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# The Economic Jurisprudence of The Burger Court's Antitrust Policy: The First Thirteen Years.

*E. Thomas Sullivan\**

## I. Introduction

The antitrust jurisprudence of the Burger Court defies crisp categorization. Since Chief Justice Burger was sworn in in 1969, the Court has gradually overhauled most of the Warren Court's substantive antitrust precedents. Although the Court's jurisprudential approach has shown signs of judicial restraint, especially in the narrow range of cases chosen for review, the Burger Court's decisionmaking demonstrates a marked break from the earlier Warren Court approach to substantive antitrust doctrines.<sup>1</sup> Analysis of the Burger Court's contribution to antitrust development after the first thirteen years reveals the sharp contrast with the earlier precedents and judicial decisionmaking styles, and portends the direction the Court will forge in future adjudication. This article will survey the Burger Court's decisionmaking process in antitrust cases in light of Warren Court antitrust precedents and established twentieth-century jurisprudential models, and will demonstrate how the present Burger Court approach will shape future antitrust conduct and litigation.

In place of the "competition equality" populism of earlier periods, the Burger Court has embraced a neoclassical "competition efficiency" paradigm.<sup>2</sup> In deciding each case within its own factual context and competitive merits, the present Court is developing a narrow, one-dimensional analytical style that emphasizes economic

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1 See generally Baxter, *Placing the Burger Court In Historical Perspective*, 47 ANTITRUST L.J. 803 (1978); Posner, *The Antitrust Decisions of the Burger Court*, 47 ANTITRUST L.J. 819 (1978); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980).

2 See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). See generally A.M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13-14 (1970); Kurland, *The Supreme Court, 1963 Term — Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964).

efficiency.<sup>3</sup> It defines the parameters of analysis according to quantitative models of prediction, to the exclusion of other relevant considerations.<sup>4</sup>

This article will suggest that the emerging economic jurisprudential paradigm isolates economic theory from political and social policy considerations. Although the interrelationship between law and economics helps to give antitrust law content and purpose, the Court should not confine the legal process so narrowly. Economic analysis should be only one of many components of the overall analysis. Noneconomic concerns in a given case may be as relevant as economic efficiency.<sup>5</sup> Social and historical evidence can enrich and inform the qualitative process of decisionmaking.<sup>6</sup>

A one-dimensional paradigm lacks the flexibility provided by an open, practical, qualitative approach to developing competitive standards. The result may be that once the "competitive efficiency" precedent is clearly in place, only a "mechanical jurisprudence" will remain.<sup>7</sup> To prevent a static theory of antitrust decisionmaking, the Court should balance the competitive interests and determine the competitive merits in each case in the context of political and social policy as well as economic theory. Whatever the Court's jurisprudential theory of antitrust interpretation, it must remain flexible to critically reexamine changing industrial behavior within an evolving industrial society. To approach the antitrust process from a solely quantitative deterministic orientation is to deny the needed flexibility inherent in the history of antitrust laws.<sup>8</sup>

The Burger Court has advanced its own analytical style in restraint issues under section one of the Sherman Act<sup>9</sup> and merger

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3 While principally employing an economic efficiency paradigm, the Court has not always been consistent or articulate in the evaluative process. Compare *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), with *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

4 See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). This article does not attempt an exhaustive review of antitrust law. Rather, it examines antitrust analysis as it has developed under the central provisions of the antitrust laws.

5 See, e.g., Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Sullivan, *supra* note 1.

6 See Adelstein, *Institutional Function and Evolution in the Criminal Process*, 76 NW. U.L. REV. 1, 46 (1981).

7 See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). See also Breckenridge, *Legal Positivism and the Natural Law: The Controversy Between Professor Hart and Professor Fuller*, 18 VAND. L. REV. 945, 948 (1965).

8 See E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PART I* (1978).

9 See note 3 *supra*.

questions under section seven of the Clayton Act. It has, however, refrained from addressing the predation question under section two of the Sherman Act. The Court must articulate the process and standards by which it will evaluate a section two charge of monopolization or attempt to monopolize. Essentially, the Court will have to define the minimum conduct threshold level that will trigger and sustain a section two complaint against a dominant industry member. Clear judicial guidelines serve to inhibit anticompetitive behavior and enhance the laws' predictability. The failure to establish predictable antitrust guidelines may deter competitively desirable conduct out of fear of the laws' uncertainty.

## II. Juristic Theories of Decisionmaking

### A. *Legal Positivism*

One juristic theory of decisionmaking particularly prevalent in the late nineteenth century but having continuing impact on contemporary judicial decisionmaking is legal positivism. To legal positivists, the law was an imperative or command from the sovereign that established a positive standard.<sup>10</sup> Legal positivists confined the legal process to merely finding the law, without an understanding or evaluation of the competing social values that interact with the sovereign imperatives. The positivist approach stated the law and applied it without reflecting on "socially preferable results."<sup>11</sup> Nonlegal considerations were not permitted to inform the laws' content or purpose. The universal and only influence on the decisionmaking process was precedent deductively applied,<sup>12</sup> allowing precise outcomes to be predicted.

### B. *Flexible Decisionmaking: Holmes and Pound*

In sharp contrast to legal positivists, Holmes noted that "[t]he life of the law has not been logic: it has been experience."<sup>13</sup> Both

10 See generally J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (2d ed. 1861); Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in *LAW: A CENTURY OF PROGRESS, 1835-1935* (1937); Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 *HARV. L. REV.* 44 (1941).

11 See W. FRIEDMANN, *LEGAL THEORY* (3d ed. 1953); J. AUSTIN, *supra* note 10, at 118-90; Breckenridge, *supra* note 7, at 948; Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 593-99 (1958); Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 35-36 (1910).

12 See generally Pound, *supra* note 11.

13 O.W. HOLMES, *THE COMMON LAW* (1881). But see Adler, *Legal Certainty*, 31 *COLUM. L. REV.* 91, 107 & n.27 (1931).

Holmes and Pound faulted positivism for its obsession with analytical logic and consistency and its refusal to invoke value-oriented policies, interests and experiences.<sup>14</sup> For Holmes, the legal process<sup>15</sup> evoked forces beyond a jurisprudence that statically denied that law implicates and is implicated by other social institutions. Holmes rejected the notion that law was or should be merely an imperative, and argued forcibly that an informed and reasoned decisionmaking process must include qualitative predictions and judgments based on an open-ended inquiry including historical, social, and economic considerations.<sup>16</sup> Judicial decisionmaking was to embrace a rational and informed process whereby competing interdisciplinary values could be weighed and determined in their proper context.

Pound also recognized that legal positivism, though efficient and predictable, too rigidly confined the decisionmaking process.<sup>17</sup> Pound observed:

It [legal positivism] confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority. Principles were no longer resorted to in order to make rules to fit cases. The rules were at hand in a fixed and final form, and cases were to be fitted to the rules. The classical jurisprudence of principles had developed, by the very weight of its authority, a jurisprudence of rules; and it is in the nature of rules to operate mechanically.<sup>18</sup>

For Pound, it would have been enough for a court to determine rules which would control the operative facts of a given relationship without announcing a universally applicable principle.<sup>19</sup> Pound believed that the governing rules should reflect a broad perspective, including law's relationship to other contemporary social forces.<sup>20</sup>

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14 See generally R. POUND, *MY PHILOSOPHY OF LAW* 250-62 (1941); Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 1-10, 12-39 (1943). Pound urged that because law is "a means toward an end, it must be judged by the results it achieves . . . , not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation." Pound, *supra* note 7, at 605.

15 See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-14 (1921).

16 O.W. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS* 210, 225 (1920).

17 Pound, *supra* note 7, at 607-08.

18 Pound, *supra* note 7, at 607. See also Pound, *The Theory of Judicial Decision* (pts. 1-3), 36 HARV. L. REV. 641, 802, 940 (1923).

19 Pound, *supra* note 7, at 622 n.69. See also *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting) (rejecting the announcement of a new universal principle which thereafter would be applied in the decision of the case).

20 G.E. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 67 (1978); Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 339-51 (1905); Pound, *supra* note 11, at 12, 35-36.

Pound's theory of juristic decisionmaking focused on freeing the process and context of law from predetermined conceptions. The decisionmaking process had to be flexible enough to accommodate changing social forces, conditions, and the practicalities of each case. The legal process could not stand immune while other social forces affected it or were affected by it.<sup>21</sup>

Pound's jurisprudential methodology of rationally and systematically interacting law with other social science disciplines, while certainly not universally accepted, was widely utilized and expanded. One product of this development has been emphasis on empirical evidence and quantitative prediction and verification.

### C. *Realism*

Not long after Pound expanded on his model of the decisional process, another group of writers, who shared Pound's interest in the utility of scientific empiricism, advanced a "realist jurisprudence."<sup>22</sup> Realism, though advanced by many spokesmen who often disagreed,<sup>23</sup> rejected the positivists' syllogistic approach and rather emphasized more fact inquiry, including both facts in the instant case and external facts that influenced or should have influenced the ultimate outcome.<sup>24</sup> For the realist, the law was the decisional process itself, not the rules or principles that, according to the positivists, shaped and determined the law.<sup>25</sup> That decisional process was influenced, the realists maintained, largely by intuitive and impressionistic notions of the deciding judge.<sup>26</sup>

21 Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 489 (1912).

22 See, e.g., J. FRANK, *LAW AND THE MODERN MIND* (1930); W. FRIEDMANN, *LEGAL THEORY* 339 (5th ed. 1967); K. LLEWELLYN, *THE BRAMBLE BUSH* (1930); E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF LAW* 527 (1953); Dias, *The Value of a Value-Study of Law*, 28 MODERN L. REV. 397, 400-01 (1965); Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931)[hereinafter cited as Llewellyn, *Some Realism About Realism*]; Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930)[hereinafter cited as Llewellyn, *A Realistic Jurisprudence*]; Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317, 322-23 (1960); Stone, Book Review, 75 HARV. L. REV. 1240, 1249-51 (1962) (reviewing R. POUND, *JURISPRUDENCE* (1959)).

23 Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1229-35.

24 Clark, *Methods of Legal Reform*, 36 W. VA. L.Q. 106 (1929); Clark, *Present Status of Judicial Statistics*, 14 J. AM. JUD. SOC. 84 (1930); Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

25 Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 800-02 (1961).

26 See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 100-11 (1930); G.E. WHITE, *supra* note 20, at 116; Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Hutcheson, *The*

Llewellyn and Frank, the leading proponents of realism, argued that the decisional process should embrace an empirical or behavioral science approach.<sup>27</sup> Through this approach, judging could divorce, or at least attempt to divorce, itself from the intuitive prejudices of the individual decisionmaker. Through scientific evaluation, the realist hoped to advance a greater "awareness of the relationship between rules . . . policy" and facts.<sup>28</sup> Realists viewed "law as an instrument for social action in a society constantly in flux."<sup>29</sup> Since society was not static, its legal process could not remain affixed to a deductive methodology based on an "*a priori* conception."<sup>30</sup>

Legal realism attempted, as did Pound's sociological jurisprudence, to correct the one-dimensional normative or positivist approach of earlier jurists<sup>31</sup> by interjecting social change into the decisionmaking framework.<sup>32</sup> "Extra-legal" factors<sup>33</sup> implicated other social science disciplines and institutions in the decisional process. Both schools of judicial decisionmaking believed that the legal process must be able to respond to social change and changing values. They differed, however, on the philosophical direction of decisionmaking. Both schools shared the idea that qualitative factors should aid in resolving conflicting values and interests, though the

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*Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480 (1927).

