51] Thus, although the Supreme Court has endorsed the goals of consumer welfare and economic efficiency, it has failed to disavow other goals, such as the freedom of individual competitors to compete.

The Court wisely has declined to endorse any one goal or set of goals for the Sherman Act, turning its focus instead back to the basic offenses that the Sherman Act originally proscribed. Wittingly or unwittingly, the Supreme Court has chosen the better path. Although the Chicago school doctrine that economic efficiency is the only goal of the Sherman Act has seductive simplicity, an efficiency standard cannot be derived from the language of the statute. Nor is an efficiency standard supported by the legislative history.[52] Further, because measuring efficiency is impossible,[53] an efficiency standard does not provide a satisfactory means for deciding individual cases. Indeed, most Chicago school analysts advocate rules of law that create proxies for efficiency. In particular, in order to judge efficiency, the analysts focus primarily on the tendency of an agreement to restrict the output of the parties to the agreement.[54]

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48. Gerhart, *supra* note 16, at 331.
49. *GTE Sylvania*, 433 U.S. at 53 n.21.
50. NCAA v. Board of Regents, 104 S. Ct. 2948, 2963-64 (1984).
51. *See supra* note 28.
52. *See supra* note 17.
53. *See infra* text accompanying notes 203-05.
54. *See, e.g.*, R. BORK, *supra* note 10, at 280-98; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 19-20 (1977).

The Chicago school analysts could avoid the efficiency detour by focusing directly on the language of the statute. Section 1 declares illegal combinations in restraint of trade—combinations that tend to restrict output. As discussed more fully below,[55] section 1 unambiguously proscribes cartelization; the essence of cartel behavior is that competitors combine together to restrict their output.[56]

Because section 1 clearly designates certain conduct illegal, the debate over the goals of the Sherman Act has been irrelevant from its very inception. In interpreting a proscriptive criminal statute, a court ordinarily is justified in inquiring into the statute's goals only if its language and legislative history fail to specify clearly the particular conduct proscribed.[57] If a criminal statute unambiguously proscribes a particular offense, a court is not justified in asking whether its proscription is consistent with the statute's goals. Nor is the court justified in identifying other conduct that the statute does not explicitly condemn and declaring such additional conduct unlawful because it runs counter to the court's perception of the statute's goals. Yet this interpretive exercise is exactly what courts have done with the Sherman Act.

An understanding that section 1 proscribes cartelization is the key that makes sense out of the ongoing debate over the goals of the Sherman Act. Antitrust commentators, searching for the Sherman Act's goals, have seen the manifestations of monopolization and cartelization but have failed to notice the cause. The adverse consequences of monopolization and cartelization are well known:[58] eliminating rivalry among competitors; concentrating economic power; reducing output of the product(s) produced by the monopolist or by the cartel; increasing prices; transferring wealth from consumers to producers; reducing allocative efficiency; driving small firms that interfere with the objects of the cartel or monopoly out of business; and concentrating political power. Each analyst participating in the debate over the goals of the Sherman Act has focused on one or more of these consequences of monopolization and cartelization. Missing from their analyses has been the recog-

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55. *See infra* text accompanying notes 59-112.

56. *See supra* note 27.

57. *See, e.g.*, Ladner v. United States, 358 U.S. 169 (1958) (in construing a criminal statute the courts should look first to the language and then the legislative history); *accord* Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1953). *See generally* 82 C.J.S. *Statutes* § 389 (1953 & Supp. 1984).

58. *See supra* note 27.

nition that these consequences all flow from cartelization and monopolization and that cartelization and monopolization, rather than their consequences, are *the* two offenses that the Sherman Act makes illegal. The Sherman Act does not declare illegal the consequences that follow from cartels and monopolies. Rather, the Act directly prohibits the twin evils of monopolization and cartelization.

III. Evidence of the Original Cartelization Standard

The Sherman Act unquestionably condemns monopolization[59] because section 2 explicitly uses the term "monopolize."[60] Much more troublesome and more important has been the identification of the specific conduct that section 1 condemns. Paradoxically, although section 1 of the Sherman Act does not expressly mention the terms "cartel" or "cartelize," close examination of the Act's language and legislative history reveals that Congress enacted section 1 for the explicit purpose of condemning cartelization. Consequently, judicial efforts to expand the scope of section 1 to include other kinds of undesirable competitive conduct have not been justified.

A. The Origin and Meaning of Cartelization

The omission of the express terms "cartel" or "cartelization" from the language of the statute is virtually insignificant. "Kartell," a term of Germanic origin, apparently first was used publicly in 1879.[61] The word "cartel," as currently used in the context of modern industrial economics, was not in general circulation in the English speaking world in 1890. The Oxford English Dictionary's earliest reference to the meaning of "cartel" in the industrial organization context is dated 1902.[62] Accordingly, the absence of the specific term "cartel" from both the Sherman Act and its legislative history is not surprising.

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59. The scope of the monopolization offense and the exact relationship between monopolization and cartelization is a matter of some interest and importance but lies outside the scope of this Article.

60. For the text of § 2 of the Sherman Act, see *supra* note 4.

61. "The word 'cartel' in our present meaning was probably for the first time used by the Deputy Richter in the German Reichstag in May, 1879, during the debate on certain cartels in the railway, rail carriage and locomotive industries . . . ." R. Piotrowski, Cartels and Trusts 11 n.2 (1933).

62. Oxford English Dictionary (Supp. 1972). The 1933 edition of the Oxford English Dictionary did not give an industrial economics definition of "cartel."

Although the term "cartel" came from nineteenth century Germany, its meaning has remained relatively straightforward, both in German and English. The first German book discussing cartels, published in 1883,[63] described a cartel as "an agreement of producers-entrepreneurs in the same branch of trade aiming at a partial elimination of unlimited mutual competition and such regulation of production that would at least approximately adapt it to the demand."[64] Robert Liefmann, one of the major early German writers on the subject of cartels, defined "cartels" as "voluntary agreements between . . . independent enterprises of similar type to secure a monopoly of the market."[65] The original German meaning of "cartel" has carried forward to twentieth century English. For example, the 1972 supplement to the Oxford English Dictionary contains the following definition of cartel: "an agreement or association between two or more business houses for regulating output, fixing prices, etc.; also, the businesses thus combined; a trust or syndicate."[66] Black's Law Dictionary contains a similar definition for "cartel."[67]

What the Germans called cartels and the Italians called syndicates, the Americans called trusts or combinations.[68] In 1890,

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63. KLEINWAECHTER, DIE KARTELLE (1883), *cited with approval in* R. PIOTROWKSI, *supra* note 61, at 11.

64. R. PIOTROWSKI, *supra* note 61, at 11-12, (citing KLEINWAECHTER, *supra* note 63, at 126). Because the term "cartel" was new, at least in the context of industrial economics, a debate ensued whether cartels themselves were a new phenomenon. *See, e.g.*, R. PIOTROWSKI, *supra* note 61, at 11; Meyer, *Early Trusts in Holland*, 42 POL. SCI. Q. 381 (1902).

65. R. LEIFMANN, CARTELS, CONCERNS AND TRUSTS 7 (English trans. 1932).

66. OXFORD ENGLISH DICTIONARY (Supp. 1972).

67. "Cartel" is defined:

> A combination of producers of any product joined together to control its production, sale, and price, and to obtain a monopoly in any particular industry or commodity. Such exist primarily in Europe, being restricted in the United States by antitrust laws. Also, an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products.

BLACK'S LAW DICTIONARY 195 (5th ed. 1979).

68. *See generally* R. PIOTROWSKI, *supra* note 61. Piotrowski summarized the general view as follows:

> There is no cartel, concern, trust, or any other combination of entrepreneurs which does not fall under this wide conception of *"cartels"* always provided that such a *union is able to influence the market*, i.e. limits in a certain direction or in some degree the competition that constitutes this market. That is the most essential trait of all those combinations.

Id. at 75 (emphasis in original). Some economists have drawn distinctions between cartels and trusts, but these distinctions typically have failed to reflect the broader meaning of trusts as used in America. *See, e.g.*, R. LIEFMANN, *supra* note 65, at 284 ("Unlike that of the

Americans used the term "trust" to encompass both single firm monopolies and combinations of horizontal competitors with market power organized for the purpose of restricting output and controlling prices, what we now call cartels.[69] The term "trust" was not applied merely to the few monopolistic combinations that used the trustee device. Rather, trusts encompassed both tight combinations, like holding companies and mergers, in which participating establishments gave up all or most of their independence, and loose combinations, like the cartels used in Europe, such as simple agreements and pools.

Present uncertainty regarding the purpose of the Sherman Act may be due in large part to linguistic changes. The terms "trust," "syndicate," and "combination" now have all lost the meaning that they conveyed in 1890. In contrast, the term "cartel" continues to convey the meaning intended by the Sherman Act. Considerable confusion probably would have been avoided if the Sherman Antitrust Act instead had been called the Sherman Anticartel and Antimonopoly Act.

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cartels, which rest upon a purely *contractual* basis, the trust's monopoly position is based on joint ownership; and this form is capable of producing much more intensive economic effects than the looser and more complicated organization of the cartel . . . . Unlike the cartel, which is simply a contractual association of firms who still retain their independence, the trust is one firm, formed by the fusion of a number of firms into one firm holding a monopoly position.") (emphasis in original). As Piotrowski points out, however: "Liefmann forgets that as German cartels so *trusts sensu largo* denote in America and England any form of combinations of entrepreneurs for the restriction of competition, not only those organized in the *legal form* of 'trust,' or only of those in the form of the "Holding Company" or "fusion"—as Liefmann says." R. PIOTROWSKI, *supra* note 61, at 62 n.3. Francis Hirst, an English barrister and lecturer at London School of Economics, similarly distinguished between trusts and cartels:

> The characteristic difference between the American Trust and the German Kartell is that, whereas the former is a combination in which the individual firm is entirely merged and absorbed, the latter only combines the firms into a syndicate for certain purposes, and allows the individuality of its members to continue so far as is consistent with the business policy of the federation.

F. HIRST, MONOPOLIES, TRUSTS AND CARTELS 105 (1905). Hirst recognized, however, the commonalities of cartels and trusts:

> The object of their formation is, of course, to increase profits by obtaining higher prices than can be obtained by competitive conditions. In other words, their supreme object is to create a monopoly. Thus the modern Trust or Kartell is simply a big recrudescence of older forms of monopoly combinations. The main purpose which has led to the formation of Trusts and Kartells is that which has led to their formation under other names in the earliest records of economic history.

Id.

69. The content of this paragraph draws heavily from H. THORELLI, *supra* note 24, at 161.

B. Textual Evidence of the Meaning of Section 1

According to conventional wisdom, the "bare language of the Sherman Act conveys little."[70] Flawed interpretations of the Sherman Act early in its history, however, influenced this conventional wisdom. A fresh look at the text of the Sherman Act reveals substantial support for the thesis that section 1 is explicitly addressed to cartelization.

First, section 1 prohibits certain "contracts, combinations *in the form of trust or otherwise*, and conspiracies."[71] Second, section 1 proscribes agreements that are "in restraint of trade."[72] Although variously interpreted, the most literal and logical reading of this phrase is that section 1 declares illegal those agreements that restrict the output of the agreeing parties, the fundamental characteristic of a cartel.[73] Third, the conduct condemned by sections 1 and 2 of the Sherman Act is proscribed as criminal conduct. Historically, among various types of anticompetitive business conduct, only monopolization and the conduct now called cartelization were regarded as sufficiently heinous to be characterized as criminal. Further, other remedies applicable to violations of sections 1 and 2 confirm that Congress designed those sections to apply to conduct considered to be extremely egregious. Thus, under other provisions of the Sherman Act, persons guilty of section 1 or 2 offenses are subject to treble damages suits,[74] and property owned by an illegal cartel or monopoly and that is used in interstate or foreign commerce is subject to seizure and forfeiture.[75] Finally, the parallelism of sections 1 and 2 suggests that both sections address conduct that either threatens to lead to or actually results in monopoly power. Cartelization and monopolization have parallel effects. Other, vaguer concepts of restraining competition sometimes obscure this parallelism.

C. Contextual Evidence of the Meaning of Section 1

The legislative history of the Sherman Act and the general history of the period of its inception also confirm the conclusion

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70. R. BORK, *supra* note 10, at 57.

71. 15 U.S.C. § 1 (1982) (emphasis added).

72. *Id.*

73. The only interpretation of § 1 that pays any heed to the language of the statute is the interpretation that § 1 makes illegal agreements designed to restrict output.

74. Sherman Act § 7 is now found in § 4 of the Clayton Act, as modified by 15 U.S.C. § 15 (1982).

75. 15 U.S.C. § 6 (1982)(Sherman Act § 6).

that section 1 explicitly prohibits cartelization.

1. General History

The Sherman Act is indisputably a product of late nineteenth century concern about monopolies and trusts.[76] Indeed, by the late 1880's, the term "trust" almost replaced "monopoly" as the popular designation for virtually every form of business combination deemed in restraint of trade.[77] The term assumed its prominence in part because the trustee device was used by "some of the largest and most obnoxious clusters of economic power, such as the Standard Oil and Sugar Trusts."[78] During the 1880's, public concern about trusts and monopolies continued to grow. By 1888 all of the major political parties had platform planks denouncing monopolies, trusts, and combinations.[79] During the years from 1888 to 1890, several states enacted legislative measures against trusts.[80] Because these measures were perceived as inadequate to deal with interstate combinations, pressure grew for national legislation.

The initial legislative action that ultimately resulted in the passage of the Sherman Act was a response to the public concern about trusts, which were synonymous with what we now call car-

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76. "In the years immediately before the Sherman Act, between 1888 and 1890, there were few who doubted that the public hated the trusts fervently." W. LETWIN, *supra* note 24, at 55. "The pervasive antitrust sentiment did not spring up overnight. Hatred of monopoly is one of the oldest American political habits and like most profound traditions, it consisted of an essentially permanent idea expressed differently at different times." *Id.* at 59. There was "a wave of reaction for which 'trusts' and 'monopolies' became outstanding catchwords." H. THORELLI, *supra* note 24, at 165.

> By about the middle of the 1880s, public sentiment in America had crystallized: something had to be done about trusts. Courts began to be more attentive to violations of common-law prohibitions against the collusive fixing of prices and planned limitations of output. In 1887 Congress created the Interstate Commerce Commission as a new means of dealing with the perennial railroad problem. Three years later, Congress passed the milestone Sherman Antitrust Act, which seemed clear, concise, and to the point.

T. MCCRAW, PROPHETS OF REGULATION 78 (1984).

77. *See* H. THORELLI, *supra* note 24, at 161.

78. *Id.*

79. The platforms are reprinted in T. MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789 TO 1905 (6th ed. 1906). The antitrust planks of the Democratic and Republican parties are reprinted in 1 E. KINTNER, *supra* note 25, at 54. The antitrust plank of the Union Labor Party (formed by a coalition of Greenbackers, Knights of Labor, and farmer organizations) reflects the populist hostility toward the trusts: "The paramount issues to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts, and we denounce the Democratic and Republican parties for creating and perpetrating these monstrous evils." *See* W. LETWIN, *supra* note 24, at 85.

80. H. THORELLI, *supra* note 24, at 155-56.

tels.[81] On January 25, 1888, the House of Representatives passed a resolution authorizing the Committee on Manufactures to investigate trusts.[82] One of the preambles to the resolution identified the vice in terms that now are understood clearly to refer to cartelization, focusing specifically on combinations designed to curtail production and thereby increase prices.[83]

2. Legislative History

Most of the legislative history of the Sherman Act concerns issues such as jurisdictional questions, constitutional concerns, and the proposed legislation's potential effectiveness.[84] Little of the congressional discussion casts much light on the substance of the Sherman Act. Nevertheless, a few key parts of the legislative history clearly demonstrate that cartelization was the vice that Congress intended for section 1 to proscribe.

(a) The Reagan Amendment

During deliberation by the Senate, Senator Reagan introduced an amendment that expressly would have declared trusts illegal.[85] Acting as a committee of the whole, the Senate adopted the Reagan amendment, which specifically defined a trust as a business combination organized for any or all of the following purposes: restricting output, fixing prices, preventing competition, or creating a monopoly.[86] By accepting the Reagan amendment the Senate

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81. *See infra* text accompanying notes 84-112.

82. 19 CONG. REC. 719 (1888).

83.

> Whereas it is alleged that certain individuals and corporations in the United States engaged in manufacturing, producing, mining, or dealing in some of the necessities of life and other productions, have combined for the purpose of controlling or curtailing the production or supply of the same, and thereby increasing their price to the people of the country, which combinations are known as associations, trusts, pools, and like names . . . .

