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FAREWELL TO THE QUICK LOOK: REDEFINING THE SCOPE AND CONTENT OF THE RULE OF REASON

ALAN J. MEESE*

The Sherman Act¹ forbids only those contracts that restrain trade unreasonably.² By its terms, this “rule of reason” would seem to require a full-blown analysis of every contract that purportedly offends the statute.³ Nonetheless, the Supreme Court has long declared certain contracts unreasonable per se, directing lower courts to dispense with any inquiry into the actual economic effects of such agreements.⁴ Such per se rules have always been the exception, however. After all, the vast majority of business contracts pose little or no threat to competition and consumers, with the result that very few are “always or almost always” harmful, a necessary condition for per se treatment.⁵ Thus, courts still subject most types of contracts to full-blown scrutiny under the rule of reason, requiring private plaintiffs or the government to offer factual proof that, on balance, such agreements are unreasonable.⁶ Not surprisingly, most contracts pass this test.

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¹ 15 U.S.C. §§ 1–7.

² *Standard Oil Co. v. United States*, 221 U.S. 1, 62–64 (1911).

³ See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359–61 (1933); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

⁴ See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *id.* at 224–25 n.59.

⁵ See *Northern Pacific Railway*, 356 U.S. at 5.

⁶ See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (stating that, under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition”) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

In *NCAA v. Board of Regents of University of Oklahoma*⁷ the Supreme Court suggested a "third way," a sort of middle ground between "per se" and rule of reason analysis. At issue was the NCAA's process of determining how many college football games would be broadcast and which networks would broadcast them. Standing alone, such restraints would have been per se unlawful, and the lower courts treated them as such.⁸ The restraints did not stand alone, however, but were instead ancillary to a joint venture that produced college football. Nevertheless, the Justices suggested that, even though ancillary, such restraints would be unlawful per se under then-prevailing precedent.⁹ At the same time, the Court found that some horizontal restraints were plainly necessary to create the product in the first instance. For instance, the Court noted that a horizontal agreement among member schools not to pay athletes a salary was necessary to the very existence of the product—*amateur* college football.¹⁰ As a result, the Court said, per se treatment of the broadcasting restrictions was inappropriate.¹¹

Ordinarily, rejection of per se treatment would have required full-blown rule of reason analysis and, with it, a requirement that the plaintiffs offer concrete proof of anticompetitive effects.¹² Not surprisingly, then, the defendants argued that plaintiffs were compelled to establish anticompetitive effects by proving that the NCAA possessed power in some relevant market.¹³ Nonetheless, the Court rejected such a full-blown approach, holding that plaintiffs need not offer any evidence of anticompetitive effect by proof of market power or otherwise.¹⁴ By their very

⁷ 468 U.S. 85 (1984).

⁸ See *Board of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1152 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

⁹ See *NCAA*, 468 U.S. at 99–100.

¹⁰ *Id.* at 102.

¹¹ See *id.* at 101 ("What is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."). Cf. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 21–24 (1979) (BMI) (holding that blanket license should be analyzed under the rule of reason because such horizontal cooperation was necessary to create a new product).

¹² See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 & n.15 (1977) (stating that, under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition") (citing *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)); 7 PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1503, at 377 (1986) ("[T]he plaintiff alleging an unreasonable restraint must show a significant restraint on competition and . . . this ordinarily requires definition of a product and geographic market, an assessment of the parties' roles in that market, and proof of such other market circumstances as bear on competitive effects.").

¹³ See Brief for the NCAA at 33–46, *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (No. 83-271).

¹⁴ See *NCAA*, 468 U.S. at 109–10.

nature, the Court said, the restraints in question posed a significant risk of anticompetitive harm with the result that proof of their existence was itself sufficient to establish a prima facie case, casting a burden of justification on the defendants.¹⁵ At any rate, the Court continued, the district court had properly found that the defendants did, in fact possess market power, and that the restraints had reduced output.¹⁶

Important scholars have endorsed *NCAA*'s approach, including the "quick look" approach to examining restraints on price or output, and Willard Tom writes in that tradition for this Symposium.¹⁷ Moreover, the

¹⁵ *Id.* at 106–11.

¹⁶ *See id.* at 111 ("As a factual matter, it is evident that petitioner does possess market power."). One could also read *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), as applying a "quick look" approach. *See id.* at 460. It should be noted, however, that the Court went on to sustain the Commission's "finding of actual, sustained adverse effects on competition." *See id.* at 461.

One could argue that the *NCAA* Court's determination that the defendants possessed market power transformed the language stating that no such power was necessary into dicta. However, the Supreme Court and most lower courts have read the decision as holding that, without more, proof that an agreement sets prices or output ipso facto establishes a prima facie case under the rule of reason. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *United States v. Brown Univ.*, 5 F.3d 658, 669, 672–74 (3d Cir. 1993); *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 674–76 (7th Cir. 1992). *But see Law v. NCAA*, 134 F.3d 1010, 1020–21 (10th Cir.) (quick look shifts burden to defendant upon proof that agreement actually affects prices), *cert. denied*, 525 U.S. 822 (1998). This essay will assume that *California Dental Association* and similar decisions properly characterized the holding of *NCAA*.

Moreover, some language in *NCAA* seems to rest upon the district court's finding that the restraints had, in fact, reduced the number of games broadcast, thereby suggesting that the Court deemed some proof of anticompetitive effects necessary before shifting the burden of justification to the defendant. *See NCAA*, 468 U.S. at 107–08. At any rate, in responding to defendants' plea for proof of market power, the Court made it clear that it would not even have required proof of anticompetitive effects in the first instance.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an *agreement* not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

Id. at 109 (emphasis added) (quoting *National Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 692 (1978)). *See Chicago Professional Sports Ltd. Partnership*, 961 F.2d at 674 (reading this passage "as holding that any *agreement* to reduce output measured by the number of televised games requires some justification") (emphasis added)). Further, the Court quoted with approval Professor Areeda's statement that, in some cases, a trial court can determine that a restraint is anticompetitive "even without a trial." *See NCAA*, 468 U.S. at 110 n.39 (quoting PHILLIP AREEDA, *THE RULE OF REASON IN ANTITRUST ANALYSIS* 37–38 (Federal Judicial Center 1981)); *see also California Dental Association*, 526 U.S. at 770 (quick look applies when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); *Brown University*, 5 F.3d at 672–74 (quick look test announced in *NCAA* does not involve proof of actual adverse effects).

¹⁷ *See* Willard K. Tom & Chul Pak, *A Flexible Rule of Reason*, 68 ANTITRUST L.J. 391 (2000) (endorsing quick look approach for certain horizontal restraints); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 262–65 (2d ed. 1999); AREEDA, *supra* note 16, at 37–38.

enforcement agencies took the "quick look" to heart, announcing that private parties bear the burden of explaining any restraint that is "inherently suspect," i.e., that, standing alone, would be deemed per se unlawful.¹⁸ Like NCAA, these scholars and officials would require private parties to explain any such restraint, even those that are ancillary to otherwise legitimate ventures, without first requiring any proof that the restraints produce anticompetitive effects.¹⁹

This essay is a dissent from this conventional wisdom. As argued below, the quick look is an artifact of a bygone Populist era in which courts and the enforcement agencies protected the freedom of traders from contractual restraints deemed "monopolistic" by the applied price theory school of industrial organization. Developments in economic theory have cast new light on the purpose and function of many restraints, demonstrating that various contracts once deemed "coercive" or "monopolistic" are in fact examples of voluntary integration that improve social

¹⁸ Joel I. Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address to the ABA Antitrust Section Semi-Annual Fall Program (Nov. 7, 1996); *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 603-604 (1988). Recently, however, the Federal Trade Commission appeared to back away from the quick look, opining that Supreme Court precedent only recognizes two modes of analysis: per se and rule of reason. See *California Dental Ass'n*, 121 F.T.C. 190, 299 (1996), *aff'd*, 128 F.3d 720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999); *California Dental Ass'n*, 121 F.T.C. at 307-22 (finding proof of anticompetitive harm before examining possible efficiencies); see also Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 628-32 (1996) (contending that the Commission's decision in *California Dental Association* effectively abandoned the approach outlined in *Massachusetts Board of Optometry*). But see Federal Trade Commission and U.S. Department of Justice Guidelines for Collaborations Among Competitors § 3.3 (Apr. 7, 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, at 20,856 (absent overriding benefits, agencies will challenge agreements "where the likelihood of anticompetitive harm is evident from the nature of the agreement") (emphasis added); *id.* at § 3.3 n.24, *reprinted in* 4 Trade Reg. Rep. (CCH) at 20,856 n.24 (quoting NCAA for proposition that rule of reason "can sometimes be applied in the twinkling of an eye," see NCAA, 468 U.S. at 110 n.39).

¹⁹ See Klein, *supra* note 18, at 3 (stating Antitrust Division's view that the existence of a horizontal restraint "that directly limits competition on price or output between or among competitors" casts upon the parties to the restraint a burden of coming forward with proof of procompetitive virtues); *Massachusetts Board*, 110 F.T.C. at 604. See also Guidelines for Collaborations Among Competitors, *supra* note 18, § 3.3 (stating that "nature of an agreement" can itself render an arrangement presumptively unlawful). One could read Mr. Klein's reference to "price or output" as a limitation on the scope of the quick look. However, he subsequently makes it clear that the Division would also apply the quick look to horizontal ancillary territorial restraints. See Klein, *supra* note 18, at 4 (stating that the Division would apply the quick look to the territorial restraints condemned in *United States v. Topco*, 405 U.S. 596 (1972)).

Antitrust aficionados may see parallels between the Division's focus on restraints that "directly limit" competition and early case law holding that the Sherman Act only outlaws "direct restraints." See, e.g., *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 568 (1898). This similarity is purely semantic, however. The "direct restrictions" presumed unlawful by the Division would include numerous restraints treated as "indirect" by early case law. See *id.* at 567-68 (ancillary restraints are indirect and thus beyond the scope of the Act).

welfare. Thus, attempts to protect “trader freedom” under the aegis of the antitrust laws have come at a cost—a cost borne by traders and consumers alike. Moreover, significant historical research has cast doubt on the assertion that “liberty from contract” or “trader freedom” is of independent normative significance under the Sherman Act. Taken together, these developments suggest that courts should accord full-blown rule of reason treatment to any restraint that is plausibly procompetitive, even if the restraint appears to affect price or output. This, of course, is the same approach taken when analyzing horizontal mergers, which by their nature eliminate price competition between the merging parties. Adherence to the quick look doctrine in the face of these arguments reflects undue solicitude for trader freedom, unjustified hostility toward contractual integration, or both.

Elimination of the quick look as a separate mode of analysis will require more careful delineation of the boundary between contracts deemed unlawful *per se* and those analyzed under the rule of reason. At the same time, courts and enforcement agencies will have to determine just what sort of evidence is necessary to establish a *prima facie* case under the rule of reason. The approach taken by this article suggests answers to each of these questions. First, where horizontal restraints are concerned, courts should not reserve the rule of reason for those restraints that are “ancillary” to some related enterprise or sale transaction. Instead, courts should apply the rule of reason to any restraint that arguably produces economic benefits, regardless whether those benefits are parasitic on some larger enterprise.

Further, when conducting this analysis, courts should not dispense with definitive proof that a challenged restraint can produce anticompetitive harm. Instead, plaintiffs who challenge horizontal restraints under the rule of reason should bear the same burden currently shouldered by those who challenge horizontal mergers: definition of a relevant market and proof that the defendant possesses or has access to market power sufficient to work competitive harm. So-called “direct proof” of anticompetitive effects, such as evidence that a restraint has increased prices above the *status quo ante*, should not suffice to establish a *prima facie* case, as such proof is equally consistent with a conclusion that the restraint is procompetitive. Indeed, reliance on such direct proof again reflects the influence of applied price theory, resting, as it does, on a definition of “competition” that does not recognize the sort of market failures that justify numerous contractual restraints.