27 See Llewellyn, *A Realistic Jurisprudence*, *supra* note 22, at 446 n.12.

28 McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941) [hereinafter cited as McDougal, *An Intervention*]; Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123, 131-133 (1962). Professor McDougal commented:

More clearly than any of their critics, the realists have appreciated that legal rules are but the normative declarations of particular individuals, conditioned by their own peculiar cultural milieu, and not truths revealed from on high. Most of their writing has, in fact, been for the avowed purpose of freeing people from the emotional compulsion of antiquated legal doctrine and so enabling them better to pursue their hearts' desires. Not bothering to explain how judges can legislate, it is they who have insisted that judges do and must legislate, that is, make a policy decision, in every case. The major tenet of the "functional approach," which they have so vigorously espoused, is that the law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves.

McDougal, *An Intervention*, *supra*, at 834-35 (emphasis in original).

29 Rostow, *supra* note 28; see Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1236.

30 See Pound, *supra* note 7, at 608.

31 E. BODENHEIMER, *JURISPRUDENCE* 155 (1962).

32 Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1236-37; Yntema, *supra* note 22, at 329.

33 Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 434-45 (1934). See Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1253-54.

realist "preferred experimentation and empiricism to theorizing."<sup>34</sup>

#### D. *Anti-Realist Criticisms*

By the late 1930's, reaction to the realist jurisprudence was substantial.<sup>35</sup> Many critics faulted the realists' devotion to and reliance on quantitative theories and "questionable empirical findings,"<sup>36</sup> which center on exacting statistical investigations and mathematical models.<sup>37</sup> Critics observed that realism failed to address adequately the proper boundaries that restrain the decisional process, and feared that judicial self-indulgence and excesses would remain unchecked if no constraints were placed on the judicial process.<sup>38</sup> Anti-realists called for "reasoned elaboration"<sup>39</sup> within each judicial opinion to determine whether judicial conclusions reasonably weighed the relevant values and interests within an accepted framework of rules and principles.<sup>40</sup>

Wechsler's "neutral principles"<sup>41</sup> seemed to embody many of the post-realist criticisms since the 1950's. The decisional process, Wechsler asserted, had been reduced to an idiosyncratic methodology wherein each decisionmaker achieved an *ad hoc* result without benefit of "neutral principles" that would guide the judicial process.<sup>42</sup> According to Wechsler, a judicial result was "unprincipled" unless it rested on analytical reasons supported by widely held be-

34 G.E. WHITE, *supra* note 20, at 131. See generally Adler, *supra* note 13; Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

35 G.E. WHITE, *supra* note 20, at 139.

36 Adler, *supra* note 13, at 92.

37 See Pound, *supra* note 34. But see Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1234 n.35. Llewellyn cites Cook as advocating a scientific approach for decisionmaking and cites Oliphant as advocating an objective method for decisionmaking. See W.W. COOK, *SCIENTIFIC METHOD AND THE LAW* (1927); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928). In later years, leading exponents of realism attempted to espouse the importance of empiricism in the legal process. J. FRANK, *supra* note 26, at xvii; Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 603 (1940). But cf. Llewellyn, *Some Realism About Realism*, *supra* note 22, at 1229-30.

38 See generally H.M. HART & A. SACKS, *THE LEGAL PROCESS* (tent. ed. 1958); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of Justices*, 73 HARV. L. REV. 84 (1959); Jaffe, *The Supreme Court, 1950 Term—Foreword*, 65 HARV. L. REV. 107 (1951); Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 HARV. L. REV. 96 (1954); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

39 See, e.g., H.M. HART & A. SACKS, *supra* note 38, at 161; White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

40 See note 38 *supra*.

41 Wechsler, *supra* note 38, at 1.

42 *Id.* at 21.



liefs. Decisions resting on intuitive predictions and convictions were considered erroneous. The "tightly guided process"<sup>43</sup> of decision-making based on "reasoned elaboration" and "neutral principles" required, in essence, that the jurist set forth clearly each step of the analytical process by announcing and balancing the competing and, perhaps, conflicting social policies and values present in the case. This was to be accomplished by stating unequivocally any assumptions or prejudgments and by reaching a decision only if it rested on a generally accepted consensus with regard to the ultimate values and policies involved.<sup>44</sup>

Wechsler's jurisprudential approach restrained policy development and judicial prerogatives. Unless a "principled, reasoned analysis" supported the result obtained, judicial restraint became an imperative. No decision regarding policies or values could be rendered absent prior public consensus or precedent. A form of mechanical jurisprudence had returned, and judicial abstention was thereby institutionalized. Activism was enjoined, because the law's decisional process could no longer serve as a means for achieving social ends.

Although the antirealist critique was directed at an activist style of constitutional interpretation rather than legislative interpretation, analogy to the early jurisprudential models and criticism aids in understanding the antitrust decisional process. The open-endedness of the antitrust laws has encouraged a multifaceted weighing analysis similar to constitutional decisionmaking, and the same analytical criticisms apply. Courts must decide whether to interpret the open-ended antitrust laws on a case-by-case, multiple factor weighing basis, or whether to develop a firm set of rules to fill in details omitted by the legislative process. Ultimately, the answer may be dictated by whether the courts' approach is faithful to the broad legislative policy.

### III. The Competition Model

#### A. *From Equality to Efficiency*

One of the legacies of the Warren Court's antitrust jurisprudence was its split jurisprudential personality. The Court refused to be bound by strict logic and rigid precedent,<sup>45</sup> and freely legislated

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43 Griswold, *Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 92 (1960).

44 White, *supra* note 39, at 286.

45 Bloustein, *Logic and Legal Realism: The Realist as a Frustrated Idealist*, 50 CORNELL L.Q. 24, 26-31 (1964).

its own concepts of social policy within the open-ended antitrust statutes.<sup>46</sup> The Court, however, was not antidoctrinal or anticonceptual.<sup>47</sup>

The Warren Court exhibited a realist enthusiasm for empirical economic data concerning industrial organization and how organizational structure could predict behavior. The Court also expressed antirealist doctrine, particularly in its wide application of *per se* illegality to thereby narrowly define the parameters of antitrust analysis.<sup>48</sup> The conclusive presumption of illegality explicit in the *per se* approach rested on the intuitive policy conclusions and theoretical postulates that certain conduct was inherently and perniciously anticompetitive. By classifying certain conduct *per se* illegal, the Court disavowed a jurisprudence that balanced competing interests and policies.<sup>49</sup> Application of absolute rules foreclosed subsequent analysis.

The focus of the decisional process under the Burger Court is on a positive economic analysis. However, unlike the Warren Court's structural perspective, the present Court's analytical inquiry is directed to an economic behavioral analysis centering on efficiency objectives—whether the challenged conduct in the long run will facilitate market competition through increased efficiency.<sup>50</sup> The Court's emphasis on relative efficiency and competition foreshadows a return to a rigid, quantitative economic approach as the predictor of behavior.

Although qualitative factors such as policy, interest and experience are less well defined than quantifiable data, they nevertheless may aid the decisionmaker in reconciling the interests sought to be protected by the antitrust laws. Courts should weigh the sometimes conflicting interests to afford the analytical flexibility needed in a dynamic and pluralistic economy. Although this balancing analysis

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46 See, e.g., *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

47 See *Gilmore*, *supra* note 24.

48 *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Brulotte v. Thys Co.*, 379 U.S. 29 (1964); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

49 The Court's general unwillingness to balance competing interests was revealed in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), in which the Court stated that it was ill-equipped to undertake a balancing of competitive effects. *Id.* at 609-10.

50 See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

will increase the costs of dispute resolution, consideration of a broad array of analytical factors increases the quality of the final judgment.

The Burger Court must confront whether historical and social evidence should be accommodated and reconciled within an economic and theoretical approach to antitrust analysis. The Court must decide whether to permit qualitative factors to inform the present economic decisionmaking approach, or whether to employ a normative standard of efficiency as the sole guideline for resolving conflicts. As the following discussion indicates, the Burger Court's antitrust analysis is presently broader than its predecessor's, but may ultimately be as narrow and as normative.

### 1. Horizontal Arrangements: Price Fixing

The analytical shift from a "competition equality" policy to "competition efficiency" paradigm is evident in the Court's horizontal price fixing cases. The Burger Court has effected this change in analytical perspective by broadening its analysis to permit greater application of a rule of reason. Unfortunately, however, the Court has not been consistent in its decisionmaking.

In the 1940 case of *United States v. Socony-Vacuum Co.*,<sup>51</sup> the Supreme Court held unequivocally that a conspiracy that "tampers with the price structure" is *per se* unlawful. By applying this absolute proscription, the Court chose to close all possible defenses that attempt to weigh competing interests or policies.<sup>52</sup> Notwithstanding

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51 310 U.S. 150 (1940). In *Socony*, defendant oil companies agreed to purchase excess gasoline from the spot market. The object of the conspiracy was to withdraw excess supply from the market so that the tank wagon (wholesale) prices would not be depressed. *Socony* presents the classic method by which prices can be affected through restrictions placed on supply. *See also* *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (Justice Stone held that price fixing, despite the reasonableness of the price, was illegal); *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911) (Chief Justice White accepted implicitly an absolute rule against cartel price fixing); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 570 (1898) (Justice Peckham employed implicitly a *per se* approach against cartel agreements); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (Judge Taft said that the "reasonableness" of the price was not subject to analysis by courts under common law precedents).

52 In the earlier price fixing cases, Justice White argued for a broader judicial prerogative in evaluating the restraint. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), he dissented, stating that under certain circumstances price fixing may provide a social utility; one benefit, for example, was avoiding industry-wide price wars that had an overall ruinous effect on the industry. *Id.* at 368 (White, J., dissenting).

The application of a clear proscription also served to clarify what conduct would be condemned outright in the future, and thus chilled potential anticompetitive conduct. *See* *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 193-94 (1977); Oppenheim, *Fed-*

the fact that the agreement did not set or peg price, the Court in *Socony* reasoned that conduct which directly affects price has by its nature and necessary effect no social utility and hence should be condemned without further consideration.<sup>53</sup>

Shortly after *Socony*, the Warren Court employed a *per se* analysis in *United States v. Northern Pacific Railway*.<sup>54</sup> Speaking for the Court, Justice Black observed that because of the nature of certain conduct, the Court could project its pernicious consequences and condemn it without requiring a "complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries."<sup>55</sup> By adopting generalizations concerning the challenged conduct, the Court was able to project that substantial competitive injury would nearly always result.

The Court justified the *per se* approach on grounds of judicial economy, efficiency, and cost effectiveness.<sup>56</sup> Its adoption demonstrated the Court's firm reluctance to engage in a broad balancing analysis. The Court made clear that it would entertain no social, political, or economic policies or values to justify horizontal agreements that tampered with price mechanisms. Regardless of whether the defendant had the actual power to affect prices or whether the conduct enhanced efficiency, the Court was satisfied that agreements which create even the potential power to fix prices are *per se* unreasonable. Further detailed inquiry was foreclosed.<sup>57</sup>

In the development of the antitrust laws, problems quickly developed, however, in identifying whether the challenged arrangement was a price fix within *Socony*'s broad "tampering" standard. Questions arose whether agreements that were attenuated from direct price fixing arrangements or that had an indirect effect on prices should be treated under the confining *Socony* approach. The central factual inquiry became whether the challenged conduct constituted an "agreement" within the meaning of section one of the Sherman Act.<sup>58</sup>

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*eral Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1150-52 (1952).