Id.

84. The text of the legislative history of the Sherman Act is reprinted in 1 E. KINTNER, *supra* note 25, at 51-363. Informative analyses of the legislative history are contained in H. THORELLI, *supra* note 24, at 164-232, and W. LETWIN, *supra* note 24, at 53-99.

85. The Reagan amendment made it a misdemeanor for a person to be "engaged in the creation of any trust, or as owner or part owner, agent or manager of any trust" engaged in foreign or interstate commerce. 21 CONG. REC. 2597 (1980).

86. The full enumeration of the prohibited purposes is as follows:

> First. To create or carry out any restrictions in trade.
>
> Second. To limit or reduce the production or to increase or reduce the price of merchandise or commodities.
>
> . . . .

sought to prohibit cartels.

(b) Senator Sherman's Explication

Senator Sherman delivered one key speech in which he attempted both to justify his bill and to explain its aims.[87] First, he explained that the bill would not "interfere with lawful trade."[88] Persons would remain free to engage in "combinations in aid of production where there [was] free and fair competition."[89] Partnership combinations were unaffected because partnerships did not prevent competition.[90] Similarly, persons remained free to form combinations in the form of corporations.[91] Sherman noted that corporations should be protected because they reduced the cost of production.[92] Further, Sherman stated: "When corporations unite merely to extend their business, as connecting lines of railway without interfering with competing lines, they are proper and lawful."[93]

Having explained what the proposed legislation would not do, Senator Sherman then turned to what it would do, emphasizing

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Third. To prevent competition in the manufacture, making, purchase, sale, or transportation of merchandise, produce, or commodities.

Fourth. To fix a standard or figure whereby the price to the public shall be in any manner controlled or established of any article, commodity, merchandise, produce, or commerce intended for sale, use, or consumption.

Fifth. To create a monopoly in the making, manufacture, purchase, sale, or transportation of any merchandise, article, produce, or commodity.

Sixth. To make . . . any contract . . . by which they shall bind . . . themselves not to manufacture, sell, dispose of, or transport any article . . . below a common standard figure, or by which they shall agree, in any manner, to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall, in any manner, establish or settle the price of any article . . . between themselves or between themselves and others, so as to preclude free and unrestricted competition among themselves and others in the sale and transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite in any interest they may have in connection with the sale or transportation of any such article or commodity that its price may, in any manner, be so affected.

21 CONG. REC. 2601 (1890).

87. Senator Sherman's speech is contained in 21 CONG. REC. 2455-62 (1890). He obviously felt compelled to respond in part to a major speech opposing the trust bill delivered by Senator James Z. George. 20 CONG. REC. 1458-62 (1889); *see also* 21 CONG. REC. 2456 (1890).

88. 21 CONG. REC. 2457 (1890).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

that the bill concerned only unlawful combinations.[94] Senator Sherman pointed out that the targeted combinations took a form that was commonly called a trust, an organization that attempted to "avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president."[95]

Having identified trusts or cartels as the vice to which his bill was addressed, Senator Sherman elaborated on the nature of such cartels or trusts:

> The sole object of such a combination is to make competition impossible. *It can control the market, raise or lower prices*, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, *when it embraces the great body of all the corporations engaged in a particular industry* in all of the States of the Union, *it tends to advance the price* to the consumer of any article produced, *it is a substantial monopoly* injurious to the public, and, by the rules of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and individuals engaged in it should be punished as criminals. *It is this kind of a combination we have to deal with now.*[96]

Senator Sherman proceeded to cite examples of combinations that his bill was designed to address.[97] All of his examples were characteristic cartel or monopoly conduct: a trust that obtained discriminatory transportation rates in order to crush a competitor;[98] a contract by all grain dealers in a town to control prices;[99] a contract by two utility companies to divide markets;[100] a merger of two utilities to form a monopoly;[101] and the formation of a stock holding company to own the stock of seventeen corporations in the

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94. *Id.*
95. *Id.*
96. *Id.* (emphasis added).
97. *Id.*
98. Handy v. Cleveland & M.R. Co., 31 F. 689 (C.C.S.D. Ohio 1887) (Standard Oil trust).
99. Craft v. McConoughy, 79 Ill. 346 (1875).
100. Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 121 Ill. 530, 13 N.E. 169 (1889).
101. Illinois v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798 (1889).

sugar refining business.[102] Senator Sherman briefly alluded to other combinations that were under public scrutiny, such as the cotton trust, the whisky trust, the sugar-refiners trust, the cotton-bagging trust, and the salt trust.[103] According to Senator Sherman, separate discussion of these examples was not necessary because each shared the same structure and purpose. Each trust was organized "with a uniform design to prevent competition" through absolute control of the supply of the product in order to further the interests of the members of the trust.[104]

Although Senator Sherman clearly stated that not all combinations were void, he did assert that the tendency of all corporate combinations was to prevent competition and restrain trade.[105] Nevertheless, Senator Sherman explained that illegality could not be presumed as a matter of law unless the combination was shown to be "injurious to the public" and "destructive to fair trade."[106]

Senator Sherman admitted the difficulty of defining, in legal language, the precise line between lawful and unlawful combinations, stating that the courts must make the ultimate determination in each case.[107] Senator Sherman then turned to defenses given for trusts, discussing first what we would now call an efficiency defense:

> It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination. It will vary in time and place by the extent of competition, and when that ceases it will depend upon the urgency of the demand for the article. The aim is always for the highest price that will not check the demand, and, for most of the necessaries of life, that is perennial and perpetual.[108]

Senator Sherman next addressed the argument that freedom of entry would eliminate the power of cartels:

> But, they say, competition is open to all; if you do not like our prices, establish another combination or trust. As was said by the supreme court of New York, when the combination already includes all or nearly all the producers, what room is there for another? And if another is formed and is legal, what is to prevent another combination?[109]

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102. New York v. North River Sugar-Refining Co., 22 Abb. N. Cas. 164, 3 N.Y.S. 401 (1889).
103. 21 CONG. REC. 2459 (1890).
104. *Id.*
105. *Id.* at 2460.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

The words of Senator Sherman are clear. Because so much confusion has emanated from the legislative history of the Sherman Act, however, a recapitulation of Senator Sherman's views may be helpful. Senator Sherman sought to have declared illegal horizontal combinations that embraced the great body of all of the producers in a particular industry, combinations that achieved substantial monopoly power and used that power to restrict production and control prices. All such trusts were to be deemed illegal, but the antitrust plaintiff or prosecutor would have to prove that any particular agreement was necessarily injurious to the public, namely, that the purpose or necessary tendency of the agreement was to reduce output and thereby increase price. Illegal cartels could not be defended on the basis of productive efficiencies or on the ground that future market entry would erode their market power.

(c) Monopolization Offense

One additional item of legislative history casts significant light on the original meaning of section 1. After the Senate, sitting as a committee of the whole, loaded down the original Sherman bill with amendments, the bill was referred to the Senate Judiciary Committee for redrafting.[110] The langnage of the bill that emerged from the Senate Judiciary Committee[111] was virtually identical to the language of the bill that was finally enacted. For the first time, the bill included the present section 2 prohibition on monopolization and attempted monopolization. On the Senate floor, questions were asked concerning the definition of monopoly and monopolization. In response, Senator Edmunds, a member of the Committee, read the dictionary definition of the verb "to monopolize" and then explained the relationship between section 1 and section 2:

> So I assure my friends that although we may be mistaken (we do not pretend to know all the law) we were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it.[112]

In other words, sections 1 and 2 of the Sherman Act were conceived to be directed at parallel offenses. Section 2 declared mo-

110. *Id.* at 2731.
111. *Id.* at 2901.
112. *Id.* at 3152.

nopolization by a single firm illegal and section 1 declared monopolization by a combination illegal. The Sherman Act proscribed twin vices: cartelization and monopolization.

IV. THE APPLICATION AND DISTORTION OF THE CARTELIZATION STANDARD

The earliest Sherman Act cases further confirm that, at the time section 1 was enacted, it was understood clearly to prohibit cartelization. The courts nonetheless failed to articulate an explicit cartelization standard. This failure laid the foundation for the later abandonment of the cartelization standard and subsequent distortion of section 1.

The earliest governmental suits under the Sherman Act clearly were directed at cartels. In *United States v. Jellico Mountain Coal & Coke Co.*[113] the government challenged the Nashville Coal Exchange, a combination of mine owners and coal dealers that was formed for the purpose of regulating the output of coal and fixing coal prices. In *United States v. Greenhut*[114] the government indicted the officers of a corporation that had purchased or leased seventy-eight competing distilleries and thereby controlled the manufacture and sale of three-quarters of the distilled spirits manufactured and sold in the United States.

The first Sherman Act case to reach the Supreme Court, *United States v. E.C. Knight Co.*,[115] also concerned a cartel, the sugar trust, doing business as the American Sugar-Refining Company. The government challenged four acquisitions whereby the sugar trust's market share allegedly rose from sixty-five percent to ninety-eight percent. The Court dismissed the government's case because of a failure to demonstrate a direct effect on interstate commerce. Since the Court decided the case on jurisdictional grounds, this case provided little substantive insight into the Supreme Court's view of the principles underlying the Sherman Act.

United States v. Trans-Missouri Freight Association[116] provided the first occasion for the Supreme Court to articulate its views concerning the Sherman Act's proper role. The government had challenged another cartel, this time a rate-setting agreement

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113. 46 F. 432 (C.C.M.D. Tenn. 1891).

114. 50 F. 469 (D. Mass. 1892). This case was brought under § 2 of the Sherman Act. Later cases held that § 1 as well as § 2 were applicable to a merger that resulted in monopoly power. *E.g.*, Northern Securities Co. v. United States, 193 U.S. 197 (1904).

115. 156 U.S. 1 (1896).

116. 166 U.S. 290 (1897).

by eighteen railroad companies. Complicating the issues was the presence of federal regulation under the Interstate Commerce Commission Act,[117] which required railroads to charge reasonable rates. The railroads, pointing in part to the ICC Act regulation, claimed that the Sherman Act did not apply to interstate transportation and also did not apply to reasonable mutual regulation.[118] The circuit court dismissed the case on both grounds,[119] and the Eighth Circuit Court of Appeals upheld this dismissal on the basis that the regulation was reasonable.[120] The Supreme Court, in a five to four decision, reversed.

Justice Peckham's majority opinion has been denigrated as simplistic and literalistic[121] because Peckham insisted that the Sherman Act prohibited *every* agreement that restrained trade or commerce.[122] As Judge Bork accurately has noted, the denigration of Justice Peckham is not justified.[123] A close reading of the *Trans-Missouri* decision reveals that Peckham implicitly applied a cartelization standard. Properly understood, Peckham insisted that every cartel was illegal, even if it was not engaged in manufacturing or sales, even if it would not have been illegal under the common law, and even if it set reasonable rates.

Justice Peckham rejected the argument that the Sherman Act "was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations, and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles."[124] Peckham did not disagree that section 1 was addressed solely to cartels; he merely insisted that section 1 applied to transportation cartels as well as cartels engaged in the manufacture or sale of articles. Justice Peckham acknowledged "the history of the times"[125] that demonstrated that the Sherman Act was aimed at trusts, such as "the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Wire Fence Trust, the Sugar Trust, the Cordage Trust, the

117. Ch. 104, 24 Stat. 379 (1887).

118. 166 U.S. at 302-04.

119. United States v. Trans-Missouri Freight Ass'n, 53 F. 440, 451-55 (C.C.D. Kan. 1892), *aff'd*, 58 F. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897) (5-4 decision).

120. United States v. Trans-Missouri Freight Ass'n, 58 F. 58, 81 (8th Cir. 1893).

121. *See, e.g.*, M. HANDLER, ANTITRUST IN PERSPECTIVE 4-5 (1957); 1 E. KINTNER, *supra* note 25, at 341-47.

122. *Trans-Missouri*, 166 U.S. at 328.

123. R. BORK, *supra* note 10, at 22.

124. *Trans-Missouri*, 166 U.S. at 312.

125. *Id.* at 319.

Cotton Seed Oil Trust, the Whisky Trust and many others."[126] In Peckham's view, however, railroads were among the associations controlling vast capital resources, which had caused public complaints that corporate combinations had "unduly and improperly" increased prices.[127] Since a railroad cartel, like a producer cartel, had the market power to increase prices, it too was covered by the Sherman Act.

Justice Peckham rejected alternative interpretations of section 1. He took the important interpretive step of rejecting the argument that the Sherman Act merely incorporated common law restrictions on contracts that hindered trade.[128] Peckham also clarified that, although the statute by its plain language made all contracts in restraint of trade illegal, it did not make *all* contracts illegal. For example, a covenant not to compete, ancillary to the sale of a business, "might not be included, within the letter or spirit of the statute in question."[129]

Finally, Justice Peckham rejected the argument that the statute prohibited only unreasonable restraints of trade. Such an interpretation would, in his eyes usurp the role of Congress and place courts in an impossible position. Courts were in no position to "judge the fact of reasonable rates" or determine "what is a fair and reasonable profit."[130] Nor was it the province of the courts to judge whether competition would result in "financial disaster and ruin to competing railroads."[131] Because Congress had made the judgment that agreements in restraint of trade should be illegal, courts had no business altering or second guessing that judgment.

The cartelization standard implicit in the *Trans-Missouri* decision reappeared in the other early Supreme Court decisions. In *United States v. Joint-Traffic Association*[132] Justice Peckham again emphasized the prime characteristic of cartels, their potential for restricting output and increasing prices. Peckham noted competition's tendency "to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce,"[133] and that "an agreement, whose first and direct effect is

126. *Id.*
127. *Id.*
128. *Id.* at 328.
129. *Id.* at 329.
130. *Id.* at 331.
131. *Id.* at 339.
132. 171 U.S. 505 (1898).
133. *Id.* at 577.

to prevent this play of competition, restrains instead of promoting trade or commerce."[134]

Peckham again, however, failed to articulate an explicit cartelization standard. Instead, he defined the category of illegal agreements as "those contracts whose direct and immediate effect is a restraint upon interstate commerce."[135] This "direct and immediate effect" standard ultimately proved to be untenable in later cases because it failed to provide sufficient guidance to courts.

Justice Peckham made the ultimate distortion of section 1 possible by failing to make explicit the cartelization standard that he was applying. In retrospect, 1911 was the watershed year. The landmark decisions were *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[136] and *Standard Oil Co. v. United States.*[137]

Dr. Miles indirectly concerned a cartel, a combination of wholesale and retail druggists who were fixing the prices of competing patent medicines.[138] One method of enforcing compliance was to induce manufacturers to enter into resale price maintenance contracts. Dr. Miles Medical Company entered into such contracts with its wholesalers and retailers and subsequently brought a tort suit against a wholesale druggist that had induced distributors to sell Dr. Miles medicines to it in breach of the distributors' contracts.[139]

On review, the Supreme Court held that the resale price maintenance contracts were not entitled to legal protection because

134. *Id.*

135. *Id.* at 568.

136. 220 U.S. 373 (1911).

137. 221 U.S. 1 (1911).

138. The fixing of retail and wholesale prices by proprietary and patent drug manufacturers was part of a long standing price fixing conspiracy "adopted and . . . acquiesced in by the manufacturers" after being "suggested by the wholesale druggists." John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 67 N.E. 136, 175 N.Y. 1 (1903). Also long standing was the litigation between Park, "the plaintiff [who] never acquiesced in this plan," and the proponents of the conspiracy, including hoth the wholesale and retail associations of the druggists. *Id.* Evidence in this case showed that Park complained to the wholesale association about being boycotted at least as early at 1889. *Id.* at 11. In the government consent decree against both associations and various members and officers, as well as certain drug manufacturers, for price fixing and attempting to boycott price cutters, two of the six manufacturers listed as "Direct Contract Proprietors" (those members of the conspiracy responsible for identifying price cutters) were involved in litigation with Park. United States v. National Ass'n of Retail Druggists, 1 Anti-Trust Cases 115, 126 (C.C.D. Ind. 1907) (No. 10593) (Consent Decree); *see also Dr. Miles,* 220 U.S. 373; John D. Park & Sons Co. v. Hartman, 153 F. 24 (6th Cir. 1907).