Part I of this article reviews antitrust doctrine as it stood before the modern era. During the pre-modern Populist era, it is shown, antitrust

jurisprudence reflected the influence of the applied price theory tradition of industrial organization as well concern for the "freedom" of traders from contractual restraints. Part II describes the rejection of the principles that informed the Populist era in decisions that ushered in the modern era of antitrust analysis. Part III argues that the quick look as articulated by *NCAA* and the enforcement agencies is in fact a throwback to the pre-modern Populist era resting, as it does, on price-theoretic assumptions that drive the quick look's hostility toward horizontal restraints. Such assumptions, it is argued, have no place in this modern era, and horizontal restraints not deemed unlawful *per se* should be treated like horizontal mergers and accorded full-blown rule of reason scrutiny. Part IV suggests that rule of reason treatment should not be reserved for horizontal restraints that are "ancillary" to some other transaction or venture, and also argues that plaintiffs challenging such restraints under the rule of reason should bear the same burden currently shouldered by those who challenge horizontal mergers, namely, proof that market structure and concentration support the plaintiff's account of how the challenged restraint will harm consumers.

I. TRADER FREEDOM AND PRICE THEORY: A ONE-TWO PUNCH

For some time, *per se* rules ruled the roost. Tying contracts, maximum and minimum resale price maintenance, certain exclusive dealing contracts, exclusive territories—all were deemed so harmful and so utterly lacking in redeeming virtue as to justify summary condemnation.²⁰ Two

²⁰ See *Albrecht v. Herald Co.*, 390 U.S. 145, 151–53 (1968) (maximum resale price maintenance); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1968) (exclusive territories); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5–6 (1958) (tying contracts); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (exclusive dealing). To be sure, the Court required proof of market power before invoking the *per se* rule against tying. See *Northern Pacific Railway*, 356 U.S. at 6–7, 11. Yet, the Court rendered this requirement meaningless, finding, for instance, that the ability to obtain agreement to a tie was itself evidence of market power! See *id.* at 7–8 ("The very existence of this host of tying arrangements is itself compelling evidence of defendant's great power . . ."); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503–04 (1969); see also *United States v. Loew's, Inc.* 371 U.S. 38, 45 (1962) (finding that possession of a copyright created presumption of market power); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 49 (9th Cir. 1971) (finding market power based on possession of attractive trademark).

Of course, the *per se* rule against minimum price fixing predates the Populist era, announced as it was in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). While *Dr. Miles* reflected an ignorance of the possible economic benefits of vertical restraints, it seems unlikely that the decision accorded "liberty from contract" or "trader freedom" any independent normative significance. Other decisions of the period construed the Sherman Act narrowly, in light of liberty of contract, and *Dr. Miles* apparently rested on a belief that the contract before the Court was, in effect, a dealer cartel of the sort that injured consumers and thus fell outside the protection of liberty of contract. *Id.* at 408–09. See generally Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV.

factors converged to bolster the hegemony of per se rules during anti-trust's Populist era. First, courts adopted an expansive and controversial account of the "harm" cognizable under the antitrust laws. More precisely, courts treated "liberty from contract" and "trader freedom" as values of independent significance under the antitrust laws, treating contractual restrictions on such freedom as a "harm" for purposes of applying the per se rule.²¹ Second, courts undervalued the benefits of contractual integration, viewing most distribution restraints, for instance, as attempts to extend a manufacturer's market power or otherwise abuse its distributors.²² This "inhospitality tradition" of antitrust flowed naturally from the dominant economic paradigm of the time, neoclassical price theory, which viewed the firm as a production function and only recognized "technological" efficiencies.²³ By their nature, these efficien-

1, 36 (1999) [hereinafter Meese, *Liberty and Antitrust*] (formative era case law reflected concern for liberty of contract); *Standard Oil Co. v. United States*, 221 U.S. 1, 61–62 (1911) (reading Sherman Act in light of liberty of contract); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911) (Sherman Act "did not forbid or restrain the power to make normal and useful contracts to further trade by resorting to all normal methods").

²¹ See *Albrecht*, 390 U.S. at 152 ("[A]greements to fix maximum prices, 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their judgment.'") (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (holding that exclusive dealing contract "conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market"); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (declaring group boycott per se unlawful absent proof of harm to consumers because the combination "takes from Klor's its freedom to buy appliances in an open competitive market" and "deprives the manufacturers and distributors of their freedom to sell to Klor's"); *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467–68 (1941); see also Thomas E. Kauper, *The Warren Court and the Antitrust Laws: of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 332 (1968) (arguing that the Warren Court was primarily concerned with "equality of opportunity, free access to markets by competing sellers, and complete freedom of choice by buyers").

²² See, e.g., *Albrecht*, 390 U.S. at 152–53; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141 (1968) (holding that various vertical restraints could not be in dealers' self-interest, and were instead "thrust upon them" by franchisor); *Brown Shoe Co.*, 384 U.S. at 321; *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964).

²³ See Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 183–95 (1997) [hereinafter Meese, *Price Theory*] (describing various price-theoretic assumptions underlying Populist approach to vertical restraints); Oliver Williamson, *Technology And Transaction Cost Economics*, 10 J. ECON. BEHAV. & ORG. 355, 356 (1988) (asserting that, under the price-theoretic paradigm, "the 'natural' boundaries of the firm were thought to be defined by engineering considerations"); OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 7 (1985) (describing assumptions of neoclassical price theory and their influence on industrial organization); *id.* at 19–26, 370–73 (describing influence of this paradigm on antitrust thinking); Ronald H. Coase, *Industrial Organization: A Proposal For Research*, reprinted in *THE FIRM, THE MARKET, AND THE LAW* 57, 60–61 (Ronald H. Coase ed., 1988) (describing industrial organization's exclusive focus on price theory); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982) (describing "inhospitality tradition" of antitrust law); George Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 185, 185 (1951) (noting that

cies could only be realized within the boundaries of the firm, before sale of a product and the accompanying passage of title.²⁴ Within this tradition, contractual restraints on purchasers after title passed were viewed as an anomaly—inexplicable except on the hypothesis of “leverage” or other forms of exclusion.²⁵ Taken together these two factors—

economists “have generally treated as a (technological?) datum the problem of what the firm does—what governs its range of activities or functions”). See also HOVENKAMP, *supra* note 17, at 42–45 (describing influence of structure-conduct-performance paradigm on antitrust thinking during Populist era).

²⁴ Richard N. Langlois, *Transaction Costs, Production Costs, and the Passage of Time*, in COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS 1, 2–4 (Steven G. Medema ed., 1998) (describing technological focus of so-called Pigovian price theory); WILLIAMSON, *supra* note 23, at 370–71 (price theory’s hostility toward vertical restraints “was buttressed by the view that true economies take a technological form, [and] hence are fully realized within firms. Since there is nothing to be gained by introducing nonstandard terms into market-mediated exchange, the use of contract restraints was presumed to have anticompetitive purpose and effect.”). See also JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 381 (1968) (contending that “economies of integration generally involve a physical or technical integration of the processes in a single plant. A classic case is that of integrating iron-making and steel-making to effect a saving in fuel costs by eliminating a reheating of the iron before it is fed to a steel furnace.”). Professor Bain also concluded that integration into distribution was likely anticompetitive:

[t]he trained observer tends to form a considerable suspicion from casual observation that there is a good deal of vertical integration which, although not actually uneconomical, is also not justified on the basis of any cost savings. This is apparently true in particular of the integration of distributive facilities by manufacturing firms. In most cases the rationale of the integration is evidently the increase of the market power of the firms involved rather than a reduction in cost.

Id. See also William S. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1436 (1968) (arguing that contractual integration cannot produce efficiencies).

Indeed, the United States relied upon this sort of reasoning in *Schwinn*. Responding to Schwinn’s assertion that condemnation of its restraints would lead it to integrate forward into distribution, the government claimed that such integration should be treated more leniently than contractual restraints, as only the former could produce demonstrable efficiencies.

[A] rule that treats manufacturers who assume the distribution function themselves more leniently than those who impose restraints on independent distributors merely reflects the fact that, although integration in distribution may sometimes benefit the economy by leading to cost savings, agreements to maintain resale prices or to impose territorial restrictions of unlimited duration or outlet limitations of the type involved here have never been shown to produce comparable economies.

Brief for the United States at 50, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (No. 25).

²⁵ Professor Coase offered the following summary of the attitude of economists during this period:

One important result of this preoccupation with the monopoly problem is that if an economist finds something—a business practice of one sort or other—that he does not understand, he looks for a monopoly explanation. And as we are very ignorant in this field, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation is frequent.

solicitude for trader freedom and price theory—formed a powerful combination that justified an unprecedented expansion of the Sherman Act.²⁶

Horizontal restraints—even those ancillary to legitimate joint ventures—did not escape this hegemony. Indeed, one of the most telling exemplars of Populist era jurisprudence involved just such a restraint.²⁷ In *United States v. Topco* the United States challenged territorial restraints adopted by a cooperative purchasing association made up of twenty-five regional supermarket chains. The Topco Association essentially served as a purchasing agent for its members, buying and distributing to these chains hundreds of grocery products under various brand names Topco owned.²⁸ Certain restraints accompanied the formation of the cooperative. In particular, the Association's bylaws awarded licenses to member chains providing the exclusive right to market Topco-brand products in their home territory.²⁹

The district court found that Topco's members possessed no market power and that the restraints were necessary to create a private label system similar to that employed by larger chains.³⁰ Indeed, the district court expressly found that the restraints would combat free riding, encourage promotion of Topco brands, and enhance competition between member chains and larger national chains.³¹ Without question—

Coase, *supra* note 23, at 67. Classic applications of this approach in the antitrust context include Comanor, *supra* note 24, and Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

²⁶ See Donald I. Baker & William Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 ANTITRUST BULL. 323, 330 (1986) (arguing that during this period, "[t]he precise objective of antitrust policy was unimportant, for populist and economic approaches yielded consistent results"). Other scholars have been less charitable, asserting that the Court used economic theory as a fig leaf, to justify predetermined results. See Kauper, *supra* note 21, at 330 (arguing that the Warren Court "used economic doctrine to support decisions arrived at upon other grounds"); Frederick M. Rowe, *The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1524–27 (1984) (arguing that the Warren Court employed economic models to justify decisions motivated by political and social concerns).

²⁷ *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

²⁸ *Id.* at 598.

²⁹ *Id.* at 601–03.

³⁰ In particular, the district court found that the market shares of Topco's various members ranged from 1.5% to 16% in their respective market areas, with an average share of 5.87%. See *United States v. Topco Assocs.*, 319 F. Supp. 1031, 1033 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

³¹ According to the court:

It is clear from the record that Topco members believe having an exclusivity comparable to that enjoyed by the national chains is an indispensable element of Topco's effectiveness and their interest in membership. Top officers of a number of members testified unequivocally that they would not spend the money, time and energy necessary to establish consumer acceptance of Topco brands

ing these findings, the Supreme Court declared the restraints per se unlawful. The Court was not troubled by the absence of consumer injury: it was enough for the majority that the voluntary contractual restraints purportedly limited the "freedom" of each member of the Association to choose where and how it would sell Topco-brand products.³² Moreover

in their areas of operation if any of their substantial competitors could likewise sell the same brand names and would not continue as members of Topco but would, to the extent possible, endeavor to develop their own private label programs in which they would have exclusivity.

Topco, 319 F. Supp. at 1040.

Moreover:

All of the witnesses for the defendant testified that the cost of developing consumer acceptance for the Topco private brands was born by each member in its own territory. Every executive of a Topco member who was a witness stated categorically that his chain would not be interested in devoting the time, energy and money to the necessary promotion and would not be interested in Topco membership if one or more of his chain's competitors in the area also offered consumers the same brands and products. All of the defendant's witnesses asserted that monopoly of Topco private label products was as essential to Topco members as the monopoly of A & P, National Tea, Jewel and other national chains' private label products was to these chains.

Id. at 1042.

The court relied on this testimony in holding that

[w]hatever anti-competitive effect these practices may have on competition in the sale of Topco private label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories. . . . Expressed another way, the relief which the government here seeks would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket field. The antitrust laws are certainly not intended to accomplish such a result. Only the national chains and the other supermarkets who compete with Topco members would be benefitted. The consuming public obviously would not.

Id. at 1043.

³² The Court's extraordinary statement is worth quoting in full:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental political freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. *Cf. United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963).