53 310 U.S. at 224.

54 356 U.S. 1, 5 (1958). See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

55 356 U.S. at 5.

56 *Id.*

57 *Id.* See also *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

58 See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *FTC v. Cement Institute*, 333

Throughout the Court's history, the breadth of the analytical process seems directly related to two key factors: the attenuation of the effect on price and the extent of the Court's experience with the challenged activity.<sup>59</sup> Whatever the conduct, however, the Court had to determine whether the conduct facilitated collusion and cartelization. The analytical approach often dictated the result and bespoke of the interests and values the Court sought to espouse and protect.

Even before the advent of the Warren Court jurisprudence, the Court exhibited a normative interest in promoting competitive equality. In doing so, the Court favored the open-ended rule of reason approach. The classic case illustrating this methodology is *Chicago Board of Trade v. United States*.<sup>60</sup> In *Chicago Board of Trade*, members of the Board of Trade entered into an agreement that required members who purchased grain after the Board closed to purchase at the closing bid price.<sup>61</sup> The Court upheld the conduct, which otherwise could have been characterized as an agreement to preclude price competition during the nonregular trading session, because it promoted competition by "perfecting market conditions,"<sup>62</sup> by regulating the Exchange's business hours, by breaking up a monopoly previously held by a limited number of warehouses that purchased grain during nonregular hours, and by increasing the number of possible transactions.<sup>63</sup> Under earlier precedent, *per se* illegality seemed clear, and no balancing of interests should have been considered. However, Justice Brandeis cautioned that the decisional process should be broad enough to weigh interests, policies, and experience:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist,

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U.S. 683 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

59 See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); see also *White Motor Co. v. United States*, 372 U.S. 253 (1963).

60 246 U.S. 231 (1918).

61 *Id.*

62 *Id.* at 240.

63 *Id.* at 240-41.

the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.<sup>64</sup>

For Brandeis, this balancing approach should determine whether the restraint is substantial enough to be deemed unreasonable.

By using a broadly-based decisional style, Justice Brandeis was able to further those values perceived to be essential under section one—the protection of small businesses in a pluralistic society increasingly dominated by large business concerns. The Brandeis approach, though not its value orientation, served<sup>65</sup> as an important guide for the Burger Court's decisional style.<sup>66</sup>

While sharing Justice Brandeis's realist concern for small businesses, the Warren Court invoked a far narrower approach in reaching the same value-oriented result. By adopting a self limiting *per se* analytical style, the Court was able to avoid balancing business justifications and policies. In this regard, the Warren Court's analysis significantly differed from Justice Brandeis's realist tradition and the Burger Court's efficiency approach.

In analyzing certain horizontal price arrangements, the Warren Court adopted a structuralist approach to decisionmaking. The Court valued the use of market structure to predict competitive behavior in cases where a nonexplicit agreement arguably facilitated price collusion among competitors. By accepting certain industrial organizational theories as a basis for predicting competitive effect, the Court was able to reach conclusions about the challenged conduct within a framework that avoided weighing other economic and social concerns.

Structuralism achieved its fullest acceptance in *United States v. Container Corp.*,<sup>67</sup> a case concerning the competitive effects of disseminating market data among competitors. The Court in *Container* addressed whether the exchange of interseller price communications was illegal under section one of the Sherman Act. In answering this question, Justice Douglas reasoned that the exchange of price-related

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64 *Id.* at 238. See also *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

65 Some commentators have suggested that *Chicago Board of Trade* was an aberration and that it was implicitly overruled by *Trenton Potteries*. See L. SULLIVAN, *supra* note 52, at 181, 186; see also Redlich, *The Burger Court and the Per Se Rule*, 44 ALBANY L. REV. 1, 9 (1979).

66 See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

67 393 U.S. 333 (1969). See generally Sullivan, *First Amendment Defenses in Antitrust Litigation*, 46 MO. L. REV. 517, 555-58 (1981).

data in a concentrated industry tends to stabilize prices.<sup>68</sup> The economic theory underlying the Court's reasoning suggested that the disclosure of price information among competitors in a highly concentrated market will further interdependence among the competitors, thus increasing the anticompetitive consequences. The Court found that although there had been a downward trend in market prices, the exchange of current prices in that market actually stabilized prices to thereby deter price competition. Relying on structural evidence such as low elasticity of demand for a homogeneous product in a concentrated market where competition centered on price, Justice Douglas found a section one price fix.

The Court's economic rationale that there is "predisposition toward collusion in a concentrated market" severely limited its analysis.<sup>69</sup> This economic approach suggested a decisional style having *per se* qualities. The Court implicitly interjected its own social and economic values into the decisionmaking process. Paradoxically, it also limited the weighing of other interests or policies such as efficiency and performance.

In two recent decisions, the Burger Court has rejected *Container's* limiting decisionmaking style in price exchange cases.<sup>70</sup> Opting for a broader analysis than pure structuralist methodology, the Burger Court has recognized that "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less competitive."<sup>71</sup> Thus, in data exchange cases which implicate price fixing agreements, the present Court has reverted back to the *Chicago Board of Trade* rule of reason approach<sup>72</sup> as the analytical measure through which it will advance competition through efficiency. The Court has not wholly rejected the utility of structural data,<sup>73</sup> but

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68 393 U.S. at 336-37. Eighteen manufacturers of corrugated containers were found to control 90% of the container production in the United States.

69 Sullivan, *supra* note 67, at 558.

70 United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

71 438 U.S. at 441 n.16.

72 See, e.g., Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

73 See, e.g., Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 (1979) (a Robinson-Patman Act case in which the Court considered the oligopolistic market structure to determine competitive effect if buyer were required to disclose to seller a competitor's bid price). For

rather is far less inclined to embrace structuralism as a short cut analytical tool. It continues to analyze conduct in light of structure, but it now seems more ready to inquire into actual competitive conditions to determine whether the exchange has procompetitive effects.<sup>74</sup>

In addition to rejecting a *per se* approach in data dissemination cases, the Burger Court has broadened its analysis in areas where the Court had insufficient experience with the challenged conduct, where the challenged agreements did not directly affect price, or where the agreements facilitated operation of a market. Several cases signal the Court's interest in advancing efficiency and performance over competitive equality as the normative standard to regulate business behavior. In each decision, the Court's underlying premise has been that economic efficiency should be optimized. The Court has rejected *Socony's* strict analytical methodology, resulting in an uncertain jurisprudential approach.

In *Goldfarb v. Virginia State Bar*,<sup>75</sup> the Court held that a minimum fee schedule which had been published by a county bar association and endorsed by the state bar constituted a price fixing arrangement under section one of the Sherman Act. *Goldfarb*, however, does not reveal the analysis employed in reaching this result. In writing for the full Court, Chief Justice Burger failed to articulate whether the Court applied the *Socony per se* approach or the broader-based rule of reason. After noting that the fee schedule was not merely advisory, Justice Burger buttressed his opinion by observing that the trial court had found that the fee schedule and its enforcement mechanism restrained trade.<sup>76</sup> The scope of analysis was unclear because Justice Burger at one point in the opinion concluded that the minimum fee schedule was a "naked agreement," language generally used to connote *per se* illegality, and at another place in the opinion implied that *per se* analysis should not be invoked when the conduct occurs within a profession rather than a business.<sup>77</sup>

Chief Justice Burger's deferential tone suggests that the Court

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example, the exchange may increase competitors' and customers' access to information regarding price, demand, and supply, and reduce barriers to market entry.

74 Sullivan, *supra* note 67, at 560.

75 421 U.S. 773 (1975).

76 *Id.* at 778.

77 The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the profession, may require that a particular practice, which



might justify some restraints on a public interest basis. The opinion implicitly indicated that the Court would adopt, at least for professions, a broader decisional analysis which would balance and perhaps accommodate noneconomic interests and policies.

The Court's deferential attitude toward professions was reaffirmed in *National Society of Professional Engineers v. United States*.<sup>78</sup> In *Professional Engineers*, the government charged that a canon of ethics, which prohibited member engineers from submitting project bids prior to an employment contract, was a restraint of trade under section one of the Sherman Act.<sup>79</sup> The defendant urged the Court to adopt a rule of reason analysis which would weigh noneconomic factors such as public safety against the restraint imposed by the canon. The Court declined to adopt such a broad analysis, though it did concede that summary analysis was too restrictive.

Relying on earlier pronouncements by Justice Brandeis, Justice Stevens, speaking for the Court, stated that the Court should broaden the application of its rule of reason balancing analysis to accommodate restraint issues when raised in the context of a profession. While the Court acknowledged a need to be less rigid in its initial approach, Justice Stevens cautioned that the decisional analysis could only be broad enough to inquire as to the "competitive significance of the restraint."<sup>80</sup>

There are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.<sup>81</sup>

The Court declined to permit the analytical inquiry to proceed be-

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could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

*Id.* at 788 n.17. See also *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 686-87 (1978).

<sup>78</sup> 435 U.S. 679 (1978).

<sup>79</sup> The canon was defended on the assertion that competitive bidding would result in inferior engineering work, thus jeopardizing public welfare and safety. *Id.* at 685 n.7.

<sup>80</sup> *Id.* at 692.

<sup>81</sup> *Id.*

yond an economic analysis of the agreement's competitive impact. The "quality product" defense was excluded because it did not increase efficiency or competition.<sup>82</sup> Flexibility in the decisional process was foreclosed because the underlying assumption of the Sherman Act implicitly dictates that "competition will produce not only lower prices, but also better goods and services."<sup>83</sup> A weighing of public interest considerations such as the public safety factors would be beyond the judicial prerogative and "would be tantamount to a repeal of the statute."<sup>84</sup>

*Professional Engineers* illustrates the Court's changing analysis of horizontal restraints. Prior to the decision, the Court consistently applied a narrow analysis where the nature of the agreement affected price competition. There was little doubt that an agreement which eliminated price competition, while not a direct price fix, would directly affect price and was proscribed under *Socony*. Yet, the Burger Court in *Professional Engineers* applied a broader analysis, only thereafter to confine the analysis strictly within an economic framework which weighed competitive harms against economic benefits.

According to *Professional Engineers*, the nature of the competition defines the parameters of antitrust analysis. The range of decisional options includes only whether the agreement which produced the restraint was "plainly anticompetitive" or, if not, whether the restraint produced a net anticompetitive result. The narrow balancing standard under the latter inquiry leaves no room to evaluate noneconomic defenses, such as quality control or public safety. Social benefits are not to be weighed against competitive factors. According to the Burger Court, only Congress may weigh interests, policies and experience.<sup>85</sup>

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82 *See id.* at 691 n.17.

83 *Id.* at 695.