139. In an unreported opinion, Dr. Miles' complaint was dismissed for want of equity. The dismissal was affirmed by the Sixth Circuit. Dr. Miles Medical Co. v. John D. Park & Sons Co., 164 F. 803 (6th Cir. 1908).

they violated the Sherman Act. The Court stated that the drug manufacturer had no independent interest in resale price maintenance.[140] Because a cartel arrangement was involved, the agreement properly was held unenforceable. In articulating the applicable rule of law, however, the Supreme Court made the unfortunate error of seemingly equating horizontal agreements and vertical agreements for section 1 purposes.[141] By so doing, the Court broadened section 1 coverage to include vertical agreements that were unrelated to cartelization.[142] Thus, although the decision was correct on its facts, *Dr. Miles* opened a Pandora's Box of vertical restraint cases under section 1, a development entirely at odds with the Sherman Act's language and purpose.

The *Standard Oil* decision was even more momentous. *Standard Oil* concerned a challenge to the Standard Oil trust. Writing for the majority, Chief Justice White articulated the Rule of Reason doctrine that subsequently played an important role in the erosion of the cartelization standard. According to White's central premise, the term "restraint of trade" had its origins in the common law at which an individual's contract in restraint of trade was void only when it unreasonably restrained his trade or business.[143] As a related thesis, Justice White announced that the Sherman Act used broad terms "to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation."[144] By using "an all-embracing enumeration,"[145] the Act was "broad enough to embrace every conceivable contract or combination which could he made concerning trade or commerce."[146] In order to save the statute from his own overly broad interpretation, Chief Justice White adopted the limiting "standard of reason" that had been applied at common law.[147]

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140. *Dr. Miles*, 220 U.S. at 408.

141. *Id.* The Court noted that vertical price fixing "falls within the same principle which condemns" horizontal price fixing. *See* M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, TRADE REGULATION 560 (2d ed. 1983).

142. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (overruling *Schwinn*); Albrecht v. Herald Co., 390 U.S. 145 (1968) (publisher's imposition of a maximum price); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (exclusive distributors).

143. Standard Oil Co. v. United States, 221 U.S. 1, 54-55 (1911).

144. *Id.* at 59-60.

145. *Id.* at 59.

146. *Id.* at 60.

147. Chief Justice White described the standard as follows:

Thus not specifying, but indubitably contemplating and requiring a standard, it follows

White did not contemplate that the Rule of Reason standard would give courts virtually unlimited discretion. According to White, courts were to determine whether, "as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute."[148] If so, the agreements "could not be taken out of [the prohibited] category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."[149]

White's analysis was, of course, circular because section 1 expressly prohibited agreements "in restraint of trade." Nevertheless, the *Standard Oil* decision was critical, diverting the attention of the courts from the concrete offense defined by the statute, cartelization, and focusing attention instead on determining whether a particular restraint unreasonably restrained competition in some vague sense. The concept of restraint of trade lost most of its meaning when it ceased to be equated with output restriction. The concept of reasonableness lacked any content at all. Thus, even though on its facts, the *Standard Oil* decision applied to a trust, the Rule of Reason articulated in the decision opened the door for applications that bore little or no relation to the original cartelization standard that Congress had enacted.[150]

V. Defining a Cartelization Standard

As discussed above,[151] cartelization was the vice originally prohibited by section 1 of the Sherman Act. If the courts are to return to an explicit cartelization standard, it will be necessary to define with some particularity the elements of the offense of cartelization and the assignment of the burden of proof with respect to each element.

> that it was intended tbat the standard of reason which had been applied at the common law and in the country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

Id.

148. *Id.* at 65.

149. *Id.*

150. As every antitrust hornbook or casebook demonstrates, the courts, in applying the Rule of Reason standard, departed completely from the cartelization standard. *See, e.g.*, *supra* note 8.

151. *See supra* text accompanying notes 59-112.

Preliminary to a discussion of the legal elements of a cartelization offense, it is useful to summarize the economic criteria for successful cartelization. In framing legal rules to implement the section 1 prohibition of cartelization, a court must utilize either implicitly or explicitly an economic model of cartel behavior. Legal rules are designed to shape and modify human behavior. Thus, in framing legal rules, a legislature or a court must have some perception, however vague, of the underlying causes of the undesirable conduct it is seeking to deter. Accordingly, an understanding of the nature of cartel behavior provides the necessary backdrop for framing legal rules against cartelization.

A. The Economic Theory of Cartelization

Economic theory provides a clear model of cartel behavior.[152] Cartelization is a form of collective monopolization. Cartel members act together to achieve the collective economic self-interest of the cartel. Specifically, the cartel members seek to maximize their joint profits by restricting output and increasing prices. This goal can be achieved only if, collectively, the cartel members have market power.[153] To achieve maximum collective profits, the cartel members must ascertain the particular price-quantity nexus that will result in maximum industry-wide profits, assign specific production levels to industry members, and effectively police the cartel to prevent individual members from cheating by directly or indirectly lowering their prices or increasing output.

Cartels can lose their effectiveness because individual members have an incentive to cheat. Each participant has an incentive to maximize individual profits. Thus, from the standpoint of each cartel member, the optimal scenario is for all other members to abide by the cartel production limitations while the individual member remains free to produce as much as it desires. Because of the conflict between individual self-interest and collective self-interest, a cartel cannot successfully maximize profits unless it can ensure concurrence, coordination, and compliance:[154] agreement on price and output, coordination of prices and quantities as previ-

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152. *See supra* note 27.

153. This Article uses the terms "market power" and "monopoly power" interchangeably. "Market power is the ability to raise price significantly without losing so many sales that the increase is unprofitable. Most firms have a little power, because their products are not perfectly interchangeable with the goods of others. But few firms have substantial power over price." Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984).

154. The seminal work is Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

ously agreed, and policing compliance to deter cheating.

Although, historically, economists viewed all coordination by competitors with suspicion,[155] agreements among competitors no longer are seen as inevitably constituting cartel behavior. In some circumstances competitors can collaborate to further their individual and collective self-interests without restricting output or increasing prices. By achieving efficiencies through partial integration, reduction of transaction costs, and elimination of externalities,[156] competitors can collectively increase output. Accordingly, such behavior does not constitute cartelization.

B. Legal Standards for Cartelization

Armed with an understanding of the economic criteria for successful cartelization and the knowledge that collective activities by competitors are not always cartel behavior, one can define a legal rule that, with minimum enforcement costs, will deter cartel behavior without deterring noncartel behavior.[157]

If enforcement costs were zero and all participants, both public and private, had perfect knowledge of whether particular collective conduct was cartel behavior, the legal rule against cartelization would correspond exactly with the economic model of cartelization. The legal rule would have four elements, reflecting the necessary elements required for successful cartelization. The cartelization standard would prohibit (1) agreements (2) among competitors (3) who collectively possess market power (4) that have the effect of restricting output. Agreement is equivalent to concurrence. Unless the agreement is among competitors who collectively possess market power, the competitors will not have the capability to restrict output. Unless the agreement has the effect of restricting output, there has been a failure either of coordination or of compliance.

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155. Even Adam Smith opined: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. SMITH, THE WEALTH OF NATIONS 128 (Modern Library ed. 1937).

156. Gerhart, *supra* note 16, at 334-44.

157. Lawmakers should frame legal rules with the awareness that such rules are rarely flawless or self-enforcing. Thus, in establishing legal rules, it is desirable to evaluate the costs associated with various types of errors that can accompany the rules. Three types of costs bave been identified: (1) the cost of the failure to deter undesirable behavior; (2) the cost of inadvertent deterrence of desirable behavior; and (3) the cost of applying the legal rules. *See, e.g.*, Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1671-77 (1983).

In the real world, of course, knowledge is not perfect and enforcement is costly and subject to error.[158] In some cases, cartels may go undetected. In other cases, conduct is held to violate the Sherman Act even though it cannot possibly be cartel behavior.[159] To accomodate for the risks of error that pervade the real world, it is necessary to modify the legal rule against cartelization from the pure rule following strictly from economic analysis. The wording of the Sherman Act itself provides assistance.

Section 1 sets forth two elements. The first element is "a contract, combination in the form of trust or otherwise, or conspiracy." In short, the threshold requirement is an agreement. The legal element of an agreement is equivalent to the economic element of concurrence. The second element of the statutory offense is that the agreement must be "in restraint of trade." Courts have had considerable difficulty with the phrase "in restraint of trade"[160] even though, as discussed above,[161] the legislative history sheds considerable light on the types of agreements that Congress considered to be in restraint of trade. The legislative history indicates that Congress sought to prohibit those agreements that eliminated competition, created monopoly power, reduced output, and increased prices. As stated by Senator Sherman, such agreements "seek to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business."[162]

In understanding the legal elements of cartelization by comparing its economic elements with the "restraint of trade" lan-

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158. Richard Posner describes "the enormous cost of antitrust proceedings" and "the substantial probability of error," noting: "The monstrous, indeed grotesque, proportions of the modern antitrust suit are difficult to convey to the uninitiated." R. POSNER, *supra* note 13, at 232. Hence, the benefits of social control must be balanced witb process costs, and because every legal system is fallible, it must reckon with error costs also. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1077-79 (1980). For an attempt to strike an optimal benefit-cost balance in light of these problems, see Easterbrook, *supra* note 153.

159. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967). Both cases have been strongly criticized. *See, e.g.*, R. BORK, *supra* note 10, at 270-79; Easterhrook, *supra* note 153, at 22-23.

160. According to Bork: "Divergent strains . . . appeared in the very first case to be decided on the merits by the Supreme Court, and these irreconcilable traditions persist in the law to this day." R. BORK, *supra* note 10, at 21. Another analyst remarks that given the Act's ambiguity, it is not surprising that "the administrations and courts charged with enforcing it have experienced so much difficulty in settling its meaning." W. LETWIN, *supra* note 24, at 54.

161. *See supra* text accompanying notes 59-112.

162. 21 CONG. REC. 2457 (1890).

guage of the Sherman Act, three key questions arise. First, does section 1 require that the agreement be between horizontal competitors? Second, does section 1 require a demonstration of market power? Third, does section 1 require a demonstration that the agreement will result in restricted output and therefore increased prices?

1. Does Section 1 Require a Horizontal Agreement?

If restraint of trade means restriction of output, normally trade will be restrained only by horizontal agreements. Neither the background nor legislative history of the Sherman Act suggests that section 1 was intended to address vertical agreements. The House debate made a few limited references to vertical price fixing, but always in the context of discussions of monopoly conduct.[163] In the discussions of the evils of trusts, all references were to horizontal agreements. Further, the historical backdrop suggests that Congress was concerned exclusively with horizontal, not vertical, agreements.[164] Including vertical agreements within section 1 would be inconsistent with the underlying structure of the Sherman Act as a criminal statute. It is impossible to define clearly a set of vertical agreements that is considered so heinous that it consistently has been condemned as criminal conduct.[165]

Similarly, policy considerations require that vertical agree-

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163. *Id.* at 4089-90.

164. *See, e.g.*, H. THORELLI, *supra* note 24, at 54-163.

165. The Antitrust Division made a foray into criminal prosecutions for vertical price fixing that resulted in a *nolo* plea in 1980 by Cuisinarts, Inc., hut that policy was abandoned with a change in administrations. *See* Faustman & Goldman, *Criminal Prosecution for Vertical Price Fixing: Antitrust Division Aiming for the Waterline*, 26 ANTITRUST BULL. 227, 228 (1981). Prior to the *Cuisinarts* case, there had been very few criminal vertical price fixing cases since 1920. *Id.* at 230-31. The authors argue against a resumption of criminal prosecution in this area, principally noting the confusion in the law regarding per se treatment for resale price maintenance.

Other vertical practices generally are accorded Rule of Reason treatment. The legality of vertical nonprice restrictions is normally examined under the Rule of Reason. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); *see also* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (SECOND) 65-74 (1984). Tying arrangements have been characterized as per se violations, but the necessity of conducting an extensive market inquiry and the willingness of courts to consider justification for the conduct has resulted in a near Rule of Reason approach. *Id.* at 77. Exclusive dealing arrangements are not treated as per se unlawful because they may have legitimate or procompetitive purposes. *Id.* at 96.

Viewed as a whole, one must conclude that the economic effects of vertical arrangements are either so little known, *cf.* White Motor Co. v. United States, 372 U.S. 253, 261, 263 (1963), or thought to be procompetitive under so many conditions, *cf. GTE Sylvania*, 433 U.S. at 54-59, that criminal prosecution generally is considered unwarranted.

ments be considered outside the ambit of section 1. Extending section 1 to vertical agreements lacking any horizontal element would deter conduct that could not possibly be characterized as cartelization, would not contribute to deterring genuine cartel behavior, and would increase antitrust enforcement costs because an extraordinarily high percentage of private antitrust cases have been premised on vertical theories.[166] Both history and policy thus dictate limiting section 1 to horizontal agreements.

2. Does Section 1 Require Market Power?

Competitors cannot collaborate successfully to restrain trade by reducing output unless the competitors collectively exercise market power. The legislative history of the Sherman Act indicates that Congress was concerned with combinations that resulted in market power.[167] The historical background also demonstrates that the detrimental exercise of market power was the central evil that the Sherman Act addressed.[168] Accordingly, from both a textual and historical standpoint, there is overwhelming justification for considering market power to be an essential element of a section 1 offense.

From a policy standpoint, the arguments for regarding market power as an essential element of a section 1 offense are mixed. As a matter of economic theory, market power is essential for cartelization. In addition, requiring an antitrust plaintiff to prove market power would dramatically reduce the number of cases in which the courts erroneously condemned legitimate competitive conduct as unlawful cartelization. This concern is not a trivial consideration in

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166. *See* National Economic Research Assocs., Inc., A Statistical Analysis of Private Antitrust Litigation: Final Report (1979). That study found: "Restraints of trade, primarily in the forms of dealer terminations, refusals to deal, exclusive dealing and tying, constitute the primary grounds on which most suits are initiated. Vertical price-fixing, vertical market allocation and discriminatory pricing are also frequently alleged." *Id.* at 49. Among cases surveyed, vertical price fixing, vertical market allocation, exclusive dealing, tying, price discrimination, dealer termination, and boycotts accounted for 73% of all alleged practice violations and for 70% of the primary allegations per case. *Id.* at 28-29. Horizontal price fixing and market allocation accounted for only five percent of all claimed practice violations and two percent of the primary allegations. *Id.* The study also found that "vertical rather than horizontal market relationships characterize most of the litigating parties." *Id.* at 49; *see also* Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 409 (1970) (finding that private cases are overwhelmingly "abuses" cases such as price discrimination, vertical integration, tying, vertical restraints, and monopolization, rather than price fixing cases).

167. *See supra* text accompanying notes 84-112.

168. *See supra* text accompanying notes 76-83.

light of cases such as *United States v. Sealy, Inc.*[169] and *United States v. Topco Associates, Inc.*[170] Per se violations of section 1 were found in both cases even though the conduct in question could not possibly have been cartelization because of the lack of market power.

On the other hand, because of the difficulty of proving market power, requiring antitrust plaintiffs to demonstrate market power in order to establish a section 1 violation undoubtedly would allow some cases of genuine cartelization to withstand a section 1 challenge. More seriously, a market power proof requirement might lessen the deterrent effect of a per se rule against naked price fixing.[171] The public welfare loss associated with such reduced deterrence might be quite high. Naked price fixing, price fixing by entities that have not appreciably integrated their operations in ways that might result in efficiencies, almost always substantially reduces consumer welfare.[172] In addition, requiring plaintiffs to prove market power would lengthen antitrust trials and increase the cost of antitrust enforcement.[173]

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169. 388 U.S. at 357-58.

170. 405 U.S. at 600.

171. Agreements which create such potential power may well be held to be in themselves unreasonable . . . without the necessity of minute inquiry . . . and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether . . . [a price] has become unreasonable through the mere variation of economic conditions.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

172. *See, e.g.*, Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429 (1981) (private damage suits against price fixing reduced price of bread); Lean, Ogur & Rogers, *Competition and Collusion in Electrical Equipment Markets: An Economic Assessment*, FTC STAFF REP. (1982) (enforcement of rules against price fixing reduced prices four to ten percent); *see also* R. BORK, *supra* note 10, at 268 ("The efficiencies arising from a naked price-fixing or market-division agreement, if any even do arise, must be so minor that the law is justified in ignoring them," since "the possibilities of saving seem miniscule compared to the certainty of output restriction."); Easterbrook, *supra* note 153, at 19 ("[I]f a group of firms agree on price but do not integrate any of their production facilities," they "reduce output and produce nothing in return.").

173. If parties are "allowed to prove lack of market power," it means

introducing the enormous complexities of market definition into every price fixing case. A cartel in the steel industry could not be declared unlawful without a trial on the cross-elasticities of demand between steel, aluminum, copper, cement, wood, and so on. There would be no net gain from such trials. In fact, the only result would be to make the prosecution of output-restricting cartels much more difficult, rendering the law less effective.