The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy. On the

the Court all but ignored the potential benefits of the restraints, taking refuge in its assertion that courts were incapable of determining whether, in fact, the benefits of the restraints outweighed any anticompetitive harms.³³ Indeed, the Court showed no sign that it understood the potential benefits of the restraints, or the market failure that its ruling would engender.

The one-two punch of trader freedom and price theory did not confine itself to Section 1 of the Sherman Act. Similar attitudes drove the Court's approach to mergers under Section 7 of the Clayton Act. In *United States v. Von's Grocery*, for instance, the Court voided a merger between two medium-sized grocery chains in a remarkably unconcentrated market with no discernable barriers to entry.³⁴ The Court made no attempt to argue that the transaction would harm consumers, instead finding anti-trust harm in the elimination of independent competitors.³⁵ Absent an extraordinary justification, the Court suggested, mergers between competitors offended the Act whenever there was a trend toward more concentration, defined as a reduction in the number of firms operating in the market in question.³⁶ The Court did not consider the possibility—suggested by the absence of actual market concentration—that the transaction produced pro-consumer efficiencies.³⁷ This failure was not surpris-

contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.

Topco, 405 U.S. at 610–11.

³³ See *id.*, 405 U.S. at 611–12. Of course, the purported inability to balance benefits against harms might just as easily have militated in favor of per se legality, given the absence of market power. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (Bork, J.).

³⁴ See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). The merger in *Von's Grocery* created a firm with a 7.5% share of the Los Angeles grocery market; the twelve largest firms accounted for only 49% of the market, which included over 3500 independent grocery stores. See *id.* at 272–74, 281 (White, J. concurring). Moreover, barriers to entry were non-existent; in the 1960s, for instance, 128 firms had entered the market de novo. *Id.* at 292 n.19 (Stewart, J. dissenting).

³⁵ See *id.* at 274–76 (quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897)) (dicta). Compare *Von's Grocery*, 384 U.S. at 300 (Stewart, J. dissenting) ("Three thousand five hundred and ninety single-store firms is a lot of grocery stores.").

³⁶ See *Von's Grocery*, 384 U.S. at 277 ("This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor."); *id.* at 273 n.3 (criticizing district court for "us[ing] the term 'concentration' in some sense other than a total decrease in the number of separate competitors which is the crucial point here.").

³⁷ See ROBERT H. BORK, *THE ANTITRUST PARADOX* 205–06 (1978) (explaining that mergers in unconcentrated markets likely produce efficiencies).

ing—just five years earlier, in *Brown Shoe Co. v. United States*, the Court had agreed with the United States that the presence of efficiencies militated *against* a transaction.³⁸

II. THE COLLAPSE OF POPULISM

The premises supporting the Court's hostile stance toward contractual restraints and mergers soon came under heavy attack. First of all, economists and others began the work of overthrowing the price-theoretic paradigm. In particular, these scholars questioned price theory's habit of assuming away opportunism and the information and bargaining costs that made such behavior possible.³⁹ This assumption, of course, went hand in hand with price theory's assertion that efficiencies were techno-

³⁸ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business[es]. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."); see also Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 405-06 (1980) (showing that government argued that lower costs and higher quality militated against the merger).

³⁹ These assumptions were reflected in assertions by economists that dealers would make optimal marketing and purchasing decisions "voluntarily," that is, without contractual restraint. See Comanor, *supra* note 24, at 1430 (asserting that "unrestricted market" would provide optimal pre- and post-sale dealer services, despite free-rider problem); *id.* at 1433 (same); JOEL B. DIRLAM & ALFRED E. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 181-87 (1954) ("It is difficult to see why many of the mutual benefits and socially beneficial consequences of exclusive dealing require coercion [i.e., contractual requirement] for their achievement.").

[I]f a strong and legitimate business need for exclusive selling actually does exist, it is strange that dealers will not follow this policy without being compelled to do so by contract, for the advantages that result should benefit them as well as the firms from which they buy. Perhaps an occasional dealer will be too inept or shortsighted to perceive his best interests, but such men could presumably be replaced for demonstrable inefficiency without resorting to a widespread use of restrictive contracts.

Derek C. Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 307-08. The United States, it should be noted, shared this view. In *FTC v. Brown Shoe Co.*, the Solicitor General, head of the Antitrust Division, and FTC urged the Court to void exclusive dealing contracts because:

[E]ven if it were supposed that complete line concentration was the most efficient approach, one would expect that retailers would be eager to achieve the attendant economies and would not have to be held to the line by contractual agreement. As the Commission concluded, "[w]hile line concentration itself may or may not be economically justifiable, there is no economic justification for making the adherence to this doctrine the subject of agreement between buyer and seller and enforcing the agreement to the latter's advantage" (citation omitted). Independent shoe dealers do not need restrictions on their freedom of choice in order to achieve efficiency.

Brief for the United States at 29-30, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (No. 118).

logical in origin and could only be realized within a firm.⁴⁰ In the real world, these scholars said, information and bargaining costs were in fact significant, and their existence suggested that the interests of buyer and seller might not always be aligned, particularly *after* the passage of title.⁴¹ Thus, reliance on market contracting to conduct economic activity often entails a cost, what these economists called a "transaction cost."⁴² These insights, in turn, suggested benign explanations for conduct previously deemed monopolistic. For instance, while price theory had viewed exclusive territories as attempts to induce "too much" advertising so as to differentiate a manufacturer's product and enhance its market power, the new economics saw many such restraints as attempts to reduce the cost of transacting, that is, the cost of relying on the market to distribute products, by preventing opportunistic shirking by dealers.⁴³ Similar insights suggested benign explanations for tying contracts, minimum resale price maintenance, and maximum horizontal and vertical price fixing.⁴⁴

Further, some assaults came from within the price-theoretic paradigm. In particular, economists questioned the assertion by some scholars that the positive correlation between concentration and profits was due to market power instead of efficiencies associated with large scale production.⁴⁵ At the same time, Oliver Williamson demonstrated that even a merger to monopoly could produce a net increase in wealth so long as

⁴⁰ See *supra* notes 23–24 and accompanying text.

⁴¹ See, e.g., Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 435–36 (1966) (identifying free-rider problem); *id.* at 468 ("It would be extraordinarily costly for the manufacturer to learn at first hand the real sales potential of every dealer's area and just how and where each dealer's sales effort should be expended."); Oliver Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960). See generally Meese, *Price Theory*, *supra* note 23, at 167–68.

⁴² See WILLIAMSON, *supra* note 23, at 15–35; Meese, *Price Theory*, *supra* note 23, at 167–68; Bork, *supra* note 41, at 435–36 (arguing that, because of the free-rider problem, a "group becomes a less efficient marketer than a single fully-integrated firm of the same size").

⁴³ See Bork, *supra* note 41, at 429–52. Compare Comanor, *supra* note 24, at 1429–30.

⁴⁴ See, e.g., Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 59–84 (1997) [hereinafter Meese, *Tying*] (describing various ways that tying can reduce transaction costs); Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345 (1985); Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Bork, *supra* note 41, at 453–64; Telser, *supra* note 41, at 89–96; see also Meese, *Price Theory*, *supra* note 23, at 159–70 (showing that procompetitive explanations for vertical restraints depend upon a rejection of various price-theoretic assumptions).

⁴⁵ See HOVENKAMP, *supra* note 17, at 44–45; Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1971).

the transaction produced a slight reduction in average costs.⁴⁶ Bigger, it seemed, was sometimes better.⁴⁷

Taken together, these various developments in economic theory confirmed what many had expected all along, namely, that protection of "trader freedom" and atomistic competition came at a price, a price paid by consumers and society as a whole.⁴⁸ At the same time, legal scholars began to question whether, in fact, the antitrust statutes empowered judges to develop antitrust doctrine by balancing the interests of dealers and other producers against those of consumers.⁴⁹ According to these scholars, consumers—not producers—were the intended beneficiaries of antitrust policy.⁵⁰ Firms that wanted protection from competition should seek assistance from Congress, not the courts.

In a "shot heard 'round the (antitrust) world," the Court reversed course in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁵¹ There the Court

⁴⁶ See Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 AM. ECON. REV. 18 (1968).

⁴⁷ Some members of the "Chicago School" of antitrust have argued that recent advances in antitrust economics are generally the result of "viewing antitrust policy through the lens of price theory." See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979). However, most insights associated with the Chicago School in fact result from application of the so-called New Institutional Economics, a self-described competitor of the price-theoretic paradigm. See Meese, *Price Theory*, *supra* note 23, at 159–70. Moreover, in some instances, overreliance on price theory has caused Chicagoans to give incomplete accounts of the causes and consequences of certain agreements. See Meese, *Tying*, *supra* note 44, at 44–49 (contending that Chicago School approach to tying contracts has undervalued existence and relevance of procompetitive benefits of such agreements). Certainly, unadorned price theory can be a useful tool when analyzing some transactions. Where contractual integration is concerned, however, it is generally not up to the task.

⁴⁸ See, e.g., Kauper, *supra* note 21, at 330–34 (arguing that the Court should openly balance trader freedom and consumer welfare, and that failure to do so in previous decisions was disingenuous).

⁴⁹ See 1 PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 111 (1997); BORK, *supra* note 37, at 82–89; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); see also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

⁵⁰ It should not be that these scholars did not always agree about just how to define "consumer welfare." Some equated "consumers" with society as a whole, while others equated "consumers" with "purchasers." Compare BORK, *supra* note 37, at 107–15 (equating consumer welfare with total social welfare); Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429 (1988) (equating consumer welfare with welfare of purchasers only); Lande, *supra* note 49 (same). Nevertheless, these scholars agreed that values, such as "trader freedom" and decentralization of power, have no independent role to play in the development of antitrust doctrine. See, e.g., 1 AREEDA & HOVENKAMP, *supra* note 49, ¶ 111; Lande, *supra* note 49, at 104–05. see also Meese, *Liberty and Antitrust*, *supra* note 20, at 36–67 (showing that formative era courts repeatedly rejected assertions that Sherman Act was designed to further trader freedom in the form of liberty from contract).

⁵¹ 433 U.S. 36 (1977).

reconsidered and overruled its holding in *United States v. Arnold, Schwinn & Co.*,⁵² that contractual restraints on a dealer's disposition of a product after passage of title were per se unlawful. In so doing, the Court repudiated the two central tenets of the Populist era. First, the Court rejected "trader freedom" as a value of independent significance under the Sherman Act.⁵³ Second, the Court fully embraced then-recent advances in economic theory suggesting that vertical distribution restraints could prevent "free riding" and thus serve the interest of consumers.⁵⁴ It did not matter when or how title passed, the Court said; all vertical restraints—save those on price—should be analyzed under a full-blown rule of reason.⁵⁵

The influence of new economic theory on antitrust doctrine was not limited to the context of vertical restraints. Shortly after *Sylvania*, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*, the Court examined what seemed to be a price-fixing agreement—a so-called "blanket license" created by two clearinghouses that acted as sales agents for thousands of horizontal competitors.⁵⁶ Each clearinghouse, which had purchased the non-exclusive rights to perform a million or more copyrighted works, offered radio stations and others the right to license its entire library of works for a fee based upon the purchaser's revenue.⁵⁷ Noting that each arrangement fixed prices in a literal sense, as the ultimate owners of the compositions had no power over the price of the blanket license, the Court nevertheless found that the arrangement "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use" and reduced the costs that would be associated with reliance upon individual market transactions.⁵⁸ Thus, the Justices concluded, the arrangement should be analyzed under the rule of reason.⁵⁹

⁵² 388 U.S. 365 (1967), *overruled by* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁵³ To be precise, the Court rejected the assertion by Judge Browning, dissenting below, that the Sherman Act was designed to prohibit restrictions on dealer autonomy without regard to the impact of those restrictions on consumers. *See* *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1019 (9th Cir. 1976) (Browning, J. dissenting), *aff'd*, 433 U.S. 36 (1977). According to the Court: "Competitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Mr. Justice Brandeis reminded us: 'Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.'" *Sylvania*, 433 U.S. at 53 n.21 (citation omitted).

⁵⁴ *See id.* at 54–56.

⁵⁵ *See id.* at 56–59.

⁵⁶ *See* 441 U.S. 1 (1979).

⁵⁷ *See id.* at 4–6.