84 *Id.* In focusing its analysis solely on competitive impact, the Court explained:

The assumption that competition is the best method of allocating in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

*Id.*

85 *Id.* at 695-96. Because defendant did not claim that the ban on competitive bidding enhanced competition, it failed to meet the competitive impact balancing test. This narrow rule of reason seems facially inconsistent with Justice Brandeis's famous language articulating the scope of the analysis in *Chicago Board of Trade*. *See Baxter, Placing the Burger Court in Historical Perspective*, 47 ANTITRUST L.J. 803 (1978). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979) (the Court refused to weigh, under section four of the Clayton Act, the interests

The Court's analytical style in *Professional Engineers* raised several immediate interpretative questions: first, whether the Court would apply the rule of reason analysis to business conduct outside a profession where the direct effect interfered with price competition; second, whether the decisional process outside the professional context would continue to be limited solely to economic criteria; and third, whether all professional conduct was immunized from *per se* scrutiny. The resolution of these issues was critical because many believed *Socony* implicitly overruled or historically confined the earlier rule of reason pronouncements in *Chicago Board of Trade* and *Appalachian Coals* concerning legal restraints affecting prices.<sup>86</sup> Although *Professional Engineers* put to rest these assumptions, it raised the question whether *Socony* had vitality after *Professional Engineers*.<sup>87</sup> A partial answer was forthcoming the next year.

In *Broadcast Music, Inc. v. Columbia Broadcasting System*,<sup>88</sup> the Burger Court continued to use a broader antitrust analysis. The Court extended the rule of reason approach outside the professions by applying it to a blanket licensing arrangement. CBS, a licensee, challenged such an arrangement as an illegal price fix. When CBS sought to bring the blanket licensing agreement within the *per se* analysis, defendants argued that the blanket license agreement was procompetitive because it sought to facilitate orderly and efficient operation of the market.<sup>89</sup> The Court cautioned that it would not apply the *Socony per se* characterization of illegality, and hence the narrower decisionmaking model, in a horizontal restraint case until the Court had had considerable experience with the challenged con-

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and policies involved in the issue whether "the cost of defending consumer class actions will have a potentially ruinous effect on small business and [whether the cost] will ultimately be paid by consumers.")

86 *Socony* said that price is the "central nervous system of the economy." 310 U.S. at 226 n.59. *Container* cautioned that an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. 393 U.S. at 337.

87 See note 70 *supra*.

88 441 U.S. 1 (1979). The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) were organizations whose membership included performing artists. Performing artists used member organizations as "clearing houses" for copyright owners and users to license the use of their performance rights. The "blanket license" given by the organizations permitted licensees to use each and every composition owned by a member of the organization for a standard fee. The fee did not directly depend upon actual usage. CBS held blanket licenses from these organizations. CBS sought to renegotiate the licensing arrangement on a per use base price. When each of the licensing organizations refused to renegotiate, CBS brought suit arguing that the blanket license was a *per se* price fix.

89 *Id. See, e.g., Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

duct.<sup>90</sup> Upon reflection, Justice White, writing for the Court, reasoned that the strict *per se* analysis was inapplicable in this context, even though the conduct concededly was “literally” a price fixing arrangement, because the economic realities of the industry required this kind of market arrangement to effectuate the rights that were granted by Congress.<sup>91</sup>

While the scope of the Court’s analysis sweeps beyond the *per se* standard, the analysis is confined to economic considerations. *Broadcast Music* indicates that the rule of reason analysis restrains the Court to inquire only whether the challenged conduct will result in a net procompetitive effect. The Court stressed that the focus must be whether the practice is “designed to increase economic efficiency and render markets more rather than less competitive.”<sup>92</sup> Under this efficiency paradigm, the Court found that the blanket license arrangement produced cost efficiencies in the monitoring and integration of sales and in enforcement against unauthorized copyright use<sup>93</sup> that could not have been achieved by individual composers. Therefore, although the collusive arrangement destroyed “competitive pricing as a free market’s means of allocating resources,” the Court, by narrowing its decisional analysis to include only efficiency criteria, was able to remand the case and conclude that the challenged practice created a new market “in which individual composers [were] inherently unable to fully effectively compete.”<sup>94</sup> On remand the Second Circuit applied the Court’s efficiency standard to hold that the blanket licensing did not create an unreasonable restraint,<sup>95</sup> because the individual transaction costs were too high for individual licensing to work competitively.

Clearly, the decisional process employed by the Burger Court in *Professional Engineers* and *Broadcast Music* has produced a significant

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90 441 U.S. at 19 n.33.

91 *Id.* at 19. It is interesting to note that Justice White was one of the members of the Court who consistently embraced the Warren Court antitrust jurisprudence. *See id.* at 8-9; *Arizona v. Maricopa County Medical Soc’y*, 102 S. Ct. 2466, 2480, 2481-84 (1982) (Powell, J., dissenting).

92 441 U.S. at 20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)). *But cf.* *Cement Mfrs. Protective Ass’n v. United States*, 268 U.S. 588, 594-95, 599, 602-06 (1925) (the Court employed a far broader standard which was not limited to whether the challenged conduct would increase economic efficiency). *See also* *McCann v. New York Stock Exch.*, 107 F.2d 908 (2d Cir. 1939).

93 441 U.S. at 21.

94 *Id.* at 23.

95 *CBS v. American Soc’y of Composers and Publishers*, 620 F.2d 930 (2d Cir. 1980). The Second Circuit also found that since the blanket license did not prohibit individual composers from obtaining direct licensing, the arrangement did not eliminate price competition.

analytical shift. Each decision bespeaks a gradual change in philosophical direction. *Per se* analysis gave way to broader application of the rule of reason in a process that values economic efficiency as the normative standard for the decisional analysis. These cases indicate that the Burger Court will apply its efficiency-oriented rule of reason model in certain horizontal restraint contexts in order to weigh the competitive harm against the economic benefit even when the challenged conduct directly affects price competition.<sup>96</sup>

In cases where the effect on competition is indirect and subject to conflicting inferences, the majority of the Court seems to discount the behavior cost (costs associated with monopoly power which increase when competition is lessened) and simply consider efficiency. When the anticompetitive behavior is direct, such as price fixing, the Court discounts the efficiency argument and considers, at least implicitly, the behavior cost involved in the restraint. The problem lies in the intermediate cases where the economic injury is inexact. Economic theory provides only limited guidance for determining what constitutes a direct price fixing agreement and which decisional analysis to employ.<sup>97</sup> These difficulties may explain the Court's most recent decisions.

In the 1979 Term, the Court in a per curiam opinion summarily reversed a court of appeals decision which had held that a horizontal agreement to eliminate credit was not necessarily a price fixing arrangement and hence not *per se* unlawful.<sup>98</sup> Reasoning that interest-free credit was the equivalent of a discount and thus an inseparable part of the price, the Court in *Catalano, Inc. v. Target Sales, Inc.*, concluded that "[a]n agreement to terminate the practice of giving credit is . . . tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se*" analysis.<sup>99</sup> The Court rejected the Ninth Circuit's reasoning that the restraint should be weighed against procompetitive benefits of lowered entry barriers

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96 The Court in *Broadcast Music* conceded that ASCAP had power to and did in fact set the price for the blanket license. 441 U.S. at 20. The ultimate holding in *Professional Engineers* made it clear that the agreement not to engage in competitive bidding had the effect of maintaining prices, and therefore violated section one of the Sherman Act. 435 U.S. at 692-93.

97 The line-drawing seems to center on how attenuated the agreement is from a direct price fixing arrangement and whether there is market interference with a price component.

98 *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). The district court entered an interlocutory order which denied plaintiff's motion for the court to analyze the conduct under a *per se* illegality standard. The order was certified to the Ninth Circuit under 28 U.S.C. § 1292(b).

99 446 U.S. at 648.

and increased visibility of prices.<sup>100</sup> The Court instead returned to the narrow *Socony* analysis, but it did so largely by relying on prior cases wherein the Court had applied the broader rule of reason analysis.<sup>101</sup>

The *Catalano* Court recognized that the directness of the impact on price may be a central factor dictating the correct analytical style. While stating that “[w]e have held agreements to be unlawful *per se* that had substantially less direct impact on prices than the agreement alleged in this case,”<sup>102</sup> the Court concluded nevertheless that if the challenged conduct has an effect on an inseparable component of the price, the only question open for consideration is whether the conduct occurred.<sup>103</sup>

The Court employed similar reasoning during the 1981 Term when the Court addressed whether a maximum fee schedule for health services provided to policyholders of certain insurance plans was *per se* illegal. The Court, in a 4-3 decision, held in *Arizona v. Maricopa County Medical Society*<sup>104</sup> that an agreement among competing doctors to set the maximum fees charged under health insurance plans constituted a *per se* violation. Rejecting *Broadcast Music* arguments that the agreement had efficiency-enhancing justifications that benefited consumers, Justice Stevens opined that the Court had not “wavered in [its] enforcement of the *per se* rule against price fixing.”<sup>105</sup> Citing *Catalano* and previous maximum price fixing cases,<sup>106</sup> the Court concluded that establishing a maximum price was just as pernicious as agreeing to fix minimum or uniform prices, though the Court recognized that the economic rationale may differ. The Court explained:

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100 605 F.2d 1097, 1099 (9th Cir. 1979).

101 For example, the Court stated “that the agreement was just as plainly anticompetitive as a direct agreement to raise prices. Consequently, no further inquiry under the rule of reason . . . was required in order to establish the agreement’s unlawfulness,” by citing *Professional Engineers, Broadcast Music*, and *Northern Pacific*, rule of reason cases. 446 U.S. at 645-46. Moreover, the Court cited *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936) as a *per se* case, when in fact the Court never employed that terminology.

102 446 U.S. at 647.

103 *Id.* at 648. The Court concluded that though the effect might have been an indirect price increase, the “agreement was just as plainly anticompetitive as a direct agreement to raise prices.” *Id.* at 645-46 (quoting favorably *Catalano*, 605 F.2d 1097, 1103 (9th Cir. 1979) (Blumenfeld, J., dissenting)).

104 102 S. Ct. 2466 (1982). A divided Ninth Circuit had ruled that *Catalano*’s *per se* analysis did not apply. *Arizona v. Maricopa County Medical Soc’y*, 643 F.2d 553, 559-60 (9th Cir. 1981).

105 102 S. Ct. at 2475.

106 *Id.* (citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951)).

The *per se* rule 'is grounded on the faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and different procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.<sup>107</sup>

Though citing case precedent to maintain a *per se* analysis in price fixing cases, the Court was not confined by *Goldfarb* and *Professional Engineers* in evaluating professional conduct. Concluding that the challenged conduct was not "premised on public service or ethical norms,"<sup>108</sup> the Court did not hesitate to apply the *per se* analysis to the medical profession. Consequently, horizontal maximum price fixing is *per se* unlawful regardless of whether it is engaged in by members of a profession. The notion that the Court would analytically distinguish professional conduct from that of other competitors seemed to have lost force in *Maricopa*, at least with regard to price fixing restraints. Curiously, however, the Court suggested that such a distinction might survive under a rule of reason balancing approach if the restraint was premised on noncommercial objectives such as public service or ethical norms, or if the restraint would enhance professional service.<sup>109</sup>

The Court's analysis in *Catalano* and *Maricopa* is not fully consistent with the decisional styles in *Professional Engineers* and *Broadcast Music*.<sup>110</sup> In both *Catalano* and *Maricopa*, the Court refused to weigh

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107 102 S. Ct. at 2475 (quoting Rahl, *Price Competition and the Price Fixing Rule*, 57 Nw. U.L. REV. 137, 142 (1962)) (citation omitted). Apparently, the Department of Justice urged the Court that "horizontal maximum price fixing is *per se* illegal, unless 'the proponents of the agreement have shown it to be necessary to some integration of productive capacity.'" *Doctors' Maximum Fee Agreements with Approved Insurers are Subject of Supreme Court Arguments*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1038, at DD-2 (Nov. 5, 1981) (emphasis added). See *United States v. Topco Assocs.*, 405 U.S. 596, 613 (1972) (Burger, C.J., dissenting).