R. BORK, *supra* note 10, at 269.

The principle of *per se* . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken.

Two alternate approaches to the market power proof issue appear sensible. The first approach would make market power an element of a prima facie case of cartelization except in cases that involve naked price fixing or market division. In naked price fixing or market division cases, market power would be presumed, but defendants would be permitted to rebut this presumption by offering evidence of lack of market power. Creating a market power presumption in naked price fixing cases is justified because experience demonstrates that naked price fixing generally exemplifies cartel behavior and can seldom be defended with procompetitive justifications.[174]

A second approach to the market power issue would be to drop market power as an element of a section 1 offense in naked horizontal price fixing and market division cases.[175] This approach could be justified on the ground that naked price fixing and market division by competitors are virtually congruent with cartelization. From a policy standpoint, this second approach is defensible as long as the test to determine whether a price setting or market division agreement is a "naked" restraint of trade adequately distinguishes between competitive behavior and cartel behavior.[176]

United States v. Northern Pac. Ry., 356 U.S. 1, 5 (1958). *But see* Easterbrook, *supra* note 153, at 19, 21-24. Easterbrook urges that "in every case the plaintiff should be required to offer a logical demonstration that the firm or firms employing the arrangement possess market power," *id.* at 19, although "sometimes this is a close and difficult question," *id.* at 24.

174. *See supra* note 172 and accompanying text; *see also infra* note 176.

175. Under current law, "the absence of proof of market power does not justify a naked restriction on price or output." NCAA v. Board of Regents, 104 S. Ct. 2948, 2965 (1984). To determine whether conduct is a naked restriction on price or output and thus to be characterized as per se unlawful, however, an inquiry is permitted regarding the purpose and effect of the conduct. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 19-21 (1979).

176. Naked price fixing does not always reduce output. For example, competitors may try to fix prices but fail. In effect, a per se rule against naked horizontal price fixing would encompass cases of attempted cartelization as well as successful cartelization. Assuming that naked price fixing by competitors provides no social benefit, a rule of law that prohibits attempted cartelization as well as successful cartelization is satisfactory so long as the rule does not deter competitive behavior. Cases such as *Sealy* and *Topco* demonstrate that the Supreme Court has not always been able to distinguish between cartel behavior and competitive behavior. The problem has been that the Court automatically assumed tbat price fixing was illegal per se, without inquiring whether the price fixing was a form of cartelization. For the first time, the Supreme Court in *BMI*, evidenced a willingness to look behind the price fixing label to determine whether the conduct was naked price fixing. As long as the Court follows *BMI* and allows parties to defend price fixing charges on the basis that tbe price setting arrangement actually increased output, a rule of law treating naked price fixing by competitors as a per se offense should not deter a significant amount of competitive behavior.

3. Does Section 1 Require an Output Restricting Effect?

Output restriction is a necessary element of a section 1 offense; the language of the Sherman Act requires that the agreement be "in restraint of trade." One critical question is whether section 1 requires a showing that the agreement was reached with the *intent* to restrict output, that the agreement has the necessary *effect* of restricting output, or simply that the agreement has the *tendency* to restrict output. The legislative history casts some light on this issue.

Senator Sherman's original bill contained separate civil and criminal sections with different requirements. The civil section, "being a remedial statute," was to be construed liberally.[177] Civil liability could be established by showing the "tendency" to prevent competition.[178] In contrast, the criminal section was to be construed strictly and was viewed as difficult to enforce.[179] Intent would have had to be proved to establish a crime.[180]

In contrast to the original Sherman bill, the Act, as ultimately passed by Congress, draws no distinction between criminal and civil liability. On its face, the Sherman Act defines both cartelization and monopolization as criminal conduct. Because cartelization is a crime, it would seem necessary to prove intent and not just tendency. However, because an actor is presumed to have intended the necessary or inevitable consequences of his actions, intent and tendency merge at some point.[181] Thus, it would seem necessary to prove either that a challenged agreement was formed with the explicit intention to restrict output or, at a minimum, that its necessary tendency was to restrict output.

Although economic analysis of cartelization would focus on the actual output reducing effect of an agreement among competitors, policy considerations and history lead to a rejection of the actual effect on output as the appropriate test of illegality. In many cases, our ability to demonstrate the exact consequences of economic

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177. 21 CONG. REC. 2456 (1890).

178. *Id.*

179. *Id.*

180. *Id.*

181. The principle that only conscious wrongdoing constitutes crime has deep roots in our legal system. A coexistent principle exists that, even for crimes requiring a specific intent, a person is presumed to intend the natural or probable causes of his knowing acts. *See, e.g,* United States v. Durham, 512 F.2d 1281 (1975), *cert. denied*, 423 U.S. 871 (1975). The Supreme Court has held that knowledge of probable anticompetitive effect is sufficient to establish tbe intent necessary to support a criminal violation of the Sherman Act. *See* United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978).

conduct is insufficient to enable us to ascertain with certainty the effect of business transactions on output. The consequences of using an actual effect on output test could be perverse. For example, in naked price fixing cases, proving that the effect of the conduct was to restrict output may be difficult. Thus, an actual effect test might weaken the deterrence value of the antitrust laws. In other cases, particularly if the market power element was not required, an effect on output test might allow some conduct to be branded as criminal merely because the economic evidence supported the proposition that the conduct might reduce output. For example, noncollusive, resale price maintenance may restrict output, depending on the elasticity of demand for a product with respect to the service provided in connection with the sale of that product versus the elasticity of demand for that product with respect to its price.[182] Yet, few if any analysts think that resale price maintenance should be viewed as criminal conduct.[183] Both in terms of reducing enforcement costs and in differentiating between cartel behavior and competitive behavior, a legal standard that requires proof of intent or the necessary tendency of the challenged agreement to restrict output is preferable to a standard requiring proof that the conduct undertaken pursuant to the agreement actually caused a reduction in output.

C. *Applications of the Cartelization Standard*

The application of the cartelization standard to business conduct can be understood in the context of specific doctrinal areas.

1. Vertical Restraints

First, consider the area of vertical restraints, such as resale price maintenance, dealer selection or termination, exclusive dealing, or tying arrangements. Arrangements that are purely vertical and do not contain any horizontal agreements do not come within the definition of cartelization. Under certain circumstances, however, such conduct may constitute monopolization and be subject to challenge under section 2. Vertical restraints also may be challenged under section 3 of the Clayton Act[184] or section 5 of the

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182. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 702-03 (1983).

183. *See infra* text accompanying notes 289-90.

184. 15 U.S.C. § 14 (1982).

Federal Trade Commission Act.[185] Arrangements that are strictly vertical, however, would never be subject to challenge under section 1 of the Sherman Act.

2. Horizontal Price Fixing and Market Allocation Agreements

Consider agreements among competitors to fix prices or allocate markets. Because naked horizontal price fixing and market division have the necessary tendency to restrict output, proof that competitors agreed to fix prices or divide markets would establish a prima facie case of carteliziation. Although the tendency to restrict output would be presumed, the defendants would be permitted to demonstrate that the agreement does not in fact restrict output. For example, such a demonstration could be made by showing that partial integration has enabled the defendants to achieve efficiencies resulting in increased rather than decreased output. Thus, in the factual setting of *BMI*,[186] the defendants might show that the joint licensing arrangement reduced the costs of transacting for individual licenses and increased the output of the industry.

If absence of market power were permitted as an affirmative defense, the defendant also could rebut a prima facie cartelization case by demonstrating that the parties to the agreement lacked market power. The defendants might show, for example, that the existence of close competitors prevented defendants from controlling prices. Under this approach, the *Topco*[187] defendants would have been permitted to demonstrate that the large number of grocery stores competing with Topco members denied the members the power to control prices.

As a practical matter, the innocuous effect and the insufficient power defenses tend to converge. In an actual horizontal price fixing case, the named defendants could refute the inference of market power only if they were able to delineate the parties to the agreement. Given the well-known illegality of naked price fixing agreements in the business community, agreements among competitors that set prices and clearly indicate the identities of the parties to the agreement are almost certain to be joint ventures. Thus, for all practical purposes, a cartelization standard would maintain a rule in effect very similar to the traditional per se rule against

185. 15 U.S.C. § 45 (1982).
186. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).
187. United States v. Topco Assocs., 405 U.S. 596 (1972).

naked horizontal price fixing and market division. In order to establish a prima facie case, the plaintiff would need to prove only the existence of a horizontal price fixing agreement. He would not need to prove the existence of market power or demonstrate the arrangement's necessary tendency to restrict output. Naked price fixing agreements, *i.e.*, agreements among nonintegrated competitors, do not create efficiencies. Thus, as a factual matter, defendants that have engaged in naked horizontal price fixing would never be able to rebut the presumption that the agreement's necessary tendency is to restrict output. If the defendants are engaged in a joint venture that increases output, however, they could effectively rebut the presumption that the price fixing agreement restricts output.

3. Mergers

If a merger of horizontal competitors would result in a firm with monopoly power, the merger would be a form of cartelization and would violate section 1.[188] On strictly economic grounds, some monopolistic mergers theoretically might be defended as achieving efficiencies.[189] Under the cartelization standard, however, an efficiency defense would not be permitted. This position is consistent with the legislative history. Senator Sherman condemned mergers to monopoly because "all experience shows that tbis saving of cost goes to the pocket of tbe producer."[190]

188. Early Supreme Court decisions held, correctly, that mergers resulting in monopoly power violated the Sherman Act. *See* United States v. Union Pac. R.R. Co., 226 U.S. 61 (1912); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); United States v. Standard Oil Co., 173 F. 177 (1909), *modified and aff'd*, 221 U.S. 1 (1911); United States v. American Tobacco Co., 164 F. 700 (1908), *rev'd*, 221 U.S. 106 (1911). The earliest Sherman Act merger cases and their effects on the merger movement are discussed in L. SULLIVAN, *supra* note 28, at 579-83, 602-03.

189. In terms of economic efficiency, a merger would increase consumer welfare as long as the efficiency gains were greater than the deadweight loss resulting from the output restriction that accompanies increased monopoly power. Williamson analyzes the tradeoff between market power and efficiencies that may occur in horizontal mergers in his article, *Economies as an Antitrust Defense: The Welfare Tradeoff*, 58 AM. ECON. REV. 18 (1968). For a comprehensive survey of the subject, see Fisher & Lande, *supra* note 157. *See also* Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381 (1980).

190. 21 CONG. REC. 2460 (1890). Senator Sherman accurately perceived that mergers resulting in monopoly power would almost inevitably lead to higher prices. For an exposition of the conditions under which a merger resulting in a single firm monopoly could sufficiently decrease the firm's marginal costs so that the new monopoly price would be as low or lower than the premerger competitive price, see Fisher, Lande & Vandaele, *Afterword: Could a Merger Lead to Both a Monopoly and a Lower Price?*, 71 CALIF. L. REV. 1697, 1705

Public policy considerations also support denial of the efficiency defense for monopolistic mergers. Assuming that monopolies rationally pursue their own self-interest and that a monopolist's self-interest generally is furthered by restricting output and increasing prices, the necessary tendency of a merged entity possessing monopoly power would be to restrict output and increase prices. Because the resulting firm would have both the capability and the incentive to restrict output, it is unwise and unnecessary to allow judges and juries to speculate about whether, on balance, society is better off as a consequence of the productive efficiencies that might result from the merger.

In contrast, horizontal mergers that do not result in monopoly power do not constitute cartelization and, consequently, do not violate section 1. Because vertical and conglomerate mergers do not contain agreements between competitors, those mergers would not be subject to challenge under the Sherman Act. Of course, all mergers remain subject to review under section 7 of the Clayton Act, a provision that addresses mergers directly and that applies different standards of legality than the Sherman Act.[191]

4. Joint Ventures

Joint ventures are, in effect, partial mergers.[192] When a joint venture comprises competitors who collectively possess monopoly

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(1983) ("Although it is possihle under our extreme assumptions for a merger creating a monopoly to have sufficient efficiencies to lead to lower consumer prices, such a result would require impossibly large efficiencies and rather large elasticities of demand.").

191. "The traditional view is that the Sherman Act standard, which requires an actual restraint of competition, is harder to meet than the Clayton Act's 'incipiency' standard, which requires only a tendency to suhstantially lessen competition or create a monopoly." 4 E. KINTNER, FEDERAL ANTITRUST LAW § 35.8, at 197 (1984); *see, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (affirming finding of no Sherman Act § 1 violation but remanding for further findings on Clayton Act § 7 question); Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962) ("tests for measuring the legality of any particular economic arrangement under the Clayton Act are . . . less strigent than those used in applying the Sherman Act"); *see also* Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 814-15 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); United States v. Tidewater Marine Serv., Inc., 284 F. Supp. 324, 343 n.16 (E.D. La. 1968); Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177, 183 (E.D. Mich. 1960), *aff'd per curiam*, 280 F.2d 747 (6th Cir. 1960); United States v. Bethlehem Steel Corp., 168 F. Supp, 576, 588 (S.D.N.Y. 1958); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 394-95 (S.D.N.Y. 1957). *But see* P. AREEDA & D. TURNER, *supra* note 28, ¶ 304C, at 9 (arguing that the same standards should apply under the two statutes); United States v. First Nat'l Bank and Trust Co., 376 U.S. 665 (1964) (applying Sherman Act § 1 merger standard in a manner that appears identical to Clayton Act § 7 standards).

192. Joint ventures have been analyzed under both § 7 of the Clayton Act, *see, e.g.*, the Supreme Court's instruction on remand in United States v. Penn-Olin Chem. Co., 378

power, a joint venture, like a merger, can constitute cartelization. Whether such a joint venture is actually a cartel depends upon whether the intent of the parties or the venture's necessary effect is to reduce output.

For example, suppose all members of the automobile industry form a joint venture to develop air pollution control technology. On its face, the joint venture appears likely to lead to an increase in output. Nevertheless, this venture might constitute cartelization. The automobile manufacturers collectively may agree to restrict the developmental pace of the new technology, agreeing in effect to restrict future output. Alternatively, the joint venture actually may serve as a means to facilitate present cartelization of automobile production, providing the automobile manufacturers with a method for coordinating pricing and output decisions.

By its nature, a joint venture always has the ostensible purpose of increasing output. At the same time, a joint venture among competitors that collectively possess monopoly power has some potential for restricting output. Traditional Rule of Reason analysis would balance the venture's benefits in terms of increased productive efficiency against the costs attributable to the decrease in allocative efficiency due to the venture. Under a cartelization standard no such balancing would be necessary. Instead, the plaintiff or prosecutor would have to demonstrate either (1) that the joint venture participants intended to reduce their output or (2) that the joint venture had the necessary tendency to restrict their output. To establish a violation, therefore, the joint venture must be, in effect, a disguised cartel. If an intent or necessary tendency to restrict output is established, an efficiency defense would not justify the cartel behavior.

5. Boycotts

Although boycotts and concerted refusals to deal have been characterized as per se violations of section 1, in practice they have presented serious problems under traditional antitrust analysis.[193]

U.S. 158, 177 (1964), and the Sherman Act, *see, e.g.*, Virginia Excelsior Mills, Inc. v. FTC, 256 F.2d 538, 540 (4th Cir. 1958); United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd mem.*, No. 81-6003 (2d Cir. Apr. 7, 1981). A discussion of the major cases is found in ABA ANTITRUST SECTION, *supra* note 165. Recent proposed analytical frameworks include Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523 (1982); Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, 52 ANTITRUST L.J. 625, 630-35 (1983).

193. *See infra* note 281.

Under a cartelization standard, the analysis is considerably more straightforward.

Boycotts are collective agreements not to deal with a particular firm or class of firms. If the participants in a boycott are competitors that collectively exercise monopoly power, the boycott can be a form of cartelization if the intent or necessary tendency of the boycott is to restrict the output of the boycotting firms. When the boycott is designed either to create or to support a cartel, the requisite intent or tendency generally exists. For example, a boycott designed to force a supplier not to deal with a price cutting competitor would have the necessary tendency to restrict output. This hypothetical boycott is designed to create or support a cartel and thus would be illegal under a cartelization standard if the participating firms collectively possessed market power.

6. Miscellaneous Horizontal Agreements

A variety of miscellaneous horizontal agreements, such as agreements to exchange information,[194] to set standards,[195] or to cross-license technology[196] have been held to violate section 1. These agreements cannot be classified uniformly because the agreements may be designed to reduce costs and increase output or they may be used in connection with cartelization.