⁵⁸ *See id.* at 20–22; *see also* HOVENKAMP, *supra* note 17, at 210 ("The blanket license arrangement saved untold millions of dollars in transaction costs.").

⁵⁹ *See BMI*, 441 U.S. at 19–25.

To some, *Sylvania* and *BMI* signaled the full retreat of the Populist approach and the advent of a new era in which the Court would employ the latest economic theories in a single-minded pursuit of consumer welfare when applying the antitrust laws.⁶⁰ The actual record, however, has been more nuanced. To be sure, the Court has abandoned or narrowed various substantive prohibitions along the lines suggested by recent advances in economic theory.⁶¹ Moreover, the Court has reformulated summary judgment standards so as to favor the interests of consumers over dealers and other producers.⁶² Finally, the Court has narrowed the class of parties entitled to seek damages for anticompetitive conduct, holding, for instance, that a firm does not suffer "antitrust injury" when a merger between its competitors produces a more efficient—and thus more competitive—firm.⁶³ As a result, the supervision and prosecution of mergers has been left largely to the enforcement agencies, who embraced the new economic learning and eschewed any effort to pursue Populist values at the expense of consumers.⁶⁴

On the other hand, the Court stubbornly has clung to some per se rules that can only be explained as attempts to further values other than consumer welfare. For instance, as noted earlier, the Court has refused to repudiate the per se rule against minimum resale price maintenance announced early in the last century.⁶⁵ Moreover, even after *Sylvania* and

⁶⁰ See Easterbrook, *supra* note 44, at 888 ("The Supreme Court has overruled *Schwinn* and explicitly rejected any analysis that makes antitrust cases turn on the 'autonomy of independent businessmen.' Arguments about the effect of a practice on quantity and price, not arguments about freedom and autonomy, control antitrust analysis.") (quoting *Sylvania*, 433 U.S. at 53 n.21)); Robert H. Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 172 ("A great deal of doctrinal baggage about the social purposes of these laws . . . was silently jettisoned."); see also *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–29 (D.C. Cir. 1986) (Bork, J.) (arguing that *BMI* implicitly rejected *Topco*).

⁶¹ See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (holding that maximum resale price maintenance should be analyzed under the rule of reason); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221–27 (1993) (narrowing the definition of "competitive injury" under the Robinson-Patman Act); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (narrowing definition of minimum resale price maintenance).

⁶² See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–98 (1986).

⁶³ See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 114–22 (1986); see also *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335–40 (1990) (holding that gasoline retailer does not suffer antitrust injury if its competitors reduce prices to non-predatory levels pursuant to a maximum resale price maintenance agreement).

⁶⁴ See U.S. Department of Justice and Federal Trade Commission Merger Guidelines (1992, revised 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 Merger Guidelines]; William Baxter, *Separation of Powers, Prosecutorial Discretion and the 'Common Law' Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).

⁶⁵ See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400–09 (1911) (declaring minimum resale price maintenance unlawful); *Business Electronics Corp.*, 485

BMI, the Court reaffirmed the per se ban on horizontal agreements setting maximum prices.⁶⁶ Finally, the Court has reiterated the per se rule against tying.⁶⁷ In so doing, the Court has maintained the Populist premise that, without more, "forcing" consumers to purchase a product they purportedly do not desire is a cognizable antitrust harm.⁶⁸ At the same time, the Court reiterated the price-theoretic conclusion that tying contracts obtained by firms with market power are necessarily the result of coercive forcing, ignoring the possibility that such contracts are examples of purely voluntary integration designed to minimize the costs of market transactions.⁶⁹

To be sure, these decisions do not explicitly invoke "trader freedom" or social concerns over market concentration. As a rhetorical matter, consumer welfare generally rules the roost. Still, while these cases "talk the talk" of *Sylvania*, they walk the walk of *Von's*, *Schwinn*, and *Topco*.⁷⁰

U.S. at 724–26 (adhering to *Dr. Miles*) (dictum); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 n.7 (1984) (refusing to consider arguments by amicus United States that *Dr. Miles* should be overruled); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977) (suggesting that Court would adhere to *Dr. Miles*).

⁶⁶ See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 (1982); see also Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 344–48 (concluding that the *Maricopa County* decision rested upon a rejection of consumer welfare as the sole normative value in antitrust); Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, LAW & CONTEMP. PROBS., Autumn 1987, at 181, 205 (same).

⁶⁷ See *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 461–62 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9–10 (1984).

⁶⁸ See *Jefferson Parish*, 466 U.S. at 12–15; see also Meese, *Tying*, *supra* note 44, at 7, 15–16.

⁶⁹ See *Jefferson Parish*, 466 U.S. at 15–18; *Kodak*, 504 U.S. at 461–62, 464–65; see also Meese, *Tying*, *supra* note 44, at 20, 66–67.

⁷⁰ See *Khan v. State Oil Co.*, 93 F.3d 1358, 1364 (7th Cir. 1996) (Posner, C. J.) (opining that Court's continuing hostility toward minimum resale price maintenance must rest upon something other than concern for consumer welfare), *vacated*, 522 U.S. 3 (1997); Alan J. Meese, *Economic Theory, Trader Freedom, and Consumer Welfare: State Oil v. Khan and the Continuing Incoherence of Antitrust Doctrine*, 84 CORNELL L. REV. 763, 771–72 (1999) [hereinafter Meese, *Economic Theory*]. The Court has consistently invoked stare decisis to justify adherence to these outmoded rules. See, e.g., *Jefferson Parish*, 466 U.S. at 9 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"). However, because the Sherman Act creates a *common law* of trade restraints, respect for precedent does not require adherence to doctrines based upon factual premises that have been proven false in light of changes in economic theory. See *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'") (quoting *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978)); *Business Electronics Corp.*, 485 U.S. at 723–31; *id.* at 732 ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself and not merely the static content that the common law had assigned to the term in 1890."). Indeed, even before

III. PRICE THEORY REDUX: THE QUICK LOOK

NCAA and the “quick look” doctrine it spawned cannot be squared with the modern—and sounder—approach to antitrust exemplified by *Sylvania* and *BMI*. Instead, the quick look doctrine is plainly a throwback to *Topco* and the pre-*Sylvania* days of Populism and price theory. Although the NCAA Court abjured per se treatment for the agreement before it, the Justices endorsed *Topco* as the general rule, carving out an exception only for those cases in which some horizontal restraint of competition is necessary to create the product in question.⁷¹ Moreover, when analyzing the arrangement’s “anticompetitive” effects as part of its truncated rule of reason analysis, the Court echoed a concern expressed in *Topco*, by stating that “[i]ndividual competitors lose their freedom to compete.”⁷² Finally, in an approach more reminiscent of *Von’s Grocery* than *Sylvania*,

the Sherman Act was passed, courts regularly adjusted the doctrine of trade restraints to reflect changes in economic theory or conditions. *See, e.g.,* *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525 (1880) (“It is not that contracts in restraint of trade are any more legal or enforceable now than they were at any former period, but that the courts look differently at the question as to what is a restraint of trade.”); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 421–22 (N.Y. 1887) (endorsing modification of the common law of trade restraints in light of changed economic conditions); *see also* Meese, *Liberty and Antitrust*, *supra* note 20, at 66–67 (arguing that Court relied upon changed perceptions of the effects of cartel agreements in sustaining Sherman Act’s interference with liberty of contract). Where changes in economic theory undermine the premises of former decisions, the Court should adjust the doctrine in light of such developments. *See* Meese, *Tying*, *supra* note 44, at 86–99 (arguing that the Court should abandon the per se rule against tying in light of recent developments suggesting that ties can be the result of voluntary integration); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1247–50 (1993)).

It has been suggested that Congress has signaled its support for the per se rule against minimum resale price maintenance by repealing the Miller-Tydings Act, which allowed states to immunize minimum resale price agreements via so-called fair trade laws. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94–145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a)); *Sylvania*, 433 U.S. at 51 n.18 (opining that repeal of Miller-Tydings Act signaled support for ban on minimum resale price maintenance). This argument fails for two independent reasons, however. First, the Miller-Tydings Act allowed states to immunize any and all minimum resale price maintenance agreements, even those that were simply disguised dealer cartels. Repeal of this statute, then, does not signal disapproval of resale price maintenance that would pass muster under the rule of reason. Second, repeal of an exception to the Sherman Act eighty years after its passage tells us literally nothing about the original meaning of the statute, which, after all, is the ultimate focus of the inquiry. *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) (“The ‘will of Congress’ we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment.”).

⁷¹ *See* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 99 & n.18 (1984) (citing *Topco* with approval for proposition that “an agreement among competitors on the way in which they will compete with one another . . . has often been held to be unreasonable as a matter of law”); *id.* at 99 & n.19 (relying on *Topco* and other decisions in asserting that “the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade”).

⁷² *See id.* at 106–07.

the Court shifted the burden of justification to the defendants, without meaningful proof of anticompetitive effects, let alone proof of market power.⁷³

NCAA is to be applauded to the extent that it created an "escape hatch," allowing defendants to justify some restraints that would otherwise be per se unlawful.⁷⁴ Moreover, the Department of Justice deserves credit for suggesting that restraints such as those at issue in *Topco* should also receive a quick look, instead of the sort of per se condemnation apparently endorsed by NCAA.⁷⁵ But, this simply begs the central question: why subject either restraint to a quick look, instead of the sort of full-blown rule of reason treatment usually accorded ancillary restraints, for instance? The mere fact that a restraint limits the "freedom" of the parties to it cannot itself constitute cognizable antitrust harm; enforcement of voluntary agreements enhances freedom.⁷⁶ Moreover, advances in

⁷³ See *id.* at 110–11; see also Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988) (requiring proof by defendant that efficiency justification "is valid"). As noted below, the Department of Justice would impose on proponents of the restraint a burden of production, not a burden of proof. See *infra* note 75.

⁷⁴ See Kattan, *supra* note 18, at 623–24; Klein, *supra* note 18, at 4 (stepwise approach "should open the door to at least some additional consideration of procompetitive justifications for horizontal agreements."). Of course, very few agreements actually escape through this hatch, at least if the outcomes of reported decisions are any guide.

⁷⁵ See Klein, *supra* note 18, at 4 (stating that the Department of Justice would most likely subject *Topco*-like restraints to a "quick look" instead of per se condemnation). It should also be noted that the Division has indicated that proponents of a restraint do not bear a burden of proving that a restraint actually produces the benefits claimed for it, but instead need only produce significant concrete evidence of such benefits. Compare *California Dental Ass'n v. FTC*, 526 U.S. 756, 788 (1999) (Breyer, J., concurring in part, dissenting in part) (stating (incorrectly) that "[i]n the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification") (emphasis added)); NCAA, 468 U.S. at 113 (proponents of restraint bear "a heavy burden of establishing an affirmative defense which competitively justifies [the restraint]"). Thus, the Division deserves credit for adopting an approach that is more consistent with the traditional structure of rule of reason analysis. See, e.g., 7 AREEDA, *supra* note 12, ¶ 1507b, at 397 ("Once the plaintiff satisfies his burden of persuasion . . . he will prevail unless the defendants introduce evidence sufficient to allow the tribunal to find that their conduct promotes a legitimate objective.") (emphasis added)); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993) ("After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues' of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff . . .") (citations omitted)). Ironically, Justice Breyer's dissent in *California Dental Association* cited both Professor Areeda and *Capital Imaging* in support of his assertion that defendants bear a burden of proof once the plaintiff has established a prima facie case. Both authorities, however, were quite clearly referring to a burden of production.