108 102 S. Ct. at 2475.

109 *Id.* To weigh noncommercial objectives against the competitive harm would conflict directly with the central holding of *Professional Engineers* and *Broadcast Music*.

110 See text accompanying notes 78-96 *supra*. In *Professional Engineers*, the Court reasoned that the ban on competitive bidding was not price fixing, even though the ban unquestionably had an anticompetitive effect. 435 U.S. at 692. Because the Court considered the business justifications for the ban on bidding, the case is considered an example of a rule of reason analysis.

the economic effects of the agreement as it had in *Professional Engineers* and *Broadcast Music*. The Court offered no "reasoned elaboration" regarding how the decisional approach employed in *Catalano* and *Maricopa* can be reconciled with the analysis of *Broadcast Music* and *Professional Engineers*.<sup>111</sup>

Although distinctions do seem apparent between *Broadcast Music* and *Maricopa*, the Court did not rest its opinion on them. The Court could have held in *Maricopa* that the price plan, while perhaps promoting economies and benefiting consumers, need not have included doctors. The doctors' participation in the pricing scheme was not essential to the desired procompetitive effects.<sup>112</sup> This element of indispensability seemed critical to the *Broadcast Music* analysis regarding the market effectiveness of the blanket license agreement. Accordingly, the main distinction could have been drawn on whether the agreement was necessary to achieve the desired efficiencies or whether less restrictive means were available. The Court instead refrained from reconciling the unelaborated distinctions in its recent cases.

Labeling certain conduct "price fixing" in one case so to find it without redeeming value and not to so label it in another, though the probable effect in both instances may be price stability or uniformity, does not create a decisional standard that can easily guide subsequent litigation. Although *Catalano* and *Maricopa* are fully consistent with *Socony* and the result achieved in *Professional Engineers*, the analysis employed is inconsistent with *Professional Engineers* and *Broadcast Music*. At best, the approach lacks systematic criteria for reviewing horizontal price-affecting cases. The result can only lead to ambigu-

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111 Perhaps one reason for the lack of a clear statement justifying the distinctions between the cases is the fact that *Catalano* was decided by summary reversal on a petition for certiorari that did not allow the parties to file briefs on the merits or argue the case orally. In *Maricopa* the issue was presented by way of summary judgment motion. Nevertheless, the Court failed to address why it was able in the earlier cases to balance the procompetitive impact of the challenged practice against the restraint imposed in order to determine net competitive effect.

The analysis employed in *Broadcast Music* and *Professional Engineers* would have required the Court in *Catalano* to weigh the competitive effect of reduced entry barriers and increased competition against the possible price increases resulting from the withdrawal of credit. *Catalano* declined to sanction such a decisionmaking approach. Likewise, in *Maricopa*, the Court refused to weigh the economic effects of the agreement as it had in *Professional Engineers* and *Broadcast Music*. The Court's attempted distinction of *Broadcast Music* was unpersuasive. First, the Court implicitly rejected *Broadcast Music*'s reasoning that *per se* rules should not be applied intuitively to condemn novel conduct in which the Court had no previous experience. Second, the Court said that in *Broadcast Music* there was little, if any, competition between individual composers, while it noted that the doctors in *Maricopa* were in competition. 441 U.S. at 9-10.

112 102 S. Ct. at 2478, 2479 n.33.



ous and inconsistent benchmarks which lack the essential elements of predictability.

It remains unclear whether the Court has now implicitly confined its broad-based analysis in *Professional Engineers* and *Broadcast Music* to the facts in those cases or whether the Court is ready to return to the *per se* approach regarding all horizontal price-affecting conduct regardless of how direct the effect on price. Although the classification process regarding the nature of the challenged conduct has repeatedly determined the scope of the analysis, the standards under which conduct will be classified "price fixing" remain unarticulated. *Maricopa* illustrates the Court's analytical tensions concerning antitrust goals and values. The majority in *Maricopa* viewed competition as the principal goal of antitrust and was concerned with whether the agreement created restraints which by their nature interfere with the right of individual competitors in the market. For the majority, interference with such an essential market factor as price competition was enough to mandate summary analysis. The three dissenting justices, however, more highly value allocative efficiency as a goal of antitrust analysis. They regard the Sherman Act as a "consumer welfare prescription,"<sup>113</sup> calling for efficiency and performance criteria as the sole standard upon which competition should be judged. For them, *per se* analysis is inappropriate without first "carefully considering the substantial benefits and procompetitive justifications"<sup>114</sup> that may serve the consumer welfare.

As these section one cases have indicated, differing jurisprudential approaches have on several occasions merged to produce a new antitrust majority which has required a harm-benefit analysis before classifying or condemning the conduct. In other instances, where this majority has been lacking, a narrower, less detailed economic analysis has been employed which focuses on whether there has been market interference with price competition. Whether the Court will accept the efforts to explain competition under an analysis foreshadowed in *Professional Engineers* and *Broadcast Music* remains unclear. The Court ultimately must decide as a matter of policy whether the analysis in the horizontal context should include a structured factual and economic inquiry which weighs the interests and policies regarding economies achieved through reducing price competition. In

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113 *Id.* at 2485 (Powell, J., dissenting) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). The *Reiter* Court was confronted with the single issue of whether consumers have standing under section four of the Clayton Act by reason of being injured in their business or property. The Court held that they did.

114 102 S. Ct. at 2483 (Powell, J., dissenting).

short, the Court's jurisprudential style for antitrust decisionmaking must resolve the changing, and often conflicting, values regarding how to define competition.

## 2. Vertical Restraints

The Burger Court's interpretative approach in vertical restraint cases best exemplifies the Court's jurisprudential change from anti-trust convention. The Court has vividly rejected the Warren Court precedents, which valued a realist populism for promoting equality in competition. In contrast, the present Supreme Court in a post-realist fashion has advanced a normative standard of economic efficiency as the preferred predictive model for defining competition protected by the antitrust laws. This normative paradigm has been evident in the vertical restraint decisional law since 1977 and is reaching new heights under current enforcement efforts.

### a. *Nonprice Market Restrictions*

The tension between the Warren and Burger Courts regarding the methodology by which the dynamic competitive process should be judicially evaluated became evident early in Chief Justice Burger's tenure. In *United States v. Topco Associates, Inc.*,<sup>115</sup> the Court addressed the legality of territorial market allocation among supermarket chains selling Topco-brand products. The majority of the Court applied a narrow summary analysis to declare the market division a *per se* violation of the Sherman Act. In the positivist tradition, the Court considered itself bound by earlier case precedent,<sup>116</sup> and felt ill-situated to balance the relative competing interests and evidentiary data that were implicated in territorial restraint cases.<sup>117</sup> Writing for the majority, Justice Marshall cautioned:

If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress and not by private forces or by the courts. . . . To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.<sup>118</sup>

115 405 U.S. 596 (1972).

116 *Id.* at 608.

117 *Id.* at 609-10.

118 *Id.* at 611-12.

Chief Justice Burger disagreed with the Court's *per se* application, and his dissent in *Topco* signalled the general decisional analysis that was to follow. Chief Justice Burger observed that cursory analysis was inappropriate because the Court, under the open-ended mandate of the Sherman Act, was required first to consider "the relevant economic realities in light of the basic policy and goals of the Sherman Act."<sup>119</sup> According to Chief Justice Burger, prior decisions had not foreclosed a broad economically-oriented policy analysis centering on competitive factors. Consequently, Chief Justice Burger believed the decisional approach should weigh the economic impact that "the condemned practices may have on competition."<sup>120</sup>

In essence, Chief Justice Burger urged the Court to employ a full factual and economic balancing analysis in each case so that the relative competitive factors could be adjudged on their own merits within the given industrial market.<sup>121</sup> Economic factors were to inform the antitrust law's content and purpose. If the challenged practice promoted cost-saving efficiencies, the Court was to weigh these benefits against the severity of the restraint. The narrow *per se* rule of illegality, established for "judicial convenience and ready predictability,"<sup>122</sup> was beginning to erode. Apparently, Chief Justice Burger believed that the summary analysis had no utility unless the challenged practice lacked *any* redeeming merit.<sup>123</sup>

In *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>124</sup> the Burger Court rejected the *per se* approach as it applied to nonprice vertical restrictions. The television set manufacturer in *Sylvania* limited the locations at which its franchised retailers could sell. Applying a strict *per se* analysis, the lower courts did not engage in a balancing analysis to consider whether the distributional restraint imposed on the retailer in the intrabrand market could promote marketing efficiencies in the interbrand television market.<sup>125</sup>

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119 *Id.* at 614-15 (Burger, C.J., dissenting).

120 *Id.* at 620.

121 For example, Justice Burger, relying on the district court's findings, would consider in evaluating the territorial limitations that the purpose of the cooperative endeavor was to further interbrand competition by enhancing through quality control and volume purchasing the individual members' ability to compete against brands of national chains. *Id.* at 613-14. Since these economic factors promoted competition in the interbrand market, they were highly relevant, Chief Justice Burger contended, in assessing the overall competitive and public (consumer) welfare. Any narrower analysis would blindly lead to a preordained result at odds with the reality of the competitive marketplace.

122 *Id.* at 614-15.

123 *Id.* at 621 (citing *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

124 433 U.S. 36 (1977).

125 The lower courts considered themselves bound by *United States v. Arnold Schwinn &*

In rejecting the *per se* approach, the Burger Court clearly endorsed an analysis which values economic efficiency as a principal goal of antitrust law. The decisional focus requires the reviewing court to weigh economic interests, policies, and factual variables in determining whether the “[v]ertical restriction [will] promote interbrand competition by allowing the manufacturer to achieve certain [marketing] efficiencies.”<sup>126</sup> *Sylvania* instructs that distributional and marketing economies are “redeeming virtues”<sup>127</sup> within *Northern Pacific*’s proscription against applying a *per se* analysis.

Central to the Court’s analysis in *Sylvania* was the concern that

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Co., 388 U.S. 365 (1967), in which the Warren Court held that vertical territorial and customer arrangements that restricted a dealer’s resale freedom should be analyzed under the *per se* approach without weighing the competitive interests or effects.

126 433 U.S. at 54. The Burger Court’s economic basis for permitting the rule of reason analysis in vertical nonprice cases is as follows:

Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.

Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These “redeeming virtues” are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer’s goodwill and the competitiveness of his product. Because of market imperfections such as the so-called “free rider” effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer’s benefit would be greater if all provided the services than if none did.

*Id.* at 54-55 (citations omitted) (footnotes omitted).

The Court emphasized that *Sylvania*’s ability to compete in the interbrand market would be enhanced if it could, through distributional restrictions, overcome the free-rider dilemma by optimizing dealer advertising, promotion, and services. This analytical refinement is based on the economic theory that vertical distributional restrictions may increase product diversification and service to retail customers. The restrictions may also permit a new manufacturer to increase competition by permitting it to induce its dealers to market the new product more aggressively.