The analysis of whether these miscellaneous horizontal agreements violate section 1 under a cartelization standard is similar to the approach applicable to joint ventures and boycotts. To violate section 1, the agreement must involve competitors that collectively possess monopoly power. In addition, the agreement at issue must

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194. The Supreme Court has struggled with the issue of price dissemination since 1921 but has yet to articulate a firm guiding principle for a practice that may be procompetitive in some cases, but anticompetitive in others. American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). The major cases and commentaries are discussed in Prance, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55 (1983); *see also* ABA ANTITRUST SECTION, *supra* note 165, at 33-37. For the view that necessary price dissemination can proceed without undue interference from the antitrust laws in an industry with very complex information needs (trucking), see MOTOR CARRIER RATEMAKING STUDY COMM'N, COLLECTIVE RATEMAKING IN THE TRUCKING INDUSTRY: A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES (1983).

195. For a comprehensive discussion of the procompetitive and anticompetitive effects that standard setting has on commerce, and pertinent case law, see BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMM'N, STANDARDS AND CERTIFICATION FINAL STAFF REPORT (1983).

196. A variety of patent licensing practices have been held to violate the Sherman Act under certain circumstances, including cross-licensing of patents. *See* ABA ANTITRUST SECTION, *supra* note 165, at 514-16.

create, in effect, a disguised cartel, or the agreement must call for conduct by the parties that is designed to create or support a cartel. Thus, agreements by firms with collective monopoly power to exchange information, to set standards, or to cross-license technology will violate section 1 if, but only if, the agreement is proven to be part of an overall scheme to limit output and increase prices.

D. Comparison with the Efficiency Standard

Because the prevailing orthodoxy considers economic efficiency to be the primary, if not the exclusive, goal of the antitrust laws,[197] it will be useful to compare the cartelization standard with a standard of illegality based exclusively on an evaluation of the efficiency consequences of a challenged practice, a standard referred to in this Article as the pristine economic efficiency standard.

1. The Role of Market Power

Except in naked price fixing and market division cases, market power is a necessary element of a section 1 violation under the cartelization standard. By contrast, market power is not an element of a section 1 violation under a pristine economic efficiency standard. Rather, one need prove merely the existence of an agreement between any two entities that has the effect of reducing economic efficiency.

Under either standard, the role of market power is the same in naked price fixing and market division cases. Neither standard requires a showing of market power. The role of market power differs under the two standards, however, in those cases that traditionally are analyzed under the Rule of Reason. Under the cartelization standard, before analyzing the likely effect on output, courts screen out all cases in which the parties to the agreement lack collective market power. This preliminary screening process cannot be accomplished under a pristine economic efficiency standard because every challenged arrangement must be evaluated to determine whether it leads to a net increase or decrease in welfare even if the parties to the arrangement do not possess market power.

Professor Easterbrook, one of the leading current spokesmen of the Chicago school, has argued that business practices are not likely to reduce consumer welfare systemically unless the parties

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197. *See supra* note 28.

using the practice collectively possess market power.[198] Accordingly, Professor Easterbook has proposed the use of a market power screen: "[I]n every case the plaintiff should be required to offer a logical demonstration that the firm or firms employing the arrangement possess market power."[199] To the extent that the efficiency standard is modified as Professor Easterbrook suggests, it will become, in practice, more similar to the cartelization standard.

2. The Role of Horizontal Agreements

To establish a section 1 violation under the cartelization standard, one must always show an agreement among competitors. By contrast, under the pristine economic efficiency standard, courts examine the welfare consequences of all agreements, vertical as well as horizontal. Adoption of a cartelization standard, therefore, would allow the courts to screen out the large numbers of strictly vertical cases.

Chicago school analysts generally assert that most vertical restraints should not be considered to be antitrust violations.[200] They argue that vertical restraints almost always increase output unless a concommitant horizontal restraint is present.[201] This argument is persuasive under a cartelization standard but is inconsistent with a pristine economic efficiency standard. As discussed below, some vertical restraints can reduce efficiency even while increasing output.[202] Accordingly, it would be impossible legitimately to screen out vertical restraints under a pristine economic efficiency standard.

3. The Role of Efficiency Enhancement

Although a challenged practice's potential for enhancing efficiency is a valid consideration under both the cartelization and efficiency standards, the role of efficiencies is very different under the two approaches.

Under the cartelization standard, the defendant can demonstrate efficiencies to rebut the presumption that an agreement that fixes prices also restricts output. If the intent or necessary ten-

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198. Easterbrook, *supra* note 153, at 19-23.

199. *Id.* at 17.

200. The seminal article challenging antitrust doctrines regulating vertical restraints is Director & Levi, *Law and the Future: Trade Regulation*, 51 Nw. U.L. REV. 281 (1956).

201. *See, e.g.*, R. BORK, *supra* note 10, at 288-91; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

202. *See infra* text accompanying notes 206-09.

dency to restrict output is affirmatively established, however, efficiency cannot be asserted as a defense. In contrast, efficiency enhancement is always a defense under the pristine economic efficiency standard. Theoretically, the finder of fact balances potential welfare loss resulting from a practice's anticompetitive effects against the potential welfare gain from economic efficiencies it generates.

If judges and juries possessed complete information regarding supply and demand conditions for all products under all conceivable circumstances, they could determine with mathematical exactitude the welfare consequences of any business practice. In the real world, however, such information is unavailable. Economic efficiencies and welfare shifts cannot be measured. As Professor Easterbrook has written:

> It is fantastic to suppose that judges and juries could make such an evaluation. The welfare implications of most forms of business conduct are beyond our ken. If we assembled 12 economists and gave them all available data about a business practice plus an unlimited computer budget, we would not get agreement about whether the practice promoted consumers' welfare or economic efficiency more broadly defined.[203]

When welfare consequences are ambiguous, it is virtually impossible to apply an efficiency standard. In such cases, courts cannot balance the anticompetitive effects of a practice against its procompetitive effects.[204] Consequently, several commentators have called for simpler rules to shortcut the full-fledged analysis required under the pristine economic efficiency standard.[205] A shortcut is, of course, already available in the cartelization standard.

4. The Role of Output Restriction

Under the cartelization standard, the tendency to restrict output is an essential element of a section 1 violation. Similarly, Chicago school analysts generally have assumed that output levels are related directly to allocative efficiency and consumer welfare and that output restriction is an essential element of a section 1 violation under the efficiency standard.[206] Both standards, however, cannot treat output restriction in the same manner because output

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203. Easterbrook, *supra* note 153, at 12.

204. *See, e.g.*, Fisher & Lande, *supra* note 157.

205. *See, e.g.*, *id.*; Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979); Posner, *supra* note 201.

206. *See, e.g.*, Posner, *supra* note 201, at 21.

restriction is not always equivalent to welfare reduction.

Ordinarily, economic activity that increases output also improves allocative efficiency and increases consumer welfare. Output enhancement, however, sometimes can result in consumer welfare reduction.[207] Although the marginal consumers who receive the increased output clearly benefit, the increase in output may come at the expense of other, inframarginal customers whose welfare is reduced. For example, in the case of price discrimination, the increased output resulting from additional sales to favored, marginal customers is accompanied by higher prices to disfavored, inframarginal customers. In this case, it is possible for output to increase but for economic efficiency to decrease.[208]

Similarly, resale price maintenance that is used to increase point-of-sale services can increase output while decreasing the welfare of inframarginal consumers who would rather purchase the product at a lower price without the additional services.[209] If the welfare gain of the new marginal customers who are attracted by the increased services is outweighed by the welfare loss of the inframarginal customers who do not desire those services, overall consumer welfare is diminished and allocative efficiency is reduced.

Since output changes are not always equivalent to welfare changes, the pristine economic efficiency standard differs, at least in theory, from the cartelization standard. In practice, however, it is virtually impossible to weigh the welfare consequences to marginal customers and inframarginal customers. The inquiry demanded by the pristine economic efficiency standard simply cannot be performed. Accordingly, a workable rule of law must be framed in terms of other factors. Recognizing the impossibility of measuring economic efficiency, Professor Easterbrook has proposed that courts "replace the existing method of antitrust analysis with a series of simple filters."[210] Two of his proposed filters would achieve results similar to those attained by using the tendency to restrict output test employed under the cartelization standard. One filter would screen out cases in which the use of the practice, with other things held equal, was accompanied by an increase in output.[211] A second filter would screen out cases in which the "defendant's

207. Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. ECON. 417 (1975).

208. *See* Schmalensee, *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination*, 71 AM. ECON. REV., Mar. 1981, at 242, 242-43.

209. Scherer, *supra* note 182.

210. Easterbrook, *supra* note 153, at 39.

211. *Id.* at 31-33.

practices are [not] capable of enriching the defendant by harming consumers."[212] These two filters would screen out cases in which the challenged practice does not have the tendency to restrict output. If Professor Easterbrook's suggestions are followed, the efficiency standard would become substantially similar to the cartelization standard.

VI. The Burger Court's Implicit Adoption of a Cartelization Standard

The recognition that in 1890 Congress understood section 1 to prohibit only cartelization is of little value unless, acting on that recognition, modern courts are in a position to revert to an explicit cartelization standard. Accordingly, it is useful to ask whether, under intervening precedents, express judicial adoption of a cartelization standard is conceivable. As the following discussion demonstrates, an examination of recent Sherman Act decisions reveals that such an adoption is not only conceivable, but the Supreme Court already has adopted implicitly an approach to section 1 that displays all of the essential elements of a cartelization standard.

The Supreme Court's reinterpretation of the Sherman Act dates from its landmark 1977 decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*[213] In *Sylvania* the Court overruled the rule announced in *Schwinn*[214] under which vertical, nonprice restraints had been declared illegal per se. More important than the holding of the case, however, were several important statements in the opinion that subsequently have helped to provide a more coherent analytical framework for applying the Sherman Act.

The Court rejected two possible foundations for interpreting the Sherman Act. First, the Court rejected the hypothesis that the scope of the Sherman Act was determined by the state of the common law at the time that Congress passed the Sherman Act.[215] The Court also rejected the "view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen."[216] The Court conceded that "[c]ompetitive economies have social and political as well as economic advantages"[217] but concluded that "an antitrust policy divorced from market considera-

212. *Id.* at 18.
213. 433 U.S. 36 (1977).
214. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
215. *GTE Sylvania*, 433 U.S. at 53 n.21.
216. *Id.*
217. *Id.*

tions would lack any objective benchmarks."[218]

The *Sylvania* Court implicitly recognized that when business conduct, including vertical arrangements, had the effect of increasing output, it did not violate the Sherman Act. The Court identified output enhancing "efficiencies in the distribution of [a manufacturer's] products" as "redeeming virtues," the presence of which the Court characterized as having been "implicit in every decision sustaining vertical restrictions under the rule of reason."[219]

The Court noted several possible distinctions between vertical price restraints and nonprice restraints. In one of these distinctions, the Court expressly recognized that the real problem with vertical price restraints was their propensity to facilitate cartelization:

> In his concurring opinion in *White Motor Co.* v. *United States*, Mr. Justice Brennan noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing."[220]

The Court repeated its implicit groping in *Sylvania* toward a cartelization standard in its next two section 1 decisions, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[221] and *National Society of Professional Engineers v. United States.*[222] *BMI* concerned the applicability of the per se rule against price fixing to a joint marketing arrangement among competitors. *Professional Engineers* concerned the legality, under the Rule of Reason, of another agreement by competitors having an effect on prices. Considered together, the two cases indicate that the per se approach and the Rule of Reason approach have a common purpose: "to form a judgment about the competitive significance of the restraint,"[223] to determine whether the practice tends to restrict competition and decrease output.[224]

In *BMI* the Court declined to hold that the issuance of blanket licenses for copyrighted musical compositions at fees negotiated by licensing organizations constituted per se illegal price fix-

218. *Id.*
219. *Id.* at 54.
220. *Id.* at 51 n.18 (citations omitted).
221. 441 U.S. 1 (1979).
222. 435 U.S. 679 (1978).
223. *Id.* at 692.
224. *BMI*, 441 U.S. at 20.

ing in violation of section 1. Although the licensing arrangement concerned an agreement among competitors that eliminated some forms of price competition, the Court concluded that the agreement was not a " 'naked restrain[t] of trade' . . . but rather accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use."[225] The Court avoided applying the per se rule against price fixing by redefining the thrust of the per se rule:

> More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always *tend to restrict competition and decrease output*, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."[226]

The Court thus held that, even though, in some literal sense, the conduct entailed some agreement on price among competing sellers, it was improper to characterize this conduct as a per se violation of section 1 unless the conduct at least had the tendency to restrict output.

Professional Engineers concerned a section 1 challenge to a canon of a professional association of engineers that forbade members to engage in competitive bidding. The association argued that competitive bidding would produce inferior engineering work and endanger the public. The Supreme Court rejected this argument even though it applied the Rule of Reason analysis. The Court declined to "decide whether a policy favoring competition [was] in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision [had] been made by the Congress."[227]

The Court made clear that the purpose of the analysis, whether using a per se approach or a Rule of Reason approach, was the same:[228] "In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . . ."[229] The Court, summarizing the *Sylvania* decision, noted:

> The Court then analyzed the "market impact" of vertical restraints, noting their complexity because of the potential for a simultaneous reduction of

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225. *Id.*
226. *Id.* at 19-20 (emphasis added) (footnote and citation omitted).
227. 435 U.S. at 692 (footnote omitted).
228. *Id.*
229. *Id.*

intrabrand competition and stimulation of interbrand competition. "Competitive impact" and "economic analysis" were emphasized throughout the opinion.[230]

Reading *Professional Engineers* in light of *Sylvania* and *BMI*, it thus appears that evaluating "the competitive significance of a restraint" under the Rule of Reason is a strictly economic inquiry—whether the "economic effect"[231] of the agreement is to "decrease output."[232] Although cartelization is never expressly mentioned in the *BMI* or *Professional Engineers* decisions, the Court focused on output restriction, the fundamental characteristic of cartels.

In its 1980 *Catalano* decision,[233] the Court continued to embrace the line of analysis it had followed in *Sylvania* and *Professional Engineers*. In a per curiam decision, the Court held that a horizontal, industry-wide agreement among competitors to discontinue the practice of giving trade credit was per se illegal. In the opinion of the Court, the agreement "entail[ed] an obvious risk of anticompetitive impact with no apparent potentially redeeming value."[234] Although the Court invoked the traditional per se approach to the agreement, which it deemed analogous to horizontal price fixing,[235] the Court expressly recognized that the output restricting tendency of the conduct justified its condemnation. In rejecting the defendants' argument that their conduct could be justified on the ground that "a horizontal agreement to eliminate credit sales may remove a barrier to other sellers who may wish to enter the market," the Court observed that "in any case in which competitors are able to *increase the price level or to curtail production by agreement*, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants."[236] By focusing on the "obvious risk"[237] of curtailed output and increased price posed by horizontal agreements relating to price and by emphasizing the lack of legally recognized justifications for such agreements, the Court closely followed a carteliza-

230. *Id.* at 691 n.17 (citation omitted).
231. *GTE Sylvania*, 433 U.S. at 59.
232. *BMI*, 441 U.S. at 20.
233. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).
234. *Id.* at 649.
235. The Court stated: "An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing." *Id.* at 648.
236. *Id.* at 649 (emphasis added).
237. *Id.*

tion standard.

In the Court's next major antitrust decision, *Arizona v. Maricopa County Medical Society*,[238] the Court continued to grope for a cartelization standard and, at the same time, demonstrated the problems that arise when courts fail to focus squarely on the Act's underlying offenses. In *Maricopa*, a plurality of the Court[239] found a per se violation in agreements between health insurance companies and foundations representing about seventy percent of licensed doctors under which the participating doctors agreed to limit to stipulated amounts the maximum fees they would claim in full payment for health services provided to policyholders. The plurality of four Justices noted the market share of the participating doctors and that the agreements involved horizontal competitors and related to price.[240] Further, the plurality could not identify any redeeming economic efficiencies, such as those arising out of partial integration: "The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit."[241] Although the plurality did not use the term "cartel," they apparently viewed the challenged conduct as classic cartel behavior—naked price fixing.

The dissent expressly addressed the legality of the challenged conduct in terms of whether it properly could be characterized as cartel behavior:

> Several other aspects of the record are of key significance but are not stressed by the Court. First, the foundation arrangement forecloses *no* competition. Unlike the classic cartel agreement, the foundation plan does not instruct potential competitors: "Deal with consumers on the following terms and no others." Rather, physicians who participate in tbe foundation plan are free both to associate with other medical insurance plans—at any fee level, high or low—and directly to serve uninsured patients—at any fee level, high or low. Similarly, insurers that participate in the foundation plan also remain at liberty to do business outside the plan with any physician—foundation memher or not—at any fee level.[242]

The dissent also differed with the plurality regarding tbe significance of the challenged health plans' potential efficiencies. The

238. 457 U.S. 332 (1982).