⁷⁶ Meese, *Price Theory*, *supra* note 23, at 188–89; CHARLES FRIED, *CONTRACT AS PROMISE* 14 (1981) (contending that the enforcement of promises enhances individual autonomy by facilitating cooperative efforts); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 140–41 (1960) (same). Indeed, courts have long recognized that the protection of freedom of

economic theory of the sort recognized in *Sylvania* have taught that horizontal restraints previously deemed anticompetitive are in many cases procompetitive attempts to minimize the costs associated with market contracting. The restraints in *Topco*, for instance, were most likely attempts to combat market failure, i.e., to reduce the transaction costs associated with reliance upon independent market actors to distribute the venture's private label products.⁷⁷ No member of the association accounted for more than 16 percent of its respective market; some accounted for far less than that.⁷⁸ In the modern, post-*Sylvania* era, there is simply no good reason to presume such restraints unlawful without proof of anticompetitive effect.⁷⁹

It will not do to say, as the Court did in *NCAA* and *Topco*, that restraints deemed suspect under a quick look regime necessarily reduce competition between the parties to them, thus presenting special dangers to competition.⁸⁰ Most ancillary restraints are horizontal and reduce compe-

contract is the most effective method of preserving competition. See *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (Sherman Act depends on belief that "the freedom of the individual right to contract, when not unduly or improperly exercised, [is] the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract [is] the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted."); *Whitwell v. Continental Tobacco Co.*, 125 F. 454, 460-61 (8th Cir. 1903) (Sanborn, J.) ("Each [defendant] had the right to determine with what persons it would make its contracts of sale. There is nothing in the [Sherman Act] which deprived any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.") (citations omitted)).

⁷⁷ This is exactly what the district court found, after a full trial. See *supra* notes 30-31 and accompanying text.. See also HOVENKAMP, *supra* note 17, at 205-06; Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 VA. L. REV. 879, 912-13 (1980) (arguing that *Topco* cannot survive *Sylvania*). Cf. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221-22 (D.C. Cir. 1986) (Bork, J.) (finding that horizontal price restraints reduced free riding and passed muster under full-blown rule of reason analysis); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189-90 (7th Cir. 1985) (Easterbrook, J.) (horizontal agreement allocating product offerings could plausibly prevent free riding and thus was analyzed under full-blown rule of reason).

⁷⁸ See *supra* note 30.

⁷⁹ See *Rothery Storage*, 792 F.2d at 226-29 (concluding that *Topco*-like restraints should be analyzed under full-blown rule of reason).

⁸⁰ See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109-10 (1984). Cf. *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 602-04 (1988).

tion by, for instance, dividing territories.⁸¹ They nevertheless receive full-blown rule of reason treatment.⁸² The very same is true of horizontal mergers which, by definition, eliminate all forms of competition between the merging firms. The *Topco* defendants could have merged completely and thus vested control over the private label in a single entity. Such a transaction would have eliminated competition between chains far more completely and irrevocably than the ancillary restraints at issue. Similarly, a merger between all teams in a professional sports league, or a merger between two sports leagues, would snuff out competition just as surely as would the restraints at issue in *NCAA*. Yet, neither courts nor the enforcement agencies would condemn such mergers without first determining the level of concentration in a properly defined relevant market.⁸³ Moreover, the mere existence of such concentration would not be sufficient to establish a *prima facie* case: courts and the enforcement agencies would also consider the possibility that the threat of entry by new firms renders current concentration figures illusory.⁸⁴ Differential treatment of ancillary restraints deemed “inherently suspect” under the quick look requires some justification.⁸⁵

Proponents of the quick look have offered two justifications for hostile treatment of the restraints that fall within its ambit. First, they have

⁸¹ See *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 266–69 (7th Cir. 1981) (rejecting Sherman Act challenge to agreement by seller of assets not to compete with purchaser “in the United States or any foreign country”) (citation omitted); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 423 (N.Y. 1887) (sustaining as reasonable covenant ancillary to the sale of a business that excluded defendant from pursuing his trade in the entire United States except Nevada and the territory of Montana). See also William J. Kolasky, Jr., *Counterpoint: The Department of Justice's “Stepwise” Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, *ANTITRUST*, Spring 1998, at 41, 43 (arguing that presumptive invalidity of any horizontal agreement that restricts competition sweeps too broadly and would require firms to justify garden variety transactions, such as the formation of a partnership).

⁸² See *Polk Bros.*, 776 F.2d at 189 (“The evaluation of ancillary restraints under the Rule of Reason does not imply that ancillary agreements are not real horizontal restraints. They are.”); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 239–41 (1918) (analyzing horizontal restraint ancillary to creation of grain exchange under full-blown rule of reason).

⁸³ See 1992 Merger Guidelines, *supra* note 64, § 1.0; *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051–54 (8th Cir. 1999); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 361–63 (S.D.N.Y. 1995).

⁸⁴ See *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984–85 (D.C. Cir. 1990) (Thomas, J.); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982–83 (2d Cir. 1984) (Winter, J.); 1992 Merger Guidelines, *supra* note 64, § 3.0.

⁸⁵ See *BMI, Inc. v. CBS, Inc.*, 441 U.S. 1, 9 (1979) (“When two partners set the price of their goods or services they are literally ‘price fixing,’ but they are not *per se* in violation of the Sherman Act.”); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360–61 (1933) (“The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. . . . The familiar illustrations of partnerships,

invoked "judicial experience," claiming that such experience indicates that these agreements usually produce net competitive harm.⁸⁶ Second, they have asserted that proof of market share and other indicia of anticompetitive effect is often difficult to come by.⁸⁷ Thus, it is said, a requirement that plaintiffs actually prove anticompetitive effects will result in an unacceptable number of "false negatives," that is, refusals to condemn restraints that are, in fact, anticompetitive.⁸⁸ As shown below, neither of these justifications withstands scrutiny, thus suggesting some other explanation for the differential treatment of mergers and other horizontal restraints.

It is certainly true that courts have had significant exposure to horizontal restraints that at least arguably serve some beneficial purpose. Indeed, the Supreme Court invoked this experience in *Topco* when it held that the restraints in question were per se unlawful.⁸⁹ Yet, such exposure does not constitute "experience" of the sort that can support condemnation of these restraints as "inherently suspect." To begin with, there is no reason to assume that the horizontal restraints that the Court has analyzed in the past are representative of the whole host of restraints that are subject to the quick look doctrine.⁹⁰ Are most such restraints like the ones in *Topco*—procompetitive efforts to combat market failure—or the ones in *NCAA*—restraints that may have been an attempt to suppress output? Are most proponents of "direct restrictions on price or output" entities like the NBA, or instead the Patriot League, which could not possibly harm competition in any conceivable market for athletes or athletic competition.⁹¹ No one really knows.

and enterprises fairly integrated in the interest of the promotion of commerce, at once occur.").

⁸⁶ See *United States v. Topco Assocs.*, 405 U.S. 596, 607–08 (1972).

⁸⁷ See *Tom & Pak*, *supra* note 17, at 399; Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 521 (2000).

⁸⁸ See *Tom & Pak*, *supra* note 17, at 398–99; Calkins, *supra* note 87, at 521; see also Klein, *supra* note 18, at 5 (requirement that parties offer proof of procompetitive benefits first "lessen[s] the burden of proving a violation compared to what we'd have to show under a full-blown rule of reason analysis").

⁸⁹ *Topco*, 405 U.S. at 607–08 ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

⁹⁰ Cf. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124–31 (1974) (DESCRIBING VARIOUS COGNITIVE BIASES, INCLUDING TENDENCY OF HUMANS TO ASSUME THAT ANY GIVEN SAMPLE IS REPRESENTATIVE OF LARGER POPULATION).

⁹¹ See *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (analyzing NBA's attempt to limit number of games broadcast by non-network superstation). The Patriot League is an intercollegiate athletic association formed by Army, Bucknell, Colgate, Holy Cross, Lafayette, Lehigh, and Navy. The league prohibits members from awarding athletic scholarships, with the exception of basketball scholar-

At any rate, even if the sample of cases that has reached the Court is representative, there is still no basis for concluding that restraints deemed suspect under the quick look approach are any more pernicious than, say, a horizontal merger or covenant not to compete. To the contrary, most of this experience has consisted simply of condemning such restraints without any analysis whatsoever. In *Topco*, for instance, the Court refused to examine the proffered benefits of the restraint, benefits the district court identified after a full trial.⁹² Such summary condemnation followed naturally during the Populist era, when trader freedom mattered and the inhospitality tradition held sway among economists and antitrust lawyers. In this environment, there was no reason to require proof of anticompetitive effect, or to allow defendants to explain their conduct, as there was only one possible explanation for such agreements.⁹³ Here the law of tying provides a useful analogy. For decades the Court held that “tying agreements serve hardly any purpose beyond the suppression of competition.”⁹⁴ This assertion, of course, rested upon outmoded assumptions, derived from the price-theoretic paradigm.⁹⁵ Presumably a court or enforcement agency considering the legality of tying de novo would find this “experience” to be of little assistance. In the same way, the experience of Populist courts applying an outmoded economic paradigm is simply useless to a modern appraisal of horizontal restraints deemed “inherently suspect” under the quick look.⁹⁶

As noted above, some have also argued that a requirement that plaintiffs actually prove anticompetitive effects will prove unduly burdensome, with the result that anticompetitive restraints will escape detection and

ships. See Mark Asher & Seth Emerson, *American to Leave CAA for the Patriot League*, WASH. POST, Apr. 25, 2000, at D-1; see also *About the Patriot League* <<http://www.patriotleague.org/aboutpl.htm>> (stating that member schools award “predominantly need-based scholarships”). This direct restriction on price competition between schools for student athletes would be deemed “inherently suspect” under a quick look approach.

⁹² See also *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (declaring territorial allocation per se unlawful despite trial court’s determination that such restraints were ancillary to larger venture and not unreasonable).

⁹³ Cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593–98 (1986) (courts should be skeptical of offers to prove conspiracies that make no economic sense.).

⁹⁴ *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 498 (1969) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958) (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949))). See also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (“certain tying arrangements pose an unacceptable risk of stifling competition”).

⁹⁵ Meese, *Tying*, *supra* note 44, at 66–94 (demonstrating that ties obtained by firms with market power can in fact be instances of voluntary integration, contrary to assumption of *Jefferson Parish*).

⁹⁶ See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 114–17 (2d ed. 1970) (explaining that paradigm shifts cause reinterpretation of previously observed phenomena).

punishment.⁹⁷ This of course was not the case in *NCAA*, the decision that spawned the quick look, where the Court found that the defendants possessed market power.⁹⁸ This assertion does not survive scrutiny, however. Here again, the merger analogy proves helpful. Both government enforcement guidelines and judicial precedent require plaintiffs to make out a *prima facie* case of anticompetitive effects before shifting any burden of justification to the proponents of the transaction.⁹⁹ Moreover, plaintiffs—be they government or private—routinely make such showings by demonstrating that the transaction in question creates high levels of concentration in a market characterized by barriers to entry.¹⁰⁰ Proponents of the quick look approach have adduced no evidence that merger litigation is beset by false negatives; nor have they explained why proof of market structure would be more difficult in the rule of reason context.¹⁰¹

To be sure, litigation over the scope of a relevant market consumes resources, and courts sometimes define markets too broadly—or too narrowly. Nevertheless, litigation over the virtues of a restraint is also expensive.¹⁰² Moreover, courts and enforcement agencies have not always

⁹⁷ See *supra* notes 86–87 and accompanying text.

⁹⁸ See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 111–12 (1984). Similarly, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), which some have read as an application of the quick look, the Court invoked the Commission's "finding of actual, sustained adverse effects on competition," as well as the fact that members of the Association were "heavy majorities" of practicing dentists in the relevant areas. See *id.* at 460–61.

⁹⁹ See 1992 Merger Guidelines, *supra* note 64, §§ 1–3; *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

¹⁰⁰ See, e.g., *Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993); *University Health*, 938 F.2d at 1219–20; *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278 (7th Cir. 1990) (Posner, J.); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, *amended on other grounds*, 890 F.2d 569 (2d Cir. 1989); *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986) (Posner, J.); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500 (D.C. Cir. 1986) (Bork, J.); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995), *aff'd sub nom. Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998).

¹⁰¹ See Kattan, *supra* note 18, at 624 (contending that the quick look "became a license to avoid the heavy lifting of analyzing markets and evaluating competitive effects (exercises that the Commission and its staff perform routinely in the merger area)"). Some have relied upon evidence that defendants almost always prevail when courts employ a full-blown rule of reason to support the claim that such litigation can produce false negatives. See, e.g., Calkins, *supra* note 87, at 521. Such evidence is equally consistent with a competing hypothesis, namely, that *per se* rules and the quick look are over-inclusive, leaving only contracts that are almost always procompetitive for full-blown rule of reason review. At any rate, the vast majority of contracts are beneficial or harmless; one would therefore expect that most would pass muster under the rule of reason.