127 433 U.S. at 54.

the Warren Court's decisions lacked "objective benchmarks" from which antitrust policy could evolve.<sup>128</sup> Since *Sylvania*, economic market factors have become the centerpiece of antitrust policy and analysis. However, *Sylvania* does not dictate that market efficiency is the only permissible criterion. The Court explicitly cautioned that such a decisional framework "is not the only *legitimate* reason for a manufacturer's desire to exert control over the manner in which . . . products are sold and serviced."<sup>129</sup> The Court implied that other criteria such as safety and quality of products might be relevant in a non-price vertical case, even absent evidence of efficiency.<sup>130</sup>

The Court in *Sylvania* did not set forth precise standards for applying the new analysis in vertical restraint cases. It did cite approvingly the continued validity of *Chicago Board of Trade*'s wide-open balancing approach.<sup>131</sup> As discussed previously, however, the Burger Court's most recent interpretation of *Chicago Board of Trade* in *Professional Engineers* and *Broadcast Music* strongly indicates that the balancing analysis, at least in horizontal restraint cases, is limited to weighing only economic efficiency factors to determine whether the challenged practice would produce a net procompetitive effect.<sup>132</sup> In the cases involving vertical restraints, the analysis would weigh the severity of the restraint in the same or intrabrand product market against the increased competition among competitors in the inter-

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128 *Id.* at 53 n.21.

129 *Id.* at 55 n.23 (emphasis added).

130 In raising concerns for product safety, the Court cited *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir. 1970), *cert. denied*, 400 U.S. 831 (1970). In *Tripoli*, the Circuit Court upheld summary judgment for a manufacturer which had imposed vertical customer restraints to protect against serious physical injury to customers and to insulate the manufacturer from product liability suits. *See also* *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 119 (1981); *Del Rio Distrib. Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979); *Clairel, Inc. v. Boston Discount Center*, 191 U.S.P.Q. (BNA) 632 (E.D. Mich. 1976), *aff'd*, 608 F.2d 1114 (6th Cir. 1979). *Cf.* *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980); *Clairel, Inc. v. Cosmetics Plus*, 130 N.J. Super. 81, 325 A.2d 505 (1974).

131 433 U.S. at 49.

132 *See* text accompanying note 96 *supra*. This conclusion is supported by the Court's citation to the economic and legal literature of scholars identified with the Chicago School of antitrust analysis, which generally argues that competitive efficiency and consumer welfare are the only goals of antitrust policy. *See, e.g.*, Baker, *Vertical Restraints in Time of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537 (1975); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II)*, 75 YALE L.J. 373 (1966); Pollock, *Alternative Distribution Methods After Schwinn*, 63 NW. U.L. REV. 595 (1968); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROBS. 506 (1965).

brand or generic product market.<sup>133</sup>

In sum, *Sylvania* permits a more realist-oriented weighing analysis and reflects the Court's consumer-directed value orientation. The Court values not whether a restraint is imposed on intrabrand competition, or whether retail dealers enjoy full autonomy from a larger manufacturer, or whether some intrabrand dealer will be unable to compete with another in that brand;<sup>134</sup> rather, the Court's concern is whether the restraint will promote interbrand competition to ultimately benefit consumers through lower prices and better service. This analysis may also protect small business franchises who, but for the franchise restrictions, may be denied a position in the market by the manufacturer opting for vertical integration. As long as a viable interbrand market exists, intrabrand retailers will be unable "to exploit the resulting market" because consumers will be able to substitute "competing products of the other manufacturers."<sup>135</sup> To the extent that a healthy interbrand market does not exist, evidenced by a monopoly, the Court will be more concerned about market restrictions.

The key to understanding the Burger Court's decisional style is to distinguish between vertical restraints on intrabrand competition that may promote overall market competition in the industry, and horizontal agreements that interfere with interbrand competition. The analysis must be focused, however, to expose and condemn vertical agreements that have a horizontal effect of restraining output or raising interbrand prices.

Although the present Court's analysis values practices which enhance interbrand competition, the Court has receded from the earlier policy orientation of analyzing a trade restraint within the framework of whether it interfered with dealer independence. The question remains whether the Burger Court's new analysis will result in a quantitative approach as rigid as the mechanical jurisprudence of earlier times.

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133 433 U.S. at 52 n.19.

134 The *Sylvania* Court, aware of the Warren Court's populist attitude toward protecting small businessmen and their independence, observed that *Schwinn's per se* rule could hurt small businessmen by preventing a firm "from using the franchise system to achieve efficiencies . . . [and by increasing the] incentive for vertical integration . . . thereby eliminating . . . the role of the independent businessmen." *Id.* at 57 n.26. See also *Simpson v. Union Oil Co.*, 377 U.S. 13, 20-21 (1964) (Justice Douglas discusses the importance of protecting retail dealers).

135 433 U.S. at 54.

b. *Resale Price Maintenance*

The language in *Sylvania* made it clear that the Court did not entirely foreclose the opportunity to apply a *per se* analysis to certain vertical restrictions.<sup>136</sup> The Court in dictum commented that “*per se* illegality of price restrictions has been established . . . and involves significantly different questions of analysis and policy.”<sup>137</sup> Given the Court’s reversion to *Northern Pacific*’s standard that a *per se* analysis applies only if the challenged practice has a “pernicious effect on competition” and is without “any redeeming virtue,”<sup>138</sup> the Court’s decision raised the question whether the Court would in the future apply its neoclassical economics to vertical price fixing cases. Arguably, resale price maintenance might have some “redeeming virtue” in promoting competition in the interbrand market by addressing the free rider problem.<sup>139</sup> Moreover, since the Court in *Sylvania* held that the ancient rule against restraint on alienation did not justify the *per se* approach in a nonprice vertical restraint,<sup>140</sup> it was conceivable that the Court would turn to a *Sylvania*-like analysis.<sup>141</sup> *Sylvania*’s analysis inadequately justified its disparate treatment of price and nonprice restraints so as to question the analytical distinction’s continued vitality.<sup>142</sup>

Justice Powell, who authored the *Sylvania* decision, addressed the analytical uncertainty three years later in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*<sup>143</sup> Plaintiffs in *Midcal* challenged California’s wine pricing scheme as a classic resale price maintenance arrangement under the Sherman Act. By state regulation, wine prices set by a single wholesaler within a particular trading area

136 *Id.* at 51 n.18, 58-59.

137 *Id.* at 51 n.18.

138 *Id.* at 50.

139 *See, e.g.*, R. BORK, *THE ANTITRUST PARADOX* 288-91 (1978); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979).

140 433 U.S. at 57.

141 Earlier resale price maintenance cases justified the *per se* analysis on the common law rationale of restraint on alienation. *See, e.g.*, *United States v. General Electric Co.*, 272 U.S. 476, 487 (1926); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404 (1911). *Cf.* *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

142 433 U.S. at 51 n.18. In *Schwinn*, the Court also stated that where price fixing is implicated in the distributional system, the restriction is *per se* illegal. 388 U.S. at 375-76.

143 445 U.S. 97 (1980).

bound all wholesalers in that trade zone.<sup>144</sup> The state alcoholic beverage commission imposed sanctions for selling below the posted price.

Unfortunately, Justice Powell's opinion in *Midcal* failed to confront the analytical conflict created in *Sylvania* between price and nonprice vertical restraints. Justice Powell continued to discuss the restraint in terms of "control" rather than competitive effect. The Court merely reaffirmed precedent, holding that vertical price restraints were as pernicious as horizontal price agreements and therefore merited only a *per se* examination to determine whether the practice existed.<sup>145</sup>

The earlier decisional law concerning resale price restraints was set forth principally by Justice Hughes in *Dr. Miles Medical Co. v. John P. Park & Sons Co.*,<sup>146</sup> where the Court relied on the property rule prohibiting restraints on alienation to find a resale price restraint conclusively illegal. This cursory analysis applied as long as the manufacturer had relinquished dominion and title to the product. The Court expressed concern for protecting freedom of trade for independent dealers "who own what they sell."<sup>147</sup> Justice Hughes reasoned that the *per se* analysis should be applied to vertical price arrangements imposed by manufacturers because such restrictions have the same competitive impact as horizontal price fixing agreements between wholesalers or dealers.<sup>148</sup> The facts of the case, however, presented no evidence of wholesaler or dealer cartelization. The Court did not address whether a decrease in price competition caused an increase in nonprice competition, and did not discuss the resultant competitive effect on the market.<sup>149</sup>

Justice Powell's opinion in *Midcal* followed the *Dr. Miles* narrow

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144 *Id.* at 99-100.

145 *Id.* at 102-03.

146 220 U.S. 373 (1911).

147 *Id.* at 407-08.

148 *Id.* at 408.

149 In 1937, largely in reaction to *Dr. Miles*, Congress permitted states to authorize resale price maintenance to insulate small business from price and marketing practices of large concerns who might be in a position, due to marketing economies, to offer their products at discount. Miller-Tydings Fair Trade Amendment, ch. 690, 50 Stat. 693 (1937) (current version at 15 U.S.C. § 1 (1976)). If minimum retail prices could be set, small retail establishments might not be driven from the market. *Dr. Miles* was therefore suspended in those states that adopted fair trade laws. The suspension lasted almost forty years. In 1975, Congress, dissatisfied with the competitive effects of the state fair trade laws, repealed its 1937 approval of the fair trade legislation. Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C. § 45 (1976)) (amending 15 U.S.C. §§1 and 45). As a result, vertical price restrictions again came within *Dr. Miles*'s reach.



approach and failed ultimately for not recognizing that *Sylvania's* economic syllogism had undercut *Dr. Miles's* rationale. Although an analytical distinction should perhaps remain between price and non-price vertical restraints, the Court has not to date set forth an adequate justification for the distinction.

The present Court's single legal justification for applying the *per se* analysis to resale price maintenance agreements is that Congress implicitly "expressed its approval of a *per se* analysis" when it rescinded the authority for state fair trade laws.<sup>150</sup> The Court can be faulted for failing to articulate how its conclusion that only a *per se* analysis should be employed in vertical price restriction cases can be reconciled with the economic theory advanced in *Sylvania*. By restricting its decisional process to this limited focus, lower courts will be unable to explore whether in a particular situation the vertical price restraint promotes interbrand competition or whether it furthers horizontal cartelization. The particular utility of the commercial practice will never be evaluated. Moreover, the Burger Court has failed to reformulate how nonprice restraints that may have an effect on price will be analyzed. The Court has left unresolved whether nonprice restraints should be weighed under *Sylvania's* new economics or treated under *Midcal's* and *Dr. Miles's* theory that vertical restrictions may be as effective in producing anticompetitive consequences as horizontal price agreements.<sup>151</sup>

The Court's rigid decisionmaking style, which precludes weighing actual economic or social effects, will certainly make the judicial process less complicated and will reduce transaction costs. As a result of the increasingly mechanistic decisionmaking, policies, interests, and experiences in a particular industry will be ignored.<sup>152</sup>

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150 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977). *See also* *California Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980).

151 445 U.S. at 102; 220 U.S. at 408. *See also* *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

152 The present antitrust enforcement officials have announced that they will urge the Burger Court to apply its analytical refinement introduced in *Sylvania* to resale price maintenance agreements as well as nonprice restraints. They argue that vertical practices by definition are incapable of affecting interbrand competition. Statement by Melanie Cutler, Twenty-First Annual Advanced Antitrust Seminar On Distribution and Marketing, in New York City (Dec. 8, 1981). The economic justification for the broader analysis follows:

Unless all the manufacturers in the relevant product market are also imposing RPM, the manufacturer's objective cannot be to foster collusion with his competitors. Moreover, since we are assuming the manufacturer has decided it is in his interest to employ the practice, his objective is clearly not to raise dealer profits.