239. *Id.* at 333. Justice Stevens wrote the opinion for a plurality consisting of himself and Justices Brennan, White, and Marshall. Justices Powell, Burger, and Rehnquist dissented in an opinion written by Powell. Justices Blackmun and O'Connor took no part in the consideration or decision of the case.

240. *Id.* at 339.

241. *Id.* at 356.

242. *Id.* at 360 (Powell, J., dissenting).

dissent concluded that, on the record before the Court, they "must find that insurers represent consumer interests,"[243] that the plan "has in fact benefitted consumers by 'enabl[ing] the insurance carriers to limit and to calculate more efficiently the risks they underwrite,' "[244] and that the plan " 'therefore serves as an effective cost containment mechanism that has saved patients and insurers millions of dollars.' "[245] Given these potential efficiencies, the dissent concluded that "the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification."[246]

The *Maricopa* case demonstrates the kinds of outcomes that occur when a court fails to adopt an explicit cartelization standard and, instead, continues to rely on an implicit standard. Because the plurality applied an implicit cartelization standard, they concluded that an arrangement among competitors was unlawful because it entailed maximum price setting that apparently was unaccompanied by any redeeming integration. The dissent, employing an approach closer to an explicit cartelization standard, properly focused attention not only on the existence of the agreement but also on the critical question of whether the agreed upon conduct was likely to reduce output. Despite the horizontal agreement regarding price, the evidence indicated that output was not decreased and prices were not increased.

Four decisions from the Supreme Court's 1983-1984 Term demonstrate that the Court now, at least implicitly, very nearly has accepted all of the premises that serve as prerequisites to the Court's formal adoption of a cartelization standard. The first of these decisions was *Monsanto Co. v. Spray-Rite Service Corp.*,[247] a resale price maintenance case. The Court upheld a jury verdict in favor of the plaintiff, a Monsanto distributor who was terminated pursuant to a vertical price fixing conspiracy between Monsanto and it distributors. Because the issue had not been raised by the parties, the majority declined to address whether the per se rule against vertical price fixing should have been overruled. In a footnote, however, the Court left open the possibility that the per se rule might be overturned in the future because resale price mainte-

243. *Id.* (Powell, J., dissenting).
244. *Id.* at 361 (Powell, J., dissenting).
245. *Id.* at 360 (Powell, J., dissenting).
246. *Id.* at 366 (Powell, J., dissenting).
247. 104 S. Ct. 1464 (1984).

nance is not always cartelization.[248] The *Monsanto* opinion suggests that, in a proper case, the Court would be receptive to the adoption of a standard that would proscribe only those vertical restrictions that facilitate horizontal cartels. The decision thus has added some additional impetus to the Court's possible adoption of an explicit cartelization standard.

In *Jefferson Parish Hospital District No. 2 v. Hyde*[249] the Court took another step toward a cartelization standard. *Jefferson Parish* concerned a contract between a hospital and a firm of anesthesiologists under which the firm was to perform all anesthesiological services for the hospital's patients. The district court[250] and court of appeals[251] held that the contract was a tying arrangement that was illegal per se under section 1. The Supreme Court reversed. The Court unanimously agreed that the contract did not violate the Sherman Act. Four dissenters were in favor of overturning the per se rule against tying.[252] The majority thought it was "far too late in the history of our antitrust jurisprudence" to overturn the per se rule against tying.[253] Nevertheless, the majority substantially modified the per se rule by requiring a showing of market power in the tying product market.[254] *Jefferson Parish* suggests the possibility that market power may be deemed an essential element of every section 1 case that concerns practices other than naked price fixing or market division.[255]

248. *Id.* at 1469 n.7.

249. 104 S. Ct. 1551 (1984).

250. Hyde v. Jefferson Parish Hosp. Dist. No. 2, 513 F. Supp. 532 (E.D. La. 1981).

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

252. *Jefferson Parish,* 104 S. Ct. at 1570 (O'Connor, J., dissenting).

253. *Id.* at 1556.

254. *Id.* at 1559-60.

255. The *Jefferson Parish* decision provides mixed signals regarding the necessity of proving market power in other antitrust cases. The text cites one contractual arrangement that "is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found," namely, "[a] price fixing agreement between competitors." *Id.* at 1556. In contrast, a footnote of the opinion contains a quote from United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948), to the effect that price fixing, concerted refusals to deal, and licensing of a patented device on the condition that unpatented materials be used with the patented device are illegal per se without regard to the amount of commerce affected. 104 S. Ct. at 1556 n.10. The text is compatible with a cartelization standard, but the quote in the footnote is not. A reader cannot be certain what to make of the footnote. In light of the erosion of the so-called per se rule against boycotts, *see infra* note 281 and text accompanying notes 267-70, the footnote probably should not be read as a reaffirmation of a rule holding illegal per se all concerted refusals to deal. More likely, the footnote reflects a reluctance by Justices Stevens, Brennan, and Marshall to revise accepted antitrust doctrines. *Cf.* Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984), discussed *infra* in text accompanying notes 256-62, in

The third decision, *Copperweld Corp. v. Independence Tube Corp.*,[256] moved still another step closer to a cartelization standard, implicitly holding that only horizontal combinations violated section 1 of the Sherman Act. In *Copperweld*, the Court overruled the so-called intracorporate conspiracy doctrine under which an unlawful conspiracy could be found between a parent corporation and its wholly owned subsidiary. The Court had some difficulty explaining why intra-enterprise agreements were not subject to challenge under the Sherman Act, particularly since those agreements had the potential to restrain trade. The Court's shorthand answer was that intra-enterprise agreements were in reality unilateral, rather than concerted, conduct.[257] The Court's more detailed explanation of *why* concerted activity posed anticompetitive dangers, however, provides a better understanding of the basis for its decision:

> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that *previously pursued their own interests separately are combining to act as one for their common benefit.* This not only reduces the diverse directions in which economic power is aimed but suddenly *increases the economic power moving in one particular direction.* Of course, such merging of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.[258]

Implicitly, the Court distinguished between cartel agreements and noncartel agreements. The essence of a cartel was that horizontal competitors that "previously pursued their own interests separately" combined for a common benefit.[259] A cartel "increases the

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which all three Justices dissented; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 25 (1979), discussed *supra* in text accompanying notes 221-26, in which Mr. Justice Stevens dissented; Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 71 (1977), discussed *supra* in text accompanying notes 213-20, in which Justices Brennan and Marshall dissented.

The propriety of a narrow reading of footnote 10 of the *Jefferson Parish* decision is confirmed by the Supreme Court's decision in Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 53 U.S.L.W. 4733 (U.S. July 11, 1985), discussed *infra* at text accompanying notes 267-70. The *Pacific Stationery* Court held that a group boycott could not be a per se violation unless the competitors imposing the boycott possessed market power.

256. 104 S. Ct. 2731 (1984).

257. *Id.* at 2740-41.

258. *Id.* at 2741 (emphasis added).

259. *Id.*

economic power moving in one particular direction."[260] In other words, the nature of a cartel was that horizontal competitors achieved market power by combining for their common benefit.[261] All consensual arrangements were designed for the common benefit of the agreeing parties, but only cartel arrangements increased the market power of the combining parties.[262] Thus, under the logic of *Copperweld*, neither vertical agreements nor intra-enterprise arrangements would violate section 1.

Although in the earlier antitrust decisions of the last decade, the Court applied various elements of a cartelization standard, the recent *NCAA v. Board of Regents*[263] decision signals the adoption of a cartelization standard *in toto*. The *NCAA* decision is particularly important. It unifies the Rule of Reason approach and the per se approach and confirms that output restriction is the essence of a Sherman Act section 1 violation.

In *NCAA* the Court held that arrangements whereby the members of the National Collegiate Athletic Association restricted the number of televised showings of college football games violated the Sherman Act. The dispositive reason that the NCAA's television plan violated the Sherman Act was that the plan restricted output:

> Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.[264]

Thus, whether a per se approach or a Rule of Reason approach is used, the inquiry is the same: does the horizontal agreement have the tendency to restrict output?

The *NCAA* decision is informative regarding the selection of a per se or a Rule of Reason approach. A horizontal agreement that creates "a limitation on output" or "operates to preclude any price negotiation" between members ordinarily is considered a per se vi-

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260. *Id.*
261. *Id.*
262. *Id.*
263. 104 S. Ct. 2948 (1984).
264. *Id.* at 2970 (citations omitted).

olation.[265] Nevertheless, a horizontal arrangement that sets prices and has a tendency to restrict output will not be per se illegal if the "horizontal restraints on competition are essential if the product is to be available at all."[266] That is, if the nature of the arrangement indicates that output may increase, no per se rule applies. Instead, the defendant is provided an opportunity, under the Rule of Reason, to demonstrate that the restraint actually increases rather than decreases output. The NCAA failed to make such a demonstration. Accordingly, the Court held the NCAA arrangement illegal under the Rule of Reason.

The Court's steady progression toward adoption of a cartelization standard has continued into the 1984-1985 Term. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*[267] the Supreme Court extended the cartelization standard to the murkiest of all per se rules, the prohibition against group boycotts. *Pacific Stationery* concerned a claim that expulsion from a wholesaler purchasing cooperative was a per se Sherman Act violation. The Court noted the criticisms voiced against the per se rule against group boycotts but chose to clarify and narrow rather than overrule the per se rule. First, quoting from *BMI*, the Court reiterated that "[t]he decision to apply the *per se* rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." ' "[268] Second, the Court characterized the group boycott cases to which it had applied a per se rule:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." . . . In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market. . . . In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.[269]

Finally, the Court held that expulsion from a cooperative could not

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265. *Id.* at 2960.
266. *Id.* at 2961.
267. 53 U.S.L.W. 4733 (U.S. June 11, 1985).
268. *Id.* at 4735 (quoting *BMI*, 441 U.S. at 19-20).
269. *Id.* at 4736 (citations omitted).

be a per se violation unless the cooperative possessed market power.[270]

Two aspects of *Pacific Stationery* are particularly significant. First, the Court seemed to distinguish between the per se violations that were intrinsically similar to cartelization and those that were not. Horizontal price fixing and horizontal market divisions generally are a form of cartelization and are presumptively illegal without any showing of market power. By contrast, group boycotts and tying arrangements are not necessarily forms of cartelization and are not presumptively illegal if the parties using the practices do not possess market power. Second, the Court suggested that a group boycott was not illegal unless the agreement involved competitors that collectively possessed market power, the boycott threatened to force a competitor out of business, and the boycott had no efficiency rationale. If competitors exercise market power in a group boycott to exclude a rival and have no efficiency rationale, the probability is high that the purpose of the boycott is to create or support cartel behavior by restricting output and increasing prices. Treating such boycotts as presumptively illegal, therefore, is consistent with a cartelization standard.

A recapitulation of the doctrinal rules that have evolved in the Burger Court's interpretations of section 1 of the Sherman Act aids in an appreciation of what the Supreme Court has done. The logic of *Copperweld*, when added to the language of *Sylvania*, *Monsanto*, and *Pacific Stationery*, leads to the conclusion that only horizontal agreements violate section 1. Read together, *Professional Engineers, BMI, NCAA*, and *Pacific Stationery* hold that the essence of a section 1 violation is that output must be restricted. These cases further hold that a prima facie violation exists if a horizontal agreement restricts output or fixes prices on its face. The prima facie case can be rebutted, however, by showing that the agreement actually increases rather than decreases output. Finally, *Jefferson Parish* and *Pacific Stationery* suggest that if an agreement does not restrict output or fix prices on its face, the plaintiff or prosecutor must demonstrate market power to prove illegality.

To summarize, a demonstration that competitors have agreed to fix prices or divide markets constitutes a prima facie case of cartelization in violation of section 1. The prima facie case can be rebutted by showing that the arrangement increased output. In all

270. *Id.* at 4737.

other section 1 cases, the plaintiff must show (1) an agreement (2) between competitors (3) with market power (4) with the intent or necessary tendency to restrict output, with the defendant free to prove that the arrangement increases output. The Supreme Court has, in short, implicitly returned to the cartelization standard that originally underlay section 1 of the Sherman Act.

VII. Doctrinal and Practical Problems That Will Be Solved By an Explicit Adoption of a Cartelization Standard

The Supreme Court's failure to articulate and adhere to an explicit cartelization standard has resulted in serious adverse consequences for antitrust jurisprudence. A number of doctrinal and practical problems have arisen, many of which continue to plague the application of section 1. Explicit adoption of a cartelization standard would resolve most of these problems.

A. The Meaninglessness of the Per Se/Rule of Reason Dichotomy

At the heart of Sherman Act jurisprudence is the dichotomy between the per se doctrine and the Rule of Reason. Under the per se doctrine, the Court deems certain types of conduct so plainly anticompetitive that it considers them illegal "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[271] The Court has applied the per se analysis to horizontal price fixing[272] and market division,[273] vertical price fixing,[274] certain group boycotts,[275] and some tying arrangements.[276] All other challenged conduct is evaluated under a Rule of Reason approach.

Under the Rule of Reason, courts determine whether the chal-

271. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

272. *E.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

273. *E.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

274. *E.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 104 S. Ct. 1464 (1984); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

275. *E.g.*, Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 53 U.S.L.W. 4733 (U.S. July 11, 1985); Silver v. New York Stock Exch., 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

276. *E.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947). *But see infra* note 281 and accompanying text.

lenged restraint "is one that promotes competition or one that suppresses competition."[277] Courts must evaluate the challenged conduct in the context of the relevant product and geographic market and determine if "the effect upon competition in the marketplace is substantially adverse."[278] In making the relevant inquiry, a court must

> consider the facts peculiar to the husiness to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained, are all relevant facts.[279]

The per se/Rule of Reason dichotomy is sterile. The per se doctrine has been virtually meaningless because the Court has failed to define adequately the type of conduct subject to per se analysis.[280] Despite the so-called per se rules against boycotts and tying arrangements, the case law demonstrates that many boycotts and tying arrangements are not considered per se illegal.[281] Even in

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

278. United States v. Arnold Schwinn & Co., 388 U.S. 365, 375 (1967).

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

280. H. PACKER, *supra* note 3, at 79.

281. Although group boycotts have been characterized as per se illegal, the Supreme Court recently has acknowledged that "[e]xactly what types of activity fall within the forbidden category is, however, far from certain." *Pacific Stationery*, 53 U.S.L.W. at 4736. Indeed, the Court stated, "'[T]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine.'" *Id.* (quoting L. SULLIVAN, LAW OF ANTITRUST 229-30 (1977)). Because of the uncertainty regarding the reach of the per se rule in this area, many lower courts have analyzed certain types of boycotts under the Rule of Reason, limiting per se analysis to "classic" boycotts. Classic boycotts often turn on finding an exclusionary or anticompetitive purpose. *See, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495-96 (7th Cir. 1983); Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 429-32 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 788 (7th Cir. 1981); Neeld v. National Hockey League, 594 F.2d 1297, 1298-99 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179-80 (D.C. Cir. 1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652 (5th Cir. 1977); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F. Supp. 1103, 1115 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); Mardirosian v. American Inst. of Architects, 474 F. Supp. 628, 637 (D.D.C. 1979). In *Pacific Stationery* the Supreme Court responded to criticism and narrowed the scope of the per se rule against group boycotts. *See supra* text accompanying notes 267-70.

Tying arrangements are also nominally analyzed under the per se concept. To evoke the per se rule, however, the court first must find market power in the tying product and that a "not insubstantial" amount of interstate commerce in the tied product market is affected. *Northern Pacific*, 356 U.S. at 11. Courts also will consider justifications in support of a tying arrangement. Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Elec. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). These considerations make the analysis of ties the area of horizontal price fixing, the Supreme Court has held that some cases should not be treated as per se illegal. Rather than abandon or modify the per se rule against price fixing, however, the Court has framed the inquiry in terms of whether it is proper to "characterize" the challenged conduct as price fixing.[282] This approach is, of course, a modest charade. When the legality of obvious price fixing depends upon whether the price fixing is *characterized as price fixing*, the per se ban against price fixing has little content and no intellectual integrity.