¹⁰² See Klein, *supra* note 18, at 7 (stating that, under quick look approach, the Division will require proponents of a restraint to come forward with "real-world evidence—factual evidence, expert economic evidence, and preferably both").

excelled at discerning the purposes and effects of restraints that, in hindsight, were quite beneficial.¹⁰³ The process of justifying restraints posited by proponents of the quick look rests upon a particularly optimistic view of human rationality, in which defendants understand exactly what they are doing and why, and march into the courtroom or agency and explain themselves to an open-minded commissioner or judge. The real world is quite different, however. Often defendants themselves have difficulty discerning and articulating the purpose of this or that arrangement in a manner useful for antitrust analysis.¹⁰⁴ Firms are simply collections of individuals, who adopt practices and then move on—or retire. Efficient practices—and the firms that adopt them—will survive, even if firms cannot “remember” why they were adopted.¹⁰⁵ Requiring proof

¹⁰³ For instance, the United States confidently asserted that the restraints at issue in *Schwinn* and *White Motors* produced no benefits, despite significant contemporaneous scholarly commentary to the contrary. See, e.g., Bork, *supra* note 41, at 429–52; Robert L. Jordan, *Exclusive and Restricted Sales Areas Under the Antitrust Laws*, 9 UCLA L. REV. 111 (1962); Telser, *supra* note 41, at 89–96; see also WILLIAMSON, *supra* note 23, at 185 n.22 (noting that he “expressly took exception with the *Schwinn* brief while it was in preparation”).

¹⁰⁴ See Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 308 (1987) (“Often it takes a decade or more to determine what a business practice really does; law moves too fast for its own good, because courts act in advance of the arrival of explanation. Judges move slower than markets but faster than the economics profession, a deadly combination.”). It should be noted that Judge Easterbrook’s assessment of the prowess of economists may be unduly optimistic. It took economists several decades to identify the beneficial purposes of minimum resale price maintenance, for instance. See, e.g., William Breit, *Resale Price Maintenance: What Do Economists Know and When Did They Know It?*, 147 J. INST. & THEORETICAL ECON. 72, 84–86 (1991).

¹⁰⁵ Judge Easterbrook has described this phenomenon well:

Wisdom lags far behind the market. It is useful for many purposes to think of market behavior as random. Firms try dozens of practices. Most of them are flops, and the firms must try something else or disappear. Other practices offer something extra to consumers—they reduce costs or improve quality—and so they survive. In a competitive struggle the firms that use the best practices survive. Mistakes are buried.

Why do particular practices work? The firms that selected the practices may or may not know what is special about them. They can describe *what* they do, but the *why* is more difficult. Only someone with a very detailed knowledge of the market process, as well as the time and data needed for evaluation, would be able to answer that question. Sometimes no one can answer it.

Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984). See also Kattan, *supra* note 18, at 627–28. Indeed, as Armen Alchian explained, many business practices are simply the result of imitation of those practices pursued by other firms. Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 218–19 (1950) (“While there certainly are those who consciously innovate, there are those who, in their imperfect attempts to imitate others, unconsciously innovate by unwittingly acquiring some unexpected or unsought unique attributes which under the prevailing circumstances prove partly responsible for their success. Others, in turn, will attempt to copy the uniqueness, and the imitation-innovation process continues.”). Of course, imitators may not always be able to explain the benefits of a practice about which they knew little in the first place.

that a practice produces this or that benefit will inevitably extinguish some practices, before economists or others can discern their purpose.¹⁰⁶

Indeed, even when firms and their counsel fully articulate the benefits of an agreement, such explanation can fall on deaf ears. Here *Topco* itself provides a useful example, in which the defendants (and the trial judge) explained in plain, understandable English just why exclusive territories were necessary to induce appropriate levels of investment in promotion of the Topco products.¹⁰⁷ Despite this explanation, which found support in the scholarly literature, the United States persisted in its attack on *Topco*, and the Supreme Court joined in.¹⁰⁸

To be sure, today's courts and enforcement agencies are more sophisticated than those of 1968 or 1972. Yet we have not reached some economic

¹⁰⁶ See Kolasky, *supra* note 81, at 45 ("[R]equir[ing] parties to come forth with a full-blown efficiencies defense . . . in every case, no matter how remote the danger to competition, [creates] a real danger that fear of antitrust prosecution will chill procompetitive collaborations among competitors.").

¹⁰⁷ See Brief for Topco Associates, Inc. at 22-23, *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (No. 70-82). Portions of this argument are worth quoting in full:

Judge Will determined that the licensing provisions are "ancillary and subordinate" to the achievement of Topco's objective because they permit each member to undertake the development of his private labels in his trading area and to build an identification of these brands with his stores. If at some future time the value each member would give to his private labels could be appropriated by others and thereby destroyed, the private labels would no longer serve their particular and important competitive purpose. The potential Topco member, who needs a private label program truly private like those of his stronger rivals, would be unwilling to undertake the substantial investment in a cooperative program that would not fulfill his need.

Id. at 22-23.

¹⁰⁸ *White Motor Co. v. United States*, 372 U.S. 253 (1963), provides another example in which the defendants could not have been more clear in their assertion that the restraints at issue—vertically imposed exclusive territories—were necessary to prevent free riding. In particular, they asserted that

Where, as here, there is vigorous interbrand competition, the goods being sold are very expensive, requiring constant service, and distributors and dealers must make an immense capital investment in inventory and plant out of their own pockets (the average value of business assets owned by White distributors and dealers is over \$250,000), territorial limitations are particularly beneficial. See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 809-13 (1962); Jordan, *Exclusive and Restrictive Sales Areas Under the Antitrust Laws*, 9 U.C.L.A. Rev. 111, 152-55 (1962)

White, on the strength of this kind of contract, and in reliance on the cases sustaining its legality, has built up substantial good will in its organization of independent dealers and distributors. The contracts assure that White dealers will have the resources to scour their respective areas for hard-to-get sales, since they will have the security of getting the easier, larger-volume White customers in their areas. And dealers who have spent valuable time "pre-selling" a customer—*i.e.*, softening him up for a White sale instead of a G.M. or Ford sale—will not lose the legitimate reward of their labor to another White dealer who jumps

Nirvana, where lawyers and judges fully internalize all the niceties of transaction cost economics.¹⁰⁹ The Department of Justice, for instance, continues to enforce the per se rules against tying and minimum resale price maintenance, even though economists and others have exploded the economic premises of these doctrines.¹¹⁰ Even professional econo-

territorial boundaries at a strategic moment and snatches away the pre-sold customer.

Such "an attempt to pick off the best accounts—to 'skim the cream,'" Note, *Restricted Channels of Distribution Under the Sherman Act*, *supra*, at 811, is particularly undesirable because it weakens White's over-all dealer organization. Individual dealers need the "cream" not only in order to be able to sell "less lucrative accounts," *ibid.*, but also in order to have the financial strength to maintain adequate service facilities. White trucks travel constantly across the nation. Their drivers have to count on strong service departments at convenient intervals along the way. If such service is not forthcoming, the drivers' employers will, quite naturally, stop buying White trucks. White's primary purpose is not to insulate dealers from competition for their own benefit, but to keep the dealers strong, in order to protect and maintain White's own business and reputation and increase competition with other manufacturers.

Brief for White Motor Co. at 42–43, *White Motor Co. v. United States*, 372 U.S. 253 (1963) (No. 54). Despite this argument, the United States persisted in its assertion that exclusive territories were unlawful per se.

¹⁰⁹ For instance, the Chairman of the Federal Trade Commission has suggested that the Supreme Court reached the correct result in *Topco* because the venture could have prevented free riding via less restrictive methods than exclusive territories, namely "primary responsibility or profit pass-over clauses." See Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1621 (1986). Less restrictive alternatives, however, are very often both less effective and more expensive to administer than an airtight exclusive territory. See Meese, *Price Theory*, *supra* note 23, at 189–95; WILLIAMSON, *supra* note 23, at 187. Primary responsibility clauses merely require firms to serve particular areas first, without precluding firms from serving other areas as well. Thus, firms bound by such clauses could serve their primary areas and then proceed to serve other areas as well, free riding on the efforts of the firms with primary responsibility over those areas. See Bork, *supra* note 41, at 467–68. Profit pass-over clauses would require a firm that invaded another's primary territory to compensate the incumbent for sales made in that territory. Administration of such clauses would presumably have required the cooperative to incur the cost of calculating members' sales of Topco brands on a store-by-store basis. Even if such administration were costless, this arrangement would still be inferior to an exclusive territory, as firms would have to predict the output of their competitors before deciding how much to invest in promoting the products in question. Absent perfect foresight, firms would make erroneous predictions and thus might over or under-invest in promotion. By creating property rights in sales to customers within a particular region, an exclusive territory ensures that firms need only predict their own sales when deciding how much to invest in promotion. See generally F.A. Hayek, *Economics and Knowledge*, reprinted in *INDIVIDUALISM AND ECONOMIC ORDER* 35–39 (F.A. Hayek ed., 1948) (several individual plans cannot all achieve their object if based on conflicting assumptions about how other individuals will behave). Thus, adoption of a "more restrictive" alternative was perfectly consistent with Topco's assertion that exclusive territories advanced consumer welfare more than any other alternatives.

¹¹⁰ See Meese, *Tying*, *supra* note 44, at 61–94; Telser, *supra* note 41, at 89–96.

To be sure, enforcement agencies may claim to be "bound" to enforce decisions like *Dr. Miles* and *Jefferson Parish* so long as they are "on the books." In other contexts, however, these same agencies have refused to enforce precedents no longer consistent with prevailing

mists find it difficult to keep up with the latest developments in their field.¹¹¹ Can we really expect enforcers and judges to maintain a knowledge of economic theory and technique sufficiently catholic to equip them regularly to understand the actual effects of practices—many of them unfamiliar—about which they are already “suspicious?” Economic paradigms shift slowly, even within the profession itself.¹¹² Enforcers and the courts are often the last to hear about such changes.

Requiring proponents to offer significant evidence of the benefits of “inherently suspect” restraints is an unjustified departure from conventional rule of reason analysis. Explanation will be costly, and some restraints will be inexplicable. Application of a quick look approach will thus produce an unacceptable number of false positives, depriving consumers of the benefits of numerous restraints. Moreover, the condemnation of such agreements will drive them underground, depriving courts and economists of the opportunity to consider the restraints in light of new learning.¹¹³ There is, of course, only one way to gain the information necessary to categorize such restraints properly: full-blown

economic wisdom. For instance, the Antitrust Division has in the past simply refused to enforce the Robinson-Patman Act. See Easterbrook, *supra* note 23, at 711. Moreover, in 1968, the Division promulgated Merger Guidelines that indicated that the Division would not proceed against many mergers that were unlawful under then-current precedents. See *id.* at 711–12 & n.30. Thus, current enforcement officials should not feel bound to enforce *Jefferson Parish* or *Dr. Miles*. The Sherman Act after all, creates a common law of antitrust, and this common law is not the exclusive province of judges. The enforcement agencies may exercise their discretion by refusing to pursue cases that, if won, would be detrimental to the welfare of consumers. See Baxter, *supra* note 64, at 686–88. This is not to say that the agencies should refuse to bring tying or minimum resale price maintenance cases. Such cases, however, should be litigated under the rule of reason.

¹¹¹ Consider this: *every* scholar working in antitrust and industrial organization believes that a *majority* of other scholars do not understand—even hold perverse views on—the topics about which he knows the most. If you do not believe it, reread the papers delivered at this conference. I need not draw out implications for the ability of generalist judges to give correct answers to knotty questions arising out of novel business practices.

None of this is the least bit surprising; disagreement and uncertainty is an outcome of the division of labor among scholars. No one can be “up” on even a large fraction of the work going on in industrial organization.

Frank H. Easterbrook, *Ignorance and Antitrust* 119, 121, reprinted in ANTITRUST, INNOVATION AND COMPETITIVENESS (Thomas M. Jorde & David J. Teece eds., 1992).

¹¹² Max Planck was even more pessimistic about the ability of superior theories to win converts: “[A] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” Max Planck, *Scientific Autobiography and Other Papers*, 33–34 (trans. F. Grayner 1949) (quoted in Kuhn, *supra* note 96, at 151). One need not entirely share Planck’s pessimism to argue that resistance to new theories often leads courts and enforcement agencies to condemn procompetitive contracts, and that this danger is heightened under a quick look approach.