### c. *Tying Arrangements*

Besides distributional restrictions, another related vertical restraint occurs where the manufacturer sells a desired product only on the condition that the purchaser take a second, perhaps less desirable, product.<sup>153</sup> If the purchaser wants the first product, it will have to take the second product even though it may be under less competitive terms. The tying arrangement has antitrust implications not only because it limits the purchaser's freedom to deal but also because it may foreclose competition in the second (tied) product market.<sup>154</sup>

Since *Sylvania*, economic theories have been advanced which argue that tying arrangements should be treated like other nonprice vertical restraints, because under certain circumstances they can achieve cost savings and enhance efficiency.<sup>155</sup> Neither the Burger Court nor its predecessor has accepted these arguments, though the Burger Court's analysis of tying arrangements has shown change in direction.

The Warren Court applied a strict analytical approach to vertical tying arrangements. Because the Warren Court considered tying

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(That would only raise price, hence reduce sales, to consumers, and would hurt the manufacturer as much as it hurts consumers.)

[T]he likely explanation for the use of RPM . . . is to encourage dealers to provide the pre-sale demonstrations, information and advertising — as well as post-sale servicing — necessary to the proper functioning of his product. If dealers are able to cut prices by not providing those services, consumers will get quite a different (and, quite likely, less satisfactory) product . . . [T]he consumer buys the product from a discounter, misuses it, the product malfunctions and the consumer concludes that the product was badly manufactured. The producer's reputation and sales plummet. Those dealers who were willing to provide the needed services will not long do so because they are losing sales to the discounters — and may even find themselves spending money to provide those services on goods they didn't sell. The producer's distribution network falls apart.

*Id.*

This economic logic has been challenged recently on the "competitive-advantage" theory that resale price maintenance should continue to be distinguished from nonprice vertical restraints because the dealer-service theory does not adequately explain vertical price arrangements and because retail price maintenance does not resolve the free rider problem. See Gerhart, *The "Competitive Advantages" Explanation for Intra-brand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417.

153 *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958).

154 370 U.S. at 330; 356 U.S. at 5-6. The underlying theory is that the seller will use its market power in the tying product as a lever to increase unfairly sales in the tied product.

155 See, e.g., A. ALCHIAN & ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL* 345-47 (2d ed. 1977); Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

arrangements inherently anticompetitive, it applied the self limited *per se* analysis to vertical tying arrangements.<sup>156</sup> The Supreme Court made it clear in *Northern Pacific Railway v. United States* that the *per se* decisionmaking style obviated an "elaborate inquiry as to the precise harm . . . caused or the business excuse . . . [or] a prolonged economic investigation into the entire history of the industry involved."<sup>157</sup> This conclusion rested on prior decisions and the intuitive assumption that tying arrangements were perniciously anticompetitive.<sup>158</sup> The Court refused to consider and weigh any procompetitive features that the practice had in a particular market, even though it held in *Northern Pacific* that the policy underlying the Sherman Act was advancement of competition. If evidence was introduced that the manufacturer had sufficient economic power in the tying product to restrain competition in the tied product market and a substantial amount of commerce was affected, the inquiry ended. The *per se* classification precluded the decisional process from weighing the economic or social interests that were relevant to the challenged conduct.<sup>159</sup>

Before the Burger Court's analytical shift in *United States Steel Corp. v. Fortner Enterprises*,<sup>160</sup> the Supreme Court frequently inferred the requisite power in the tying product if the arrangement affected a not insubstantial dollar volume of commerce in the tied product.<sup>161</sup>

156 *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495 (1969) (Fortner I); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

157 356 U.S. at 5.

158 *See, e.g.*, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

159 On at least two occasions the Court had made exceptions to its strict *per se* analysis. *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923) (not an unfair practice under § 5 of the FTC Act for oil companies to lease underground tanks with pumps imprinted with its trademark to retail dealers upon the condition that the leased products be used only with gasoline supplied by the lessor, because the Court valued the "goodwill" defense that consumers would be misled and supplier's goodwill adversely affected if gas refined by other oil companies was supplied from its pumps); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (where the tied product was found to be closely integrated with the tying product, the Court permitted the defendant to raise its goodwill as a defense out of fear that it may be damaged if other manufacturers' products were used instead). *But cf.* *International Salt Co. v. United States*, 332 U.S. 392 (1947) (violation of federal antitrust laws for owner of patents on machines using salt to lease the machines subject to condition that salt be purchased from lessor); *IBM Corp. v. United States*, 298 U.S. 131 (1936) (condition in lease requiring lessee to operate leased machinery only with supplies from lessor violates § 3 of Clayton Act).

160 429 U.S. 610 (1977) (Fortner II).

161 *See* *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *International Salt Co. v. United*

This inferential leap permitted the Court to apply its cursory analysis in finding the tying arrangement illegal. In *Fortner II*, the Burger Court signaled that it was not predisposed to rely on such an inference to establish *per se* illegality.<sup>162</sup> Consequently, plaintiffs now face far greater difficulty in invoking the *per se* analysis in cases involving tying arrangements.

*Fortner II* moved sharply away from the Warren Court's rigid summary analysis. Although the *per se* standard still remains after *Fortner II*, the Court now requires a greater evidentiary showing of market power in the tying product before applying the *per se* analysis. Absent rather explicit evidence of actual market power, the Court will examine the tying arrangement under the broader rule of reason approach. Under this analytical process, the Court will be more inclined to measure the restraint's severity against cost efficiencies.<sup>163</sup> In light of the economic framework of *Sylvania* and *Fortner II*, the Burger Court seems ready to apply a more consistent and broader based analysis for nonprice tying arrangements, and will consider

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States, 332 U.S. 392 (1947); *IBM Corp. v. United States*, 298 U.S. 131 (1936); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

162 Plaintiff in the *Fortner* cases was a residential property developer who accepted an offer from U.S. Steel to purchase prefabricated houses at below market interest rates. Thereafter Fortner sued U.S. Steel on the theory that U.S. Steel had tied the sale of the prefabricated houses (tied product) to the low interest line of credit (tying product). In *Fortner I* the Warren Court reversed the lower courts because it held that plaintiff had satisfied the second prong of the test—that a “not insubstantial” amount of commerce in the prefabricated housing market had been affected by the transaction—and that plaintiff should be permitted to demonstrate whether U.S. Steel had “appreciable economic power” in the credit (tying product) market.

On remand the lower court found the requisite market power under the standard set forth by the Warren Court. Plaintiff charged only a *per se* violation and did not on remand pursue the case under the rule of reason standard. 429 U.S. at 610-11. In *Fortner II*, decided eight years later, the Burger Court reversed without dissent. The Court reasoned that in order for the plaintiff to come within the *per se* analysis it had to demonstrate that U.S. Steel had market power, either by showing that the company enjoyed some cost advantage over other competitors in the credit market or that its tying product (credit terms) was unique. Uniqueness was not defined by the fact that the credit was the most advantageous in the market. In other words, the Court would not infer market power simply because the financing terms were unusual, since they may also reflect that U.S. Steel was willing to take greater risks or less profit. *Id.* at 621-22. Moreover, the mere existence of a substantial number of transactions involving the tie did not prove power in the tying product because this might have been due to the advantageous credit terms. *Id.* at 618 & n.10.

163 The Court has utilized an efficiency analysis irregularly in tie-in cases. *See, e.g.*, *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1957) (Harlan, J., dissenting); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

and weigh the actual competitive harm in the particular market. The precise boundaries of analysis remain to be seen. If the Court chooses to apply the noneconomic factors noted in *Sylvania*,<sup>164</sup> the defenses of product quality and goodwill may yet find acceptance and take on added analytical importance.

### 3. Mergers

Although amended several times, section seven of the Clayton Act<sup>165</sup> remains the standard under which mergers are judged. The statute proscribes mergers or acquisitions, whether categorized as horizontal, vertical, or conglomerate, that threaten to significantly impair or lessen competition in a defined market. The Warren Court applied the Clayton Act standard strictly and often mechanistically, as its analyses focused on industrial structure and concentration data.<sup>166</sup> While the Burger Court's jurisprudential style toward mergers has not yet fully emerged, certain analytical distinctions are evident.

The Warren Court's structural-based analysis in merger cases confirmed its realist use of empirical economic data. The Court's doctrinal analysis also exhibited its value-implicit normative direction toward promoting competition equality. In the early case of *United States v. E.I. DuPont de Nemours & Co.*,<sup>167</sup> Justice Brennan observed that the statute was "designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market."<sup>168</sup> Under the *DuPont* analysis, section seven of the Clayton Act set a standard of reasonable probability—a

164 433 U.S. at 55 n.23.

165 15 U.S.C. § 18 (1976). See generally P. AREEDA & D. TURNER, *ANTITRUST LAW* (1980); R. BORK, *THE ANTITRUST PARADOX* 198-262 (1978); J. MARKHAM, *CONGLOMERATE ENTERPRISE AND PUBLIC POLICY* (1973); J. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956* (1959); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 81-150, 544-63 (1st ed. 1970). For pre-Clayton Act merger cases, see *United States v. Union Pac. R.R.*, 226 U.S. 61 (1912); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Cincinnati Packet Co. v. Bay*, 200 U.S. 179 (1906); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

166 The advent of this structural approach was presaged in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

167 353 U.S. 586 (1957).

168 *Id.* at 589. The Court stated that "incipiency" denotes "any time when the acquisition threatens to ripen into a prohibited effect." *Id.* at 597. Substantiality was to "be determined only in terms of the market affected." *Id.* at 593.

less rigorous standard than the Sherman Act. Mergers were forbidden when the trend toward concentration was still in its incipiency, and an actual restraint was not necessary.

The Court's seminal merger case is *Brown Shoe Co. v. United States*,<sup>169</sup> where the Court fully embraced a Brandeisian multi-faceted analysis designed to further industry deconcentration, disperse economic power, and protect small business. Chief Justice Warren interpreted the legislative history of section seven to mandate a normative decisional approach:

The dominant theme pervading congressional consideration . . . was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Other considerations . . . were the desirability of retaining 'local control' over industry and the protection of small businesses.<sup>170</sup>

The Court suggested a multifaceted analysis to promote competition that included weighing a broad range of quantitative economic factors: market share data, concentration data, market and industry trends, and entry barrier evidence.<sup>171</sup> Although the Court's decision to uphold a violation seemed to turn on concentration data,<sup>172</sup> the Court provided little direction or guidance to the lower courts in determining what weight each factor merited.

The wide-open balancing analysis advanced by *Brown Shoe* seemed undercut the following year when the Court in *United States v. Philadelphia National Bank*<sup>173</sup> announced a presumptive illegality test. The Court in *Philadelphia National Bank* held that the merger is presumed illegal if as a result, one firm controls an "undue market share percentage" and market concentration significantly increases.<sup>174</sup> The Court's analysis emphasized the market share factor. The Court noted that its decisional process need not entertain "elaborate proof of market structure, market behavior, or probable anticompetitive

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169 370 U.S. 294 (1962). The normative underpinnings of *Brown Shoe*, like those espoused earlier by Justice Brandeis in *Chicago Board of Trade*, found expression in the Court's conclusion that § 7, in order to protect small competitors, did not proscribe small firms from merging so that they could better compete against larger competitors. *Id.* at 319.

170 *Id.* at 315-16 (footnotes omitted). See *Hearings on S. 698 Before the Senate Committee on Interstate Commerce*, 63d Cong., 2d Sess. 1147 (1914).

171 370 U.S. at 321-22.

172 *Id.* at 346. See Peterman, *The Brown Shoe Case*, 18 J. LAW & ECON. 81 (1975).