The Rule of Reason has been "equally meaningless" because the Court has not delineated the analytical criteria,[283] and therefore the task prescribed by the Rule of Reason cannot be performed.[284] First, the concept of competition has been too elusive.[285] What must an antitrust court seeks to determine: whether the number of competitive entities has been reduced; whether allocative efficiency has been reduced; whether consumers' wealth has been unfairly transformed into business profits; whether economic, social, and political decisionmaking has been centralized; or whether freedom of individual economic entities has been abridged? Even if the underlying concept were agreed upon, how could a judge or a jury make the evaluation? Courts rightly protest that they cannot perform such tasks. "[C]ourts are of limited utility in examining difficult economic problems. . . . [They are] ill-equipped and ill-situated for such decisionmaking. [They cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions. . . ."[286]

Explicit judicial adoption of a cartelization standard for sec-

a de facto Rule of Reason standard. United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977) (Fortner II). The Supreme Court recently reaffirmed its nominal per se standard but required a study of the impact on competition. Four justices would have abandoned the per se standard altogether. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1570 (1984) (O'Connor, J., dissenting).

282. Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 9 (1979).

283. *See* H. PACKER, *supra* note 3, at 79; *see also* ABA ANTITRUST SECTION, *supra* note 165, at 15 ("Although the rule of reason has been part of Sherman Act jurispurdence for over seventy years, the standards for determining whether particular restraints of trade unreasonably restrict competition are still not clearly established."); Easterbrook, *supra* note 153.

284. *See supra* text accompanying notes 203-05.

285. *See, e.g.*, R. BORK, *supra* note 10, at 58 ("Part of the confusion about goals arises from the ambiguity of the word 'competition' . . . ."); *see also supra* notes 34-40 and accompanying text.

286. United States v. Topco Assocs., 405 U.S. 596, 609-12 (1972) (footnote omitted).

tion 1 would eliminate the false dichotomy between per se and Rule of Reason analysis. All section 1 cases would have a common standard that courts easily could apply. In each case, the court simply would ask whether the challenged conduct constituted cartelization.[287] If so, the conduct would be illegal; if not, the conduct would be legal. By adopting a cartelization standard, the forbidden conduct under both the per se doctrine and the Rule of Reason would be clearly defined, and judges and juries would be given tasks that they could reasonably perform.

B. The Conflict Between Civil and Criminal Actions

The use of identical language in the Sherman Act to define both civil and criminal proscriptions has resulted in an aggravated case of dual personality. The Sherman Act has assumed two identities, one civil and one criminal. The two identities usually politely ignore each other. The criminal identity, by virtue of the prosecutorial discretion of the Antitrust Division, generally has been limited to cases of horizontal price fixing, bidrigging, and market division.[288] The civil identity, by contrast, has developed a much larger and more amorphous shape, limited only by the uncertain contours of the Rule of Reason.

No theoretical jurisprudential wall, however, separates civil liability from criminal liability. Indeed, as a theoretical matter, the two forms of liability bear the same scope. Accordingly, the risk always exists that criminal cases will be brought under theories that now are used only in civil suits. Recent history provides an example of expanded use of criminal liability under the Sherman Act. Even though resale price maintenance much earlier had been declared per se illegal,[289] the Carter administration in 1980 brought

287. *See supra* text accompanying notes 157-83.

288. Donald L. Baker, former Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, 1976-77, stated that "most criminal antitrust cases involve hard-core price-fixing and market allocations." Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 409 (1978). Criminal prosecution is reserved for willful violations, and nearly 80% of such cases entail price fixing. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967); *see also* U.S. JUSTICE DEP'T, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955) ("criminal process should he used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonahly to restrain trade"), *quoted in* United States v. United States Gypsum Co., 438 U.S. 422, 439 (1978). For a discussion of the criminal cases brought in the 1970's, see Kirkpatrick, *Antitrust Enforcement in the Seventies*, 30 CATH. U.L. REV. 431, 561-79 (1981).

289. The first case explicitly holding that vertical price fixing was per se illegal was

the first criminal antitrust case alleging vertical price fixing.[290]

As a doctrinal matter, the discordance hetween the civil and criminal aspects of the Sherman Act is a serious problem, one that assumes constitutional dimensions.[291] Not only are businesses and individuals potentially subject to criminal liability for conduct that never has been labeled criminal in the past, but, given the ambiguities and uncertainties in the application of the Sherman Act, criminal suits conceivably could be brought challenging conduct that traditionally has been viewed as perfectly innocent.[292]

Adopting an explicit cartelization standard for section 1 instantly would heal the discordance between the Sherman Act's civil and criminal sides. Under a cartelization standard, the civil and criminal proscriptions would be congruent. Section 1's proscription would be limited to cartel behavior, agreements among competitors with market power with the intent or necessary tendency to restrict the output of the cartel members. Since parties can determine in advance what conduct is proscribed, treating all prohibited conduct as criminal presents few if any due process problems.

Confining section 1 to those practices that properly constitute criminal behavior would not weaken the structure of the antitrust laws. Business conduct that cannot properly be viewed as criminal but that previously has been held in violation of section 1 would

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United States v. Bausch & Lomb Co., 321 U.S. 707, 720 (1944), but courts have consistently held vertical price fixing illegal ever since *Dr. Miles*, without inquiring into the competitive consequences of such practices. *See, e.g.*, M. HANDLER, H. BLAKE, P. PITOFSKY & H. GOLDSCHMID, *supra* note 141, at 560-61 ("Although the Supreme Court in *Dr. Miles* did not explicitly state that vertical price-fixing agreements are *per se* illegal under the Sherman Act, its reasoning supports that conclusion."). The Supreme Court recently declined the opportunity to reconsider the application of the per se doctrine to resale price maintenance. *Monsanto*, 104 S. Ct. at 1469-70 n.7.

290. United States v. Cuisinarts, Inc., 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. 1981).

291. Note, for example, Professor Packer's evaluation of the questions that Professor Turner proposed for defining "agreement" under the Sherman Act:

> It needs to be noted, and the point is not without relevance to this study, that these two questions ignore—the first implicitly, the second explicitly—the criminal side of the Sherman Act and the difficulties (possibly of constitutional magnitude) that attend the interpretation of a statute whose civil and criminal proscriptions are couched in identical language. We continue to lack the exploration of the criminal side of the Sherman Act from a doctrinal standpoint that will shed some light on this problem.

H. PACKER, *supra* note 3, at 127.

292. "A defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially or that the law has changed in the meantime." 2 P. AREEDA & D. TURNER, *supra* note 28, ¶ 331b2, at 150.

still be subject to scrutiny under the Clayton Act[293] and section 5 of the Federal Trade Commission Act.[294]

C. The Adverse Impact on Consumer Welfare

Antitrust doctrines have been criticized because antitrust decisions have condemned conduct that neither injured consumers nor diminished economic welfare.[295] This unfortunate result followed from the interpretation of the nebulous concept of unreasonably restricting competition to encompass elimination of rivalry, injury to competitors, and reductions in the number of economic participants. These interpretations permitted antitrust suits that reduced consumer welfare.[296]

In theory, an economic efficiency standard would allow only those antitrust suits aimed at enhancing consumer welfare. In practice, however, neither economic efficiency nor consumer welfare can be measured directly. Accordingly, even if courts sought to apply an economic efficiency standard, the potential for decisions injurious to consumer welfare would remain.

By contrast, an explicit cartelization standard virtually would eliminate the risk of condemning business conduct that posed no threat of injury to consumers or diminution of economic welfare. In all section 1 cases, other than horizontal price fixing and market division cases,[297] the plaintiff or prosecutor would have to demonstrate both market power and an intent or necessary tendency to reduce output. When these conditions are present, consumer welfare is almost certainly suboptimal.[298] Similarly, in horizontal price

293. 15 U.S.C. §§ 13-14, 18 (1982).

294. 15 U.S.C. § 45 (1982); *see also infra* text accompanying notes 321-32.

295. *See, e.g.*, R. BORK, *supra* note 10, at 72-89; R. POSNER, *supra* note 13, at 22.

296. Economists usually evaluate economic welfare in terms of "Pareto optimality." *See, e.g.*, F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 8-38 (2d ed. 1980). Pareto optimality is not achieved if total ouput is less than possible. Because cartelization has the effect of reducing the output of the cartel members, it falls short of Pareto optimality unless the cartelization simultaneously creates some offsetting advantages. A cartelization test does not attempt to evaluate any potential efficiencies that may result from cartelization. Accordingly, it is theoretically possihle that a cartelization standard will strike down some conduct that increases consumer welfare. The risk is not significant, however, because few, if any, efficiencies are realized by naked horizontal price fixing, naked market divisions, or by mergers that result in monopoly power. *See, e.g.*, R. BORK, *supra* note 10, at 220-22, 263-68.

297. As discussed *supra* notes 172-76 and accompanying text, cases of naked horizontal price fixing and market division virtually always reduce consumer welfare.

298. As discussed *supra* text accompanying notes 206-09, output expansion can be associated with a reduction in consumer welfare. However, this result generally depends on the existence of substantial market power. Accordingly, requiring proof of hoth market

fixing and market division cases, the defendant would have an opportunity to demonstrate that the challenged practice increased output. Thus, few antitrust suits that reduce consumer welfare are likely to be successful under the cartelization standard.

D. Inappropriate Antitrust Remedies

The Sherman Act provides a unique remedy for antitrust violations: a successful private plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[299] In recent years, the availability of a private treble damages remedy has been subject to scholarly criticism. One criticism notes that treble damages recoveries may be unfair to defendants because "[a] defendant might reasonably suppose that he is complying with the antitrust laws, only to discover that he was mistaken initially or that the law had changed in the meantime."[300] A second criticism addresses the potential inefficiency of treble damages recoveries.[301] The prospect of treble damages may encourage "nuisance suits"[302] or may lead to the consumption of excess resources in pursuit of a large recovery.[303] A third criticism concerns "the lure of the treble damage bonanza, especially for lawyers in class actions, [which] tends to trivialize antitrust litigation [and transform] [o]rdinary tort and contract claims . . . into antitrust complaints."[304]

Proposals for legislative changes to the treble damages remedy have been advanced. A 1955 Attorney General's report recommended that trebling be discretionary.[305] The Reagan Administration has proposed legislative changes that would allow treble damages in per se cases but allow only actual damages plus interest for

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power and the tendency to restrict output will eliminate antitrust suits that reduce consumer welfare.

299. Sherman Act § 7, now found in § 4 of the Clayton Act, as modified, 15 U.S.C. § 15 (1982).

300. 2 P. AREEDA & D. TURNER, *supra* note 28, ¶ 331h2 (1978).

301. The principal critique of the potential inefficiency of treble damages for antitrust violations has been by Professors Elzinga and Breit. *See* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS (1976); Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974); *see also* Schwartz, *supra* note 158, at 1075. For a critical evaluation of the efficiency argument against treble damages, see Sullivan, *Breaking up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17 (1983).

302. K. ELZINGA & W. BREIT, *supra* note 301, at 90-95.

303. *Id.* at 95.

304. 2 P. AREEDA & D. TURNER, *supra* note 28, ¶ 331h2.

305. U.S. JUSTICE DEP'T, *supra* note 288.

violations under the Rule of Reason standard.[306]

An explicit return to the cartelization standard would, without the necessity for legislation, solve many of the perceived problems with the scope of the treble damages recovery. If section 1 antitrust claims required a showing of cartelization, the problem of unfairness would be eliminated. Potential defendants would be aware of their potential liability. The restrictive scope of section 1 liability that would accompany a return to the cartelization standard would end nuisance suits and the trivialization of antitrust. Under a cartelization standard, plaintiffs would have difficulty converting ordinary tort and contract claims into antitrust complaints. Finally, fewer resources would be devoted to section 1 cases as the scope of section 1 retreated to the bounds originally intended by Congress.

Explicit judicial adoption of a cartelization standard would make significant strides toward the rationalization of antitrust remedies. Since compensatory damages with interest, costs, and attorney's fees provide adequate compensation, allowing treble damages must be justified on deterrence grounds.[307] Compensation, by itself, provides adequate deterrence when violations are readily discoverable. When violations have been concealed, however, treble damages supply an added incentive to detect violations and therefore provide an added deterrent. Accordingly, treble damages can be justified as appropriate for deterrence only when violations are concealed.[308] Cartel activity, such as price fixing, market division, and bid rigging, is virtually always concealed. Thus, by paring section 1 back to cartelization, section 1 would be reserved for offenses that fit the treble damages remedy.

E. *The Confusion in Applying Vertical Restraint Doctrines*

Under current Sherman Act jurisprudence, the Supreme Court has drawn a line between vertical price restraints and nonprice restraints. Vertical price restraints are considered illegal per se, and nonprice restraints are tested under the Rule of Reason.[309] This

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306. *See Reagan Administration Approves Proposal for Antitrust, Intellectual Property Bill*, 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1108, at 681, 713-14 (Mar. 31, 1983).

307. For evaluations of the effectiveness of antitrust treble damages in providing compensation and deterrence, see Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 UTAH L. REV. 57; Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

308. *See* R. POSNER, *supra* note 13, at 231.

309. *GTE Sylvania*, 433 U.S. at 51, 59.

distinction makes little sense. As the Supreme Court recognized in *Monsanto*: "[T]he economic effect of all of the conduct described above—unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical."[310] Not only do vertical territorial restrictions affect resale price, price effects often are one of the reasons for using territorial restrictions.[311] Until the courts adopt a coherent and coordinated approach to vertical price and nonprice restrictions, sanity will not return to the area of vertical restrictions. Under a cartelization standard, all vertical restraints would be treated the same under section 1. Absent an element of horizontal agreement, vertical restraints could not be cartelization and would not be illegal under section 1.

F. *The Confusion in Applying the Sherman Act to State and Local Governments*

Commentators uniformly agree that the cases considering the applicability of the Sherman Act to state and local governments are thoroughly confusing.[312] The Supreme Court has been ambiva-

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310. *Monsanto*, 104 S. Ct. at 1470.

311. Territorial restrictions can be used by a manufacturer to reduce intrabrand competition among its distributors, allowing the distributors higher prices and profit margins that can be used to support demand, induce advertising, and enhance customer services. These territorial restrictious affect the consumer the same as if the manufacturer were using resale price maintenance. Professor Posner has written:

> There is no basis for choosing between [price fixing and market division] on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive sales territories is like market division, and therefore bad too . . . .
>
> ¶ . . . .
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> ¶ . . . [If helping entrants break into a market] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem . . . . In fact, *any* argument that can be made in behalf of exclusive territories can also be made on behalf of resale price maintenance.

Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 292-93 (1975) (footnote omitted), *quoted in GTE Sylvania*, 433 U.S. at 69 n.10 (White, J., concurring); *see also* Baker, *supra* note 10, at 1465-66.

312. *See, e.g.*, Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 HARV. L. REV. 435, 443-46 (1981); Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 484 (1982); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U.L. REV. 1099 (1981); Shenefield, *The* Parker v. Brown *State Action Doctrine and the New Federalism of Antitrust*, 51 ANTITRUST L.J. 337, 338 (1982); Slater, *Local Governments and State Action Immunity After* City of Lafayette *and* City of Boulder, 51 ANTITRUST L.J. 349 (1982).

lent about applying the preemption doctrine to invalidate anticompetitive state and local legislation that was in conflict with the Sherman Act. The Court's reluctance is explained in part by a concern that the Sherman Act has been so variously interpreted that preemption might inadvertently lead to striking down legitimate state regulation.[313] Despite the Supreme Court's reluctance to preempt state statutes under the Sherman Act, the Court has construed the concept of state action[314] narrowly, probably in an effort to limit the category of anticompetitive and unjustifiable state and local regulation.[315]

Judicial adoption of a cartelization standard for section 1 would facilitate the courts' task of clarifying the Sherman Act's impact on state and local government regulation. Once it is clear that the Sherman Act prohibits only cartelization and monopolization, then courts confidently can identify and strike down state and local regulatory schemes that conflict with the Sherman Act. Once courts discover that the preemption doctrine adequately polices anticompetitive state and local action, courts should feel comfortable holding that state and local governments are not subject to damage suits for violations of the Sherman Act.[316]

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313. The Supreme Court has been "reluctant to infer pre-emption." Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978). Preemption is not to be found absent the clear and manifest intention of Congress that a federal act should supersede the police powers of the states. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). For examples of the Supreme Court's reluctance to apply the preemption doctrine to the Sherman Act, see Rice v. Norman Williams Co., 458 U.S. 654 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978).

314. The state action doctrine, enunciated by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943), held that Congress did not intend for the Sberman Act to apply to a restraint imposed as an act of a state government.

315.

> No doubt the [Supreme] Court's interest in the [state action] issue was heightened by the widespread perception that resourceful lawyers and ambitious state officials had built on the precepts of *Parker* so creatively that large and important areas of each state's economy were alleged to be protected from antitrust scrutiny by what must have seemed in some cases to be a rather flimsy veil of state action.