¹¹³ See Easterbrook, *supra* note 105, at 6–7.

rule of reason scrutiny in an environment receptive to claims that such restraints may, in fact, further competition.¹¹⁴ Without such full consideration, neither courts nor scholars can make confident assertions that these agreements are, in fact, “inherently suspect” as proponents of the quick look employ that term.

In sum, there is no reason to treat horizontal restraints not deemed unlawful per se any differently from mergers. All such transactions or restraints eliminate price competition and, for that matter, trader freedom. The only difference between the two transactions lies in the extent of integration and thus the “location” of the efficiencies that might be produced. Mergers involve a complete integration of assets (and a permanent elimination of competition) and thus the possible creation of technological efficiencies realized “within” a firm. On the other hand, contractual integration produces a temporary limitation on competition and can generate non-technological efficiencies, usually the elimination or reduction of opportunistic behavior. The persistence of and support for the quick look doctrine necessarily reflects a hostility toward efficiencies that are generated by contract, outside of the firm. Such hostility, of course, is an artifact of the applied price theory tradition of industrial organization, a tradition rejected in *Sylvania*. There is no basis for favoring one sort of efficiency over the other.¹¹⁵

IV. (RE)DEFINING THE SCOPE AND CONTENT OF THE RULE OF REASON

The analysis thus far leaves two open questions. First, how should courts draw the line between horizontal restraints subject to rule of reason treatment, on the one hand, and those that should be per se unlawful, on the other? Second, assuming that rule of reason treatment is appropriate for a particular restraint, what sort of burden should plaintiffs have to discharge before shifting the burden of production to the defendants?

On the first question, it would be tempting to embrace the ancillary restraints test announced by Judge Taft and endorsed by Thomas Arthur in this Symposium.¹¹⁶ That is, one could ask whether the restraints at

¹¹⁴ See HOVENKAMP, *supra* note 17, at 485 (arguing that courts should examine minimum resale price maintenance under the rule of reason because “[b]oth legal policy makers and economists learn a great deal from studying the records of business litigation”).

¹¹⁵ See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466–67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”).

¹¹⁶ See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 338–39 (2000); see also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff’d as modified*, 175 U.S. 211 (1899).

issue accompany and plausibly promote a sale transaction or integration of assets.¹¹⁷ Certainly satisfaction of this test should be *sufficient* to avoid per se treatment. But, should it be *necessary*? I would suggest not: Some horizontal restraints on price or output should be analyzed under the rule of reason even if there is no accompanying sale transaction or combination of productive assets.

Consider in this connection the Ivy League's agreement eliminating competition on levels of financial aid.¹¹⁸ Certainly these restraints are not "ancillary" to some other purpose in the way that Professor Arthur or Judge Taft would use that term. According to some, these restraints are cartel price fixing, plain and simple. Yet, another possibility suggests that rule of reason treatment is appropriate—that is, the Ivy League's restraints may be designed to overcome the market failure that would result from unbridled price competition among the schools in question. In particular, all-out competition for potential students based solely upon their academic merit may result in student bodies that are unduly homogeneous, i.e., lack the sort of socio-economic diversity that all students might value.¹¹⁹ Such diversity, of course, costs money, in the form of financial aid needed to attract and retain diverse students. Competition that drives the price paid by non-diverse students to the marginal cost of providing the education in question deprives schools of the resources necessary to assemble a diverse student body. The result, it is said, would be a "lemons" equilibrium—low prices, but sub-optimal quality as well.¹²⁰ Proof that the Overlap Group has fixed prices, then, should not end the inquiry; instead, the Group should be allowed to adduce evidence that these restrictions actually enhance the welfare of all students.¹²¹

¹¹⁷ Arthur, *supra* note 116, at 374–83. See also *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (asking whether challenged restraints "are part of a larger endeavor whose success they promote").

¹¹⁸ See *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993); see also Brief Amicus Curiae for the Association of Alumni and Alumnae of the Massachusetts Institute of Technology in Support of Appellant at 11–14, *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (No. 92–1911).

¹¹⁹ See *Brown Univ.*, 5 F.3d at 674 (describing this purported benefit).

¹²⁰ See generally George A. Akerlof, *The Market For "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 89 (1970).

¹²¹ Of course, mere proof that the restraint creates substantial benefits would not itself establish that the arrangement is reasonable. Under current law, a plaintiff could still prevail by showing that adoption of a less restrictive alternative would generate the same benefits. See 7 AREEDA, *supra* note 12, ¶ 1507b, at 397. Where the Ivy Overlap Group is concerned, one could argue that individual schools could have achieved the objective in question without collective action by competing "on the merits," i.e., by disclosing to potential students the extent of diversity at their respective institutions and charging non-needy students the tuition necessary to accomplish that diversity. See Alan J. Meese, *Antitrust*

To be sure, even under this most charitable interpretation, the Ivy League's restraints resemble, as Professor Arthur points out, consumer protection self-regulation by interested parties.¹²² Yet this characterization should not be damning. Here franchising provides a useful analogy. Antitrust scholars have long been in the habit of characterizing franchise contracts as vertical restraints. And this characterization is tolerable for those franchise contracts that are "ancillary" to a manufacturer's sale of goods to its dealers. But many franchises are of a business format variety under which the franchisee produces the franchise product.¹²³ These arrangements involve an agreement among actual or potential competitors—franchisees—on what products to offer and how and where to offer them. Having agreed to these terms, franchisees then appoint an agent—the franchisor—to monitor and enforce compliance with them.¹²⁴ Many of these contractual terms would be per se unlawful if adopted on their own, and not as part of a franchise contract.¹²⁵ Neverthe-

Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts, 95 MICH. L. REV. 111, 162–63 (1996) [hereinafter Meese, *Franchise Tying Contracts*] (suggesting that such a less restrictive alternative would suffice in these circumstances). While disclosure of a school's diversity characteristics would entail some minimal cost, there is no reason to suspect that this cost would be greater than the costs of administering the Overlap Group; it may even be lower. If, in fact, the presence of diversity did enhance the quality of education for non-needy students to the extent claimed, one would expect that such students would be willing to pay the additional tuition necessary to support it.

It should be noted that the Overlap defendants claimed that such unilateral pursuit of diversity would be less successful than collective pursuit because there would be "constant pressure from various segments of the university to use school resources to attract the most desirable students." Brief For Massachusetts Institute of Technology at 36, *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (No. 92-1911). This argument seems to rest on a recognition that non-needy "most desirable students" would not be willing to incur the cost necessary to subsidize the diversity sought by the Overlap Group, i.e., that the financial aid policies at issue would not survive in a well-functioning, competitive market. See generally *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692–96 (1978). Cf. Alan J. Meese, *Monopoly Bundling in Cyberspace: How Many Products Does Microsoft Sell?*, 44 ANTITRUST BULL. 65, 114–15 (1999) (proof of market failure necessary to justify contractual restrictions on purchasers).

¹²² See Arthur, *supra* note 116, at 379 n.263.

¹²³ See *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1353 (9th Cir. 1982) (distinguishing between "business format" and "distribution" franchise systems); *Principe v. McDonald's Corp.*, 631 F.2d 303, 305–11 (4th Cir. 1980).

¹²⁴ See WILLIAMSON, *supra* note 23, at 181–82 (characterizing franchise contract in this manner); HOVENKAMP, *supra* note 17, at 205 ("[R]estaurateurs scattered across a wide area might develop joint menus, building plans, and methods of doing business, and then promote their 'chain' nationally. This national name recognition will enable them to reach traveling customers that might otherwise avoid a local restaurant about which they know nothing. The *Topco* case . . . involved such a venture."). See also Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223 (1978).

¹²⁵ For instance, an agreement between fast food franchisors to offer chicken but not pizza, or to offer Coke but not Pepsi, would eliminate a significant form of nonprice competition between the parties, as would "an agreement among automobile manufactur-

less, courts accord such restraints full-blown rule of reason treatment. This is not because such restraints are "vertical" or "ancillary" in any meaningful sense.¹²⁶ It is instead because, regardless of labels, such restraints can serve procompetitive purposes, often by combating the sort of market failure that would result from unbridled competition.¹²⁷ In the same way, horizontal restraints, such as the ones imposed by the Overlap Group, can prevent market failure and thus should be analyzed under the rule of reason.¹²⁸ Instead of asking whether a restraint is ancillary or not, courts and agencies should ask whether the restraint creates the sort of benefits that are cognizable under the Sherman Act.¹²⁹

ers to use plastic rather than leather for their seatcovers." See HOVENKAMP, *supra* note 17, at 259.

¹²⁶ One could argue that such restraints are ancillary to the licensing of a trademark. However, the existence of a trademark created by actual or potential competitors does not transform an otherwise horizontal restraint into a vertical one. No one would suggest that members of the Ivy League could have avoided the "horizontal" label in *Brown University* by appending an "Ivy League" trademark to their literature and website. Similarly, franchisees are no less actual or potential competitors because they operate under a trademark they have created.

¹²⁷ See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–59 (1977); Rubin, *supra* note 124, at 227–29 (arguing that franchise contractual restrictions combat market failure).

¹²⁸ See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221–23 (D.C. Cir. 1986) (Bork, J.) (finding, under full-blown rule of reason analysis, that horizontal price restraint among independent participants in moving company joint venture produced significant benefits).

¹²⁹ Cf. Thomas G. Krattenmaker, *Per se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165 (1989) (declaration that practice is "per se" unlawful necessarily reflects conclusion that certain classes of justification are not cognizable under the Sherman Act); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–84 (6th Cir. 1898) (Taft, J.) (assertion that prices were reasonable not cognizable under the Act), *aff'd as modified*, 175 U.S. 211 (1899).

Some may argue that the approach suggested here is inconsistent with the original meaning of the Sherman Act as articulated by Judge Taft in *Addyston Pipe*. But Taft himself departed from the results mandated by the common law he invoked. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW* 285–87 (1991) (showing that Taft's approach was inconsistent with common law decisions enforcing horizontal agreements fixing reasonable prices); see also, e.g., *Dolph v. Troy Laundry Mach. Co.*, 28 F. 553, 555–56 (C.C.N.D.N.Y. 1886) (sustaining horizontal restraint on prices and output), *rev'd on other grounds*, 138 U.S. 617 (1891). In so doing, Taft simply applied the principle animating the Sherman Act—concern for consumer welfare—in light of changes in economic theory suggesting that private cartels could, in fact, raise prices above the competitive level. See *Addyston Pipe*, 85 F. at 291–93 (finding that prices charged by defendants were unreasonable); Meese, *Liberty and Antitrust*, *supra* note 20, at 66–67 (suggesting that the Supreme Court took a similar approach). The framework suggested here follows in the tradition Taft initiated, i.e., applies advances in economic theory to distinguish between those restraints that may enhance consumer welfare and those that will not. See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731–32 (1988) ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. . . . The Sherman Act adopted

Horizontal restraints that plausibly produce such efficiencies should be judged under the rule of reason, regardless of whether they are “ancillary.”¹³⁰

This brings us to the second question raised above, namely, what sort of proof should suffice to establish a *prima facie* case under the rule of reason? If the merger analogy holds, and there is no obvious reason that it does not, plaintiffs should be required to prove the contours of a relevant market in which the restraint in question purportedly enhances the defendant’s market power.¹³¹ Moreover, plaintiffs should establish just how the challenged restraint operates to confer market power on the defendant. Absent such proof, courts can properly assume that the restraint under challenge is generally beneficial or benign.¹³² This is not to say that plaintiffs must always establish that the defendant possesses market power of the sort necessary to a claim of monopolization. Some restraints may themselves allow a firm to raise the costs of its rivals’ inputs, and thus price above its own costs, even if the firm could not

the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”) (citation omitted).

¹³⁰ *BMI, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979) (“Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not per se illegal, and many of them withstand attack under any existing antitrust standard”); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 376 (1933) (“[N]o valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. We agree that there is no ground for holding defendants’ plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production.”) (citation omitted).

¹³¹ *See, e.g., Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985). Of course, courts usually have little choice but to rely upon inferences drawn from market shares in merger cases, as plaintiffs often challenge such transactions before they have occurred, thus making so-called direct proof of anticompetitive effects impossible. One could therefore argue that the law of mergers does not really provide support for this article’s argument that proof of power in a relevant market should be necessary before a plaintiff can establish a *prima facie* case under the rule of reason.

In this connection it should be noted that § 7 of the Clayton Act applies to all mergers, whether or not they have been consummated. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 588, 607–08 (1957) (voiding stock purchase under § 7 that occurred in 1917–1919). Moreover, neither the 1992 Merger Guidelines (as amended in 1997) nor any case law of which I am aware dispenses with the market power inquiry in cases where the merger under review has already occurred and a plaintiff can purportedly prove direct effects. Thus, it would appear that merger law is entirely consistent with the proposal offered here.

¹³² *See Rothery Storage*, 792 F.2d at 221; *Polk Bros.*, 776 F.2d at 191 (“Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial.”).

otherwise affect prices in its market by reducing output.¹³³ Plaintiffs should be free to prove that market conditions are such that a challenged agreement does, in fact, raise rivals' costs in this manner.¹³⁴

Admittedly, the requirement that plaintiffs prove the contours of a relevant market appears inconsistent with some Supreme Court case law. As Mark Patterson has shown in this Symposium, some case law suggests that plaintiffs can establish a *prima facie* case simply by proving the existence of anticompetitive effects, such as an increase in price or reduction in quality.¹³⁵ Indeed, one could even read *NCAA* to require proof of such effects as part of a quick look analysis.¹³⁶ Supreme Court doctrine, however, does not reflect consistent solicitude for consumer welfare in light of modern economic theory; the Justices are still working out the full implications of *Sylvania's* rejection of Populism and price theory.¹³⁷ Even after *Sylvania*, it still took nineteen years for the Court to overrule *Albrecht's* per se ban on maximum resale price maintenance.¹³⁸ Moreover, even after *Sylvania*, the Court has continued to adhere to rules, such as the per se ban on certain tying contracts, that cannot withstand a post-price theory analysis.¹³⁹ Like *Albrecht* and *Jefferson Parish*, decisions that allow plaintiffs to establish a *prima facie* case based solely on "direct evidence" of anticompetitive effects are misguided, resting, as they do, on the sort of price-theoretic assumptions that informed

¹³³ See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 251 (1986) ("[A] firm need not enjoy or acquire traditional market power to gain the ability to price above pre-exclusionary-rights competitive levels."); Meese, *Franchise Tying Contracts*, *supra* note 121, at 145–46 (describing a raising rivals' cost strategy by a franchisor without market power in market for the franchise product).

¹³⁴ Such proof will not be easy, however. Among other things, a plaintiff would have to show that the input market in question is sufficiently concentrated to support such a strategy. See Krattenmaker & Salop, *supra* note 133, at 240–42; *cf.* Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996) (exclusive contracts cannot support downstream collusion absent concentration in the input market). See generally Krattenmaker & Salop, *supra* note 133, at 267 ("Certainly, in most industries, exclusionary rights contracts cannot be profitably employed for anticompetitive ends.").

¹³⁵ See Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L.J. 429, 432 (2000); see also *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986); *Competitor Collaboration Guidelines*, *supra* note 18, § 3.31 ("If anticompetitive harm is found, examination of market power ordinarily is not required.").

¹³⁶ See *supra* note 16.

¹³⁷ See generally Meese, *Economic Theory*, *supra* note 70; Thomas C. Arthur, "Formalistic Line Drawing: Exclusion of Unauthorized Servicers from Single Brand Aftermarkets Under *Kodak* and *Sylvania*," 24 J. CORP. L. 603, 625–32 (1999) (arguing that *Kodak's* treatment of certain distribution restraints is inconsistent with approach taken by *Sylvania*).

¹³⁸ See *State Oil Co. v. Khan*, 522 U.S. 3, 10–15 (1997) (describing how *Sylvania* undermined premises of *Albrecht*).

¹³⁹ See *supra* notes 94–95 and accompanying text.

Schwinn and *Topco*. Direct proof of anticompetitive effects is, in fact, quite illusory, and should not by itself cast any sort of burden on the proponent of a restraint. More precisely, proof that a restraint raises prices above their previous level may be equally consistent with a defendant's assertion that the restraint produces significant benefits by, for instance, curing a market failure.

Consider again the case of the Ivy Overlap Group. Under a "direct effects" approach, proof that the arrangement produces prices higher than they otherwise would have been would suffice to establish a *prima facie* case, thus casting a burden of production onto the defendant. Yet, such a price increase is also entirely consistent with the defendants' account of the purposes and hoped-for effects of the restraints. "Lemons" equilibria are characterized by reductions in quality *and* price: the point of these restraints—at least according to the defendants—was to correct the market failure that unbridled competition would have produced.¹⁴⁰ Proof that the restraints led to higher tuition may simply indicate that they did, in fact, improve the quality of the education offered by the parties to it, and that matriculants were willing to pay for that quality in the form of higher prices.¹⁴¹ Market power consists of the ability to price *above* cost, and improved products sometimes cost more than their predecessors. Thus, proof that a restraint increases prices is entirely consistent with the assertion that the restraint induced cost-justified price increases and does not reflect any exercise of market power.¹⁴² Such proof should not, by itself, establish a *prima facie* case under the rule of reason.¹⁴³

¹⁴⁰ Cf. *California Dental Ass'n v. FTC*, 526 U.S. 756, 771–73 (1999).

¹⁴¹ See Easterbrook, *supra* note 111, at 127 ("[M]onopoly and efficiency explanations so often imply similar traits. Think of vertical restrictions within a dealership network. If these monopolize, the price rises and output falls. If the restraints cause dealers to supply efficient point-of-sale services delivered to consumers, again price rises, and quantity may fall (although consumers' surplus would rise because they value the higher quality)."); William F. Baxter, *Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 945–46 (1987):

Higher retail prices are entirely consistent with the benign explanation of resale price maintenance. Imposition of [resale price maintenance] reflects a judgment on the part of the brand owner that her products will compete more successfully, both against other branded products and against generic rivals, if the retailer competes along parameters other than price. And the retailer's expenses of engaging in those other forms of rivalry are financed by setting a retail margin higher than would prevail if retail price competition were allowed or encouraged.

¹⁴² Cf. Meese, *Tying*, *supra* note 44, at 69–70 (cost-justified price differential that induces purchaser to accept tying contract does not reflect exercise of market power).

¹⁴³ The Commission's opinion in *California Dental Association* also illustrates the danger of relying solely upon "direct proof" to establish a *prima facie* case under the rule of reason. There the Commission relied upon evidence that certain firms used advertising to increase their sales to conclude that bans on such advertising were presumptively anticompetitive. See *California Dental Ass'n*, 121 F.T.C. 190, 310–11 (1996), *aff'd*, 128 F.3d

Ultimately, reliance upon "direct effects" to establish a *prima facie* case rests upon an outmoded price-theoretic definition of "competition." Under this paradigm, bargaining and information costs do not exist, and competition takes the form of constant rivalry between firms, unhampered by contractual integration.¹⁴⁴ Such rivalry produces a "competitive" price, and restraints that alter that price or depart from the model of atomistic competition are presumptively "*anticompetitive*."¹⁴⁵

In the real world, competition takes a different form. Bargaining and information costs do exist, and market failure can sometimes result. Many contracts and practices inexplicable under a price-theoretic definition of "competition" are in fact attempts to overcome market failure and thus better approximate the result that perfect competition would, in fact, produce.¹⁴⁶ In this real world, there is no reason to presume that prices or other conditions that existed before a restraint was adopted were "competitive" in any relevant sense, any more than were the prices that existed in the state of nature.¹⁴⁷ Indeed, one suspects that market failures, as well as the attempts to solve such failures by contract, are far more prevalent than market power of the sort necessary to do any appreciable harm to consumers.¹⁴⁸ Thus, proof that a restraint creates prices different from those that prevailed before the restraint is at least equally consistent with the hypothesis that the arrangement furthers competition and thus

720 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999). This evidence, however, was equally consistent with the Association's assertion that such advertising was inherently misleading and that regulation of members' advertising was therefore necessary to forestall a "lemons" equilibrium. *See California Dental Association*, 526 U.S. at 771-73. The whole point of false advertising, after all, is to increase one's sales.

¹⁴⁴ *See supra* notes 23-25, 39-40 and accompanying text. *See also* Hayek, *supra* note 109, at 94-99 (contending that then-modern economic theory began with various assumptions of the model of perfect competition and thus had no explanation for numerous real world business practices); *id.* at 94 (asserting that "most [conditions of the perfect competition model] are equally assumed in the discussion of various 'imperfect' or 'monopolistic' markets, which throughout assume certain unrealistic 'perfections.'").

¹⁴⁵ *See* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (condemning exclusive dealing contract because it "take[s] away freedom of purchasers to buy in an open market").

¹⁴⁶ *See supra* notes 41-44 and accompanying text; HAYEK, *supra* note 109, at 96 (noting that because of its various unrealistic assumptions, "'perfect' competition means indeed the absence of all competitive activities").

¹⁴⁷ *Cf. Northern Sec. Co. v. United States*, 193 U.S. 197, 411 (1904) (Holmes, J., dissenting) (Sherman Act should not be read to "make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms"); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d. 185, 188 (7th Cir. 1985) ("The war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.").

¹⁴⁸ *See* Coase, *supra* note 23, at 26 ("The fact that there are transaction costs and that they are large implies that many effects of peoples' actions will not be covered by market transactions. Consequently, 'externalities' will be ubiquitous." (footnote omitted)); WIL-

cannot support a presumption of anticompetitive harm.¹⁴⁹ A requirement that plaintiffs prove market power, on the other hand, will ensure that a presumption of anticompetitive effects only arises in those instances where there is a significant possibility of consumer harm.

V. CONCLUSION

Most business contracts enhance consumer welfare, and horizontal agreements are no exception. Cooperation is the basis of most productive activity, and much cooperation requires agreements between actual or potential competitors. Sometimes these agreements involve a total fusion of assets and talents, as when individuals form a partnership or corporation, or when two firms merge. Such arrangements are properly analyzed under the rule of reason, and plaintiffs must prove that conditions in the relevant market will support an anticompetitive scheme before casting any burden of production on the defendant.

Complete fusion of assets and talent is not always a reasonable mode of cooperation, however. The members of the NCAA cannot merge so as to eliminate the market failures that would result from unbridled competition for athletes, for instance. Thus, some beneficial cooperation takes the form of horizontal agreements between firms that are otherwise independent competitors in the marketplace. Like a total fusion of assets, such agreements often advance the welfare of consumers, as they can eliminate the sort of market failures that would beset unbridled competition. Nevertheless, case law and enforcement policy treat many such restraints as “inherently suspect” without any market analysis, even if they might plausibly produce the sort of efficiencies ordinarily cognizable under the Sherman Act.

This essay has shown that the current hostility toward restraints deemed “inherently suspect” under a quick look approach cannot be justified, resting, as it does, on an approach reminiscent of *Topco* and the applied price theory tradition of antitrust. Developments in economic theory suggest that many horizontal restraints once deemed anticompetitive are, in fact, examples of partial contractual integration designed to overcome the sort of market failures that unbridled competition can produce. In light of these developments, courts and the enforcement

LIAMSON, *supra* note 23, at 28 (“[t]he transaction cost literature also maintains the rebuttable presumption that nonstandard forms of contracting have efficiency purposes.”).

¹⁴⁹ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466–67 (1992) (legal presumptions must rest on actual market realities); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–98 (1986) (court cannot draw inference of anticompetitive conduct from evidence equally consistent with procompetitive explanation); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761–64 (1984) (same).

agencies should analyze such restraints under a full-blown rule of reason, as they are conceptually no different from horizontal mergers and other complete integrations. Such treatment should not be reserved for restraints that are "ancillary" to a venture or transaction, but instead should apply to any restraint that might plausibly produce efficiencies of the sort that are cognizable under the Sherman Act. Moreover, plaintiffs who challenge such restraints should bear the same burden currently shouldered by those who challenge horizontal mergers, i.e., proof that market conditions and concentration are conducive to the sort of anti-competitive effects purportedly produced by the agreement under scrutiny.