Shenefield, *supra* note 312, at 340. The Supreme Court noted in *Lafayette* that "the economic choices made by public corporations . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978). The state action doctrine has been restricted by the Supreme Court's decisions in Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

316. Reacting to the adverse potential of treble damages antitrust judgments against

G. Anticompetitive Private Antitrust Suits

Many private antitrust suits actually limit competition and reduce consumer welfare.[317] Disgruntled distributors constitute a prime source of private antitrust suits.[318] There is little reason to believe that many of these suits increase consumer welfare.[319] Moreover, suits brought by competitors actually may be designed to inhibit competition.[320]

Anticompetitive private antitrust suits would be reduced significantly if courts adopted a cartelization standard for section 1. Most vertical suits under section 1 would be eliminated because vertical arrangements cannot themselves constitute cartelization.

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local governments, Congress enacted the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (to be codified at 15 U.S.C. §§ 34-36). Under this legislation, no antitrust damages may be recovered from local government or government officials acting in an official capacity, but parties remain free to seek injunctive relief from local governmental activity that violates the federal antitrust laws. The Act is functionally equivalent to a holding that local governments are not liable under the antitrust laws but that local government regulatory activity can be struck down under the preemption doctrine when it conflicts with the federal antitrust laws.

317. *See, e.g.,* R. Posner, *supra* note 11, at 35; Easterbrook, *supra* note 153, at 33-39. This phenomenon poses potentially a much more extensive problem than that of an occasional ill-advised antitrust enforcement action brought by the federal government. According to data published by the Administrative Office of the United States Courts, over 90% of the antitrust suits filed in the federal courts in a typical year are filed by private parties. Annual Report of the Director of the Administrative Office of the U.S. Courts, 1965-1981.

318. According to a study of all antitrust cases filed in the Southern District of New York between 1973 and 1978, 46% of the cases in the sample concerned allegations of dealer termination or boycotts, and 50% concerned allegations of vertical price restraints or market allocation. Many suits concerned both types of allegations. In 26% of the cases the primary violation alleged was dealer termination or boycotts, and vertical price restraints or market allocation was the primary violation alleged in another 20% of the cases. The study also shows that plaintiffs and defendants had vertical business relationships (i.e., dealer/supplier, franchisor/franchisee, or licensor/licensee) in slightly over half the cases in the sample. National Economic Research Assocs., Inc., *supra* note 166, at 28-31.

319. Private plaintiffs presumably are interested primarily, if not exclusively, in treble damages awards, which are not necessarily correlated with economic efficiency. Moreover, most private antitrust litigation does not result in damages or cash settlements and therefore merely increases costs. Of all the private antitrust cases filed in the Southern District of New York from 1973 to 1978, almost two-thirds were voluntarily dismissed by the plaintiff or by agreement of the parties; 18% were settled; and 16% were tried. *Id.* at 44. The plaintiff won in only 12% of the cases that went to trial and did not prevail in any of the vertical restraints cases. (The sample size was small, however.) *Id.* at Table B23.

320. Twenty-one of the cases in the SDNY sample discussed *supra* note 319 concerned horizontal competitors as plaintiffs and defendants. *Id.* at 31. In most cases that concern cartelization, the plaintiff has no valid reason to sue; absent predatory conduct, the plaintiff actually benefits from a price umbrella created by the cartel. Suits challenging alleged predatory pricing may be designed expressly to prevent competition and thereby to promote cartel behavior.

Similarly, most competitor suits under section 1 would be eliminated. Competitors almost invariably benefit from cartelization. A competitor could demonstrate antitrust injury under a cartelization standard only when the competitor itself was the victim of concerted predatory effort to drive it out of business. This situation would probably account for very few section 1 suits. Of course, private suits challenging actions such as tying arrangements or exclusive dealing could still be brought under section 3 of the Clayton Act.

H. The Confused and Duplicate Roles of the Antitrust Division and the FTC

In passing the Sherman Act, Congress provided for enforcement through a combination of private suits and government suits (suits now brought by the Antitrust Division of the Department of Justice). In 1914 Congress supplemented the Sherman Act by passing the Clayton Act[321] and the Federal Trade Commission Act.[322] The Clayton Act made illegal certain practices that were thought to lead to monopoly power.[323] The Federal Trade Commission Act created the Federal Trade Commission (FTC) and empowered it to define "unfair methods of competition,"[324] that is, additional business practices likely to result in monopoly power.[325]

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321. Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.).

322. Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended in scattered sections of 15 U.S.C.).

323.

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [A]ct of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.

S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), *reprinted in* 2 E. KINTNER, *supra* note 25, at 1744, *quoted in* United States v. United Shoe Mach. Co., 264 F. 138, 162 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1921).

324. 15 U.S.C. § 45(a)(1) (1982).

325. As stated by the House managers in the conference report: "[T]he only effective means of establishing and maintaining monopoly . . . is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition." H.R. COMM. REP. No. 1142, 63d Cong., 2d Sess. 18-19 (1914), *quoted in* 2 P. AREEDA & D. TURNER, *supra* note 28, ¶ 305, at 11. Senator Newlands, principal sponsor of the FTC Act, stated that the Act sought to cover "every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." 51 CONG. REC. 12024 (1914). Thus, the "Clayton Act and the Federal Trade Commission Act were envisaged as reinforcements of the Sherman Act; they were designed to specify practices believed likely to undercut competition." R. BORK, *supra* note 10, at 63.

Since 1914 the scope of the Sherman Act has undergone a tremendous expansion.[326] At times it has been thought that the Sherman Act could be used to attack almost any business conduct perceived to reduce competition.[327] As the Sherman Act has expanded, questions have arisen regarding the appropriate role of the FTC. Some analysts have called for the elimination of the Bureau of Competition of the FTC, in part on the theory that the Antitrust Division and the FTC Bureau of Competition perform duplicate functions.[328] For its part, the FTC has felt some pressure to bring novel theories under section 5 of the FTC Act in order to justify its existence.[329] In the 1970's, partly as a consequence of such novel cases, the FTC frequently was perceived as a rogue agency.[330]

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326. *See supra* note 8.

327. Some commentators have concluded that the Sherman Act "reflects a flexible public policy directed against all undue limitations on competition." ATTORNEY GENERAL'S REPORT, *supra* note 305, at 8. Another analyst states: "Every conceivable act which can possibly come within the spirit and purpose of Section 1 is covered" to "afford courts broad discretion in interpreting the law so as to prevent the anticompetitive activities which Congress sought to avert." 2 E. KINTNER, *supra* note 191, § 9.1, at 1-2. "Because of the breadth of the provision, all agreements which unreasonably restrain trade fall within the purview of the Act." *Id.* § 10.1, at 62.

328. *See, e.g.*, STAFF OF SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 51-52 (Landis) (Comm. Print 1960); Gellhorn, *Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction*, 49 TENN. L. REV. 471, 475 (1982) ("the FTC's redundant Antitrust assignment" should be "eliminated"); Liebeler, *Antitrust Law and the New Federal Trade Commission*, 12 SW. U.L. REV. 166, 229 (1981) (the FTC serves no purpose); remarks of Professor William Baxter, later Assistant Attorney General in charge of the Antitrust Division at the United States Department of Justice, *Debate: The Federal Trade Commission Under Attack: Should the Commission's Role Be Changed?*, 49 ANTITRUST L.J. 1481, 1495-96 (1980) ("I would like to see the FTC lose all its antitrust jurisdiction." In view of the Antitrust Division's duplicate function, "I see no arguments whatsoever for preserving these two agencies.") [hereinafter cited as *Debate*]; *cf.* REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 5, *reprinted in* [1969] 427 ANTITRUST & TRADE REG. REP. (BNA) 3 (Sept. 16, 1969 Spec. Supp.) (recommending radical change or elimination).

329. Commissioner Robert Pitofsky defended the FTC as "willing to break new ground in tough and controversial areas." *Debate*, *supra* note 329, at 1489. As one analyst observes, "[I]t is at the margin that the FTC can make a 'distinctive,' that is, unmatched, contribution; this unique combination can then be used to justify both the FTC's continuation and an even larger budget." Gellhorn, *supra* note 328, at 499 n.149.

330. *See* R. BORK, *supra* note 10, at 48 ("The Federal Trade Commission has in fact proved less expert about economics and business realities, and more hostile to competition, than any other group connected with the operation of the antitrust system."); Gellhorn, *The New Gibberish at the FTC*, REGULATION, May-June 1978, at 37; Gellhorn, *supra* note 328, at 475 ("the FTC has invariably attacked aggressive competition—often on the part of small, struggling enterprises—at the expense of competition and consumer welfare" and "is destined to continue its indefensible and often irrational antitrust program"); remarks by Bax-

In an attempt to fence in the FTC, some analysts have argued that the FTC Act's ban on unfair methods of competition is no broader than the Sherman Act.[331] These arguments, however, fly in the face of the legislative history of the FTC Act, which makes quite clear Congress' intention that the FTC Act be broader tban the Sherman Act.[332] Although the FTC Act clearly was intended to be broader than the Sherman Act, if the Sherman Act covers all conduct that unreasonably restricts competition or reduces consumer welfare, the question remains whether the FTC has any distinct role to play. If the Sherman Act is sufficiently broad to attack all agreements that reduce competition or consumer welfare, any interpretation that granted the FTC Act a broader scope almost certainly would lead to results that would reduce competition or injure consumers. Accordingly, if the Sherman Act and the FTC Act are deemed coterminous, no need exists for both the Antitrust Division and the FTC Bureau of Competition.

Adoption of an explicit cartelization standard for section 1 would allow for distinct, and potentially useful, roles for both the Antitrust Division and the FTC. The Antitrust Division could devote its efforts to enforcing the Sherman Act, bringing criminal suits in cases of horizontal price fixing, bid rigging, and market division. The FTC could focus its efforts on practices that may have anticompetitive potential but that generally fall short of monopolization or cartelization, practices that are now generally considered under the Rule of Reason. Thus, the FTC could focus on practices such as mergers, exchanges of information, standard setting, anticompetitive state and local regulation, joint ventures, patent licensing, and vertical restrictions.

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ter, *Debate*, *supra* note 328, at 1496 ("The FTC in my view has done a lousy job with its piece of the antitrust elephant"). One congressman was prompted to proclaim that "[of] all the agencies which are running amok, the Federal Trade Commission is the absolute worst example." 124 CONG. REC. 5011 (1978). As Commissioner Pitofsky described the situation, "the agency in 1980 was assailed in Congress for being excessively zealous," incurring the "frequent diagnosis" that "it was an agency that was 'out of control' . . . 'wild to regulate' . . . 'a regulatory thyroid case.'" *Debate*, *supra* note 328, at 1485. "[T]here was a *perception* that the agency was striking out in all directions at once and that some elements of the staff were 'out to get' businesses they were assigned to investigate." *Id.* at 1487 (emphasis in original).

331. *See, e.g.*, 2 P. AREEDA & D. TURNER, *supra* note 28, ¶ 307a, at 20 ("[T]he spirit and letter of the antitrust laws are identical, . . . [and] insofar as sound policy condemns or permits given conduct under the Sherman or Clayton acts, then sound policy requires the same results under the Federal Trade Commission Act.").

332. *See* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 229-38 (1980).

Whether an agency such as the FTC can, on a consistent basis, sensibly evaluate business conduct that falls short of monopolization remains to be seen. In such cases, the FTC generally would employ the kind of analysis called for by the Rule of Reason. Experience may prove that neither the Rule of Reason nor FTC enforcement makes sense. If, however, any decisionmaking body is to be given the responsibility to apply standards as complex as reduction of competition and maximization of consumer welfare, the FTC, rather than judges and juries, seems best suited for the task. The FTC has institutional continuity, experience in applying economic concepts to business conduct, collegial decisionmaking, oversight by Congress, review by courts of appeals, and remedial powers limited to cease and desist orders. With these characteristics, the FTC has at least a possibility of evolving a Rule of Reason approach that promotes rather than diminishes consumer welfare.

VIII. Conclusion—In Defense of a Cartelization Standard

The wisdom of a legal rule governing business conduct, such as the cartelization standard, cannot be judged in the abstract. The rule must be compared with other possible courses of action. Three options have been suggested: (1) repeal of the Sherman Act; (2) application of a multiple-goal diminution of competition standard; and (3) application of an economic efficiency standard.

Of these three contenders, only the multiple-goal, diminution of competition standard has a proven track record. In the 1950's and 1960's, many analysts thought the courts were performing reasonably well in utilizing the vast discretion that they were deemed to have been granted under the Sherman Act.[333] This perception gave way under the onslaught of the Chicago school. By testing antitrust doctrines against an economic efficiency standard, these analysts were able to demonstrate that much of prior antitrust enforcement had reduced economic efficiency and injured consumers.

In retrospect, it has become clear that the multiple-goal, diminution of competition standard lacked a coherent intellectual framework. Per se rules were developed ad hoc. Rule of Reason analysis was unguided. Under the Rule of Reason, judges and juries faced the impossible task of weighing the competitive costs and benefits of challenged practices. Because of its lack of coherent

333. *See, e.g.*, U.S. Justice Dep't, *supra* note 288, at 2; Van Cise, *Recommendation from the Bar—What Is Not Wrong with Our Antitrust Laws*, in American Bar Ass'n Section of Antitrust Law, An Antitrust Handbook 93-118 (1958).

intellectual content, the multiple-goal, diminution of competition standard could not withstand the intellectual rigor of the Chicago school analysis. The multiple-goal standard is dead, and few have mourned its passing.

The Chicago school economic efficiency standard virtually has been enthroned as the successor to the multiple-goal, diminution of competition standard. By comparison with the vague diminution of competition standard, an economic efficiency standard is an important step forward. An economic efficiency standard is coherent, consistent, and consumer welfare oriented. Indeed, in the hands of an omniscient philosopher king, the economic efficiency standard would be a model rule.

Despite its great theoretical appeal, however, an economic efficiency standard ultimately should be rejected as a legal standard under section 1. Our Constitution wisely was framed on the conception that philosopher kings, if they exist, are not trustworthy. Although economic efficiency provides a coherent, consistent framework for economic analysis, it does not provide a legal rule that can be applied satisfactorily by ordinary mortals, particularly when criminal sanctions and treble damages are at stake. Because economic efficiency cannot be measured, an economic efficiency standard is vague and grants vast discretion to judges and juries. In terms of safeguarding human freedom, an economic efficiency standard falls short.

Focusing on the shortcomings of past antitrust jurisprudence, libertarians argue that the Sherman Act and all other antitrust statutes should be repealed.[334] These critics advance two principal lines of argument: (1) human freedom would be expanded by eliminating governmental restrictions on economic behavior; (2) economic efficiency would be advanced because courts in applying the antitrust laws frequently strike down efficient arrangements. The libertarian view is a telling critique of both an economic efficiency

334. D. ARMENTANO, THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES (1972); England, *Antitrust*, in BEYOND THE STATUS QUO (D. Boaz & E. Crane eds. 1985); Smith, *Why Not Abolish Antitrust?*, REGULATION, Jan.-Feb. 1983, at 23. Armentano takes heart in recent strong criticisms of the antitrust laws by critics such as Robert Bork and Ward Bowman but concludes: "There was no 'golden age' when monopolistic abuse was running rampant in the free market and when, accordingly, antitrust was magnificently relevant. Antitrust law has *always* been ambiguous, the theoretical foundations of antitrust have *always* been faulty, and the empirical evidence has *always* been nonexistent." D. ARMENTANO, *supra*, at 277; *see also* M. ROTHEARD, POWER AND MARKET (1970); Greenspan, *Antitrust*, in A. RAND, CAPITALISM: THE UNKNOWN IDEAL 63-71 (1966); Petro, *The Growing Threat of Antitrust*, 66 FORTUNE 128-38 (Nov. 1962).

standard and a multiple-goal, diminution of competition standard. Both standards are vague; both grant a wide range of discretion to judges and juries. By contrast, a cartelization standard can withstand the libertarian critique. Cartelization reduces both economic efficiency and freedom of consumers. A cartelization standard is reasonably specific and precise. If section 1 is properly narrowed to prohibit cartelization, no basis exists for section 1's repeal.

A cartelization standard is superior to the available alternatives. It would be predictable. It would strike down the principal business practices that unequivocally reduce consumer welfare. It would limit the discretion of judges and juries. A cartelization standard is consistent with the wisdom of the ages, including the wisdom of the Congress in 1890 and of the economics profession of the 1980's. Through a piecemeal process, the Burger Court implicitly has returned to the original cartelization standard of the Sherman Act. Hopefully, the Court will make explicit the cartelization standard that it already implicitly has adopted.