173 374 U.S. 321 (1963).

174 *Id.* at 363. The challenged merger had a resulting market share of 30%; the merger was deemed violative of § 7.

effects."<sup>175</sup> Although the Court did not define "undue," it required no weighing analysis because the acquisition was inherently suspect if the merger resulted in an undue market share. The Court cautioned that a merger resulting in less than a thirty percent market share might also raise an inference of illegality.<sup>176</sup>

*Philadelphia National Bank's* prima facie test seems inconsistent with the broader market factor analysis of *Brown Shoe*. Although the Court's analysis in *Philadelphia National Bank* is highly simplified because the Court does not weigh economic impact or policies, the analysis is not conclusive. The Court indicated it would permit evidence that the merger was not anticompetitive, but the available defenses were not evident. The Warren Court rejected enhanced efficiencies, ease of market entry, scale economies, and increased competition in other markets as relevant factors to be weighed.<sup>177</sup> It appeared to sanction the "failing company" doctrine as the only defense.<sup>178</sup>

The Court's normative methodology is also evidenced by its preference for industrial growth by internal *de novo* expansion over growth by acquisition. Without elaborate discussion or citation, the Court commented that "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition,"<sup>179</sup> even though the latter might be more cost efficient and enhance competition. Thus, the Court implicitly subordinated the goal of economic efficiency to other values.

Subsequent Warren Court cases confirm the Court's jurisprudential predilection towards doctrinal structuralism as the basis for its populist protection of small business. In *Von's Grocery*, the Court

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175 *Id.* The presumptive illegality test arguably has application only to a concentrated market. Otherwise the broader *Brown Shoe* balancing approach would be operative.

176 374 U.S. at 364.

177 *Id.* at 370-71. Although unclear, the Court implied that the "failing-company" doctrine or insolvency might be the only defense available to rebut the presumption. *See* United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974); United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131, 136-37 (1969); International Shoe Co. v. FTC, 280 U.S. 291, 299-303 (1930); S. REP. NO. 1775, 81st Cong., 2d Sess. 7 (1950).

178 *See, e.g.*, United States v. General Dynamics Corp., 415 U.S. 486 (1974); United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Diebold, Inc., 369 U.S. 654 (1962); International Shoe Co. v. FTC, 280 U.S. 291 (1930); *Hearings on the Failing Company Defense Before Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); 4 P. AREEDA & D. TURNER, *supra* note 165, at 100-46; E. KINTNER, PRIMER ON THE LAW OF MERGERS 262-70 (1973); Laurenza, *Section 7 of the Clayton Act and the Failing Company: An Updated Perspective*, 65 VA. L. REV. 947 (1979).

179 374 U.S. at 370.

reasoned that in order "to arrest this 'rising ride' toward concentration into too few hands and to halt the gradual demise of the small businessman,"<sup>180</sup> it was necessary to define the markets narrowly and to rely primarily on only small increases in market shares of the merging firms.<sup>181</sup> In neither case did the Court attempt, in the words of Justice Stewart, "to appraise the competitive effects of . . . [the] acquisition"<sup>182</sup> under the broad economic functional analysis of *Brown Shoe* or under any other analysis that qualitatively weighed interests or policies other than the protection of small competitors.

More recently, the Burger Court has rejected the Warren

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180 *United States v. Von's Grocery Co.*, 384 U.S. 270, 276 (1966).

181 *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America (Alcoa)*, 377 U.S. 271 (1964). *See also* *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970).

182 384 U.S. at 282 (Stewart, J., dissenting).

I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined. In any meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes. Affiliated with cooperatives that give the smallest store the buying strength of its largest competitor, new stores have taken full advantage of the remarkable ease of entry into the market. And, most important of all, the record simply cries out that the numerical decline in the number of single-store owners is the result of transcending social and technological changes that positively preclude the inference that competition has suffered because of the attrition of competitors.

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called "Mom and Pop" grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway. The transformation of American society since the Second World War has not completely shelved these specialty stores, but it has relegated them to a much less central role in our food economy. Today's dominant enterprise in food retailing is the supermarket. Accessible to the housewife's automobile from a wide radius, it houses under a single roof the entire food requirements of the family. Only through the sort of reactionary philosophy that this Court long ago rejected in the Due Process Clause area can the Court read into the legislative history of § 7 its attempt to make the automobile stand still, to mold the food economy of today into the market pattern of another era.

*Id.* at 287-89 (Stewart, J., dissenting) (footnotes omitted).



Court's rather mechanical jural analysis and, while not yet fully developed has introduced a decisional approach to merger law that attempts to examine a broader array of factors relevant to the merger's probable competitive effects. In *United States v. General Dynamics Corp.*,<sup>183</sup> the Court entertained an analysis that went beyond the structuralism of market share data and concentration ratios to determine whether inferences of merger illegality were rebutted. While the narrow *Philadelphia National Bank* streamlined analysis remained applicable, the Court in *General Dynamics* broadened its approach to consider other market factors which may be more relevant in predicting future market conditions and behavior in a particular market.

Specifically, the Court in *General Dynamics* held that post-acquisition evidence of reserve capacity, rather than market share data, was the most relevant economic data in determining future competitive effect in the coal market.<sup>184</sup> In drawing this conclusion, the Court's analysis focused on market conditions other than share data and concentration evidence. The Court importantly considered that the acquired firm's market percentage represented current deliveries on contracts entered into many years before, that the acquired firm had few uncommitted coal reserves for current or future contract opportunities, and that the firm's future competitive prospects were "unpromising."<sup>185</sup> Together the Court accepted these market factors as rebuttal evidence of the firm's market position.

In sum, Justice Stewart's majority opinion<sup>186</sup> in *General Dynamics* implicitly suggests a return to *Brown Shoe's* broader-based merger analysis. The Court's open-ended functional analysis weighs industry structure, history, competitive conditions, and probable future market effects,<sup>187</sup> after a full economic and factual investigation. Factors bearing on actual competitive and legal<sup>188</sup> capacity, rather than mere sales data, are central to the predictive function of the analysis. Sales data, however, has not become irrelevant. *General Dynamics* indicates clearly that undue market shares can still raise the presumption of illegality.<sup>189</sup> The distinction lies in the Burger

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183 415 U.S. 486 (1974). See also, *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974).

184 415 U.S. at 510-11.

185 *Id.* at 500-02.

186 It is interesting to note that Justice Stewart was a frequent, vocal critic of the Warren Court's antitrust jurisprudence.

187 415 U.S. at 498.

188 See *United States v. Marine Bancorp.*, 418 U.S. 602 (1974).

189 See *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

Court's greater receptivity to a wider range of competitive criteria leading to a more broadly-based analytical style.<sup>190</sup> In addition, the Burger Court's analysis portends that it values the protection of competition rather than competitors as the primary goal of antitrust.<sup>191</sup> This trend suggests new defense avenues beyond the failing company doctrine, particularly when structural market share data overstate competitive significance.

*General Dynamics* does not resolve whether the Burger Court's epochal analytical changes regarding efficiency objectives in decision-making under section one of the Sherman Act apply under section seven of the Clayton Act. While *General Dynamics* indicates that the Court will employ economic evidence as a decisionmaking tool in determining market competitiveness, it did not signal that the Court is prepared to embrace, as it has in other textual contexts, efficiency standards as an analytical model under section seven.<sup>192</sup> Whether the balancing framework advanced to date is broad enough to include the defense that the challenged expansion through acquisition would promote competition in the merged firm's market remains unclear. Expansion through acquisition arguably can increase efficiency by reducing plant size and capital costs to result in lower prices, thus promoting competition and consumer welfare.<sup>193</sup> These economic rationales are consistent with the goals of antitrust policy espoused in *Professional Engineers*, *Broadcast Music*, and *Sylvania*.

In certain important respects, the economic rationales suggested in *General Dynamics* are inconsistent with the social and political values articulated in *Brown Shoe*.<sup>194</sup> If the Court views the preservation and stabilization of small competitors as the underlying political or

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190 See *United States v. International Harvester Co.*, 564 F.2d 769 (7th Cir. 1977) (market share data rebutted by evidence that the acquired firm was not an effective competitor because of insufficient financing). See also *FTC v. National Tea Co.*, 603 F.2d 694 (8th Cir. 1979); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 108 (E.D. Pa. 1978). *Fortner II* further evidences that the present Court is not inclined to infer market power from market share data and might be cited in the §§ 2 and 7 context that actual power must be established.

191 *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977); but see *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 & n.25 (1978).

192 See, e.g., *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). While internally inconsistent, the Court in *Brown Shoe* also implied that it would consider efficiency as an analytical measure in evaluating a merger between small companies. 370 U.S. at 319.

193 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

194 See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 236-37 (1960). Compare the internal inconsistency in *Brown Shoe*, 370 U.S. at 319-20, 344.

social value of section seven, as did the Warren Court, then the use of a positive efficiencies analysis in assessing mergers will surely wane. However, since the Burger Court has recently declared that "anti-trust policy divorced from market considerations would lack any objective benchmarks,"<sup>195</sup> the Court will likely recognize that other structural factors and efficiency criteria serve as useful analytical measures of competitive probabilities.<sup>196</sup> Current merger enforcement policies emphasize whether there is an actual or significant competitive threat at the horizontal level of competition. As a result, mergers classified as vertical or conglomerate<sup>197</sup> no longer receive

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195 433 U.S. at 53 n.21.

196 See generally 4 P. AREEDA & D. TURNER, *supra* note 165, at 1-206. This approach would seem clearly incompatible with the Warren Court's philosophy noted in *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967), where the Court stated that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."

197 The decisions frequently indicate that the traditional merger categorization into vertical, horizontal, or conglomerate mergers does not help the analysis. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967). The judicial analysis has often touched on whether the merger has "lessened competition" by reason of foreclosing competition, squeezing price and supply, or increasing entry barriers. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957); *Fruehauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979); *United States v. Kennecott Copper Corp.*, 249 F. Supp. 154 (S.D.N.Y. 1965), *aff'd per curiam*, 381 U.S. 414 (1965); *United States v. Alcoa*, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965). Even in the vertical merger context, the trends in the decisional law and lack of significant cases since the early 1970's suggest that the courts are less inclined to interpret § 7 in a strictly structural market analysis to determine whether there has been a market foreclosure. Indeed, analysts have questioned whether vertical integration by merger should be treated differently than vertical integration by internal expansion and whether the judicial analysis should weigh substantial efficiencies as a defense. R. POSNER & F. EASTERBROOK, *ANTITRUST* 861, 869-76 (1980). See also 4 P. AREEDA & D. TURNER, *supra* note 165, at 211-15. In recent years, challenges to conglomerate mergers have invoked heated debate. Much of the enforcement effort directed against such mergers arises from the normative ideal that small business should be preferred over expanding asset acquisition, which concentrates economic and political power in the hands of few organizations. See note 169 *supra*. Jural analyses of such mergers have included the following theories: that the merger leads to reciprocal dealing where a buyer uses its purchasing power as leverage to force suppliers to deal with products or services that it or its subsidiaries deal in; that the merger by a large acquiring firm over a dominant member of another concentrated market will entrench further the dominant acquired firm; and that the merger will lead to loss of potential competition. For a general discussion of the reciprocity theory, see *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Allis-Chalmers Mfg. Co. v. White Consol. Indus. Inc.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963); *United States v. United Technologies Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y. 1978), *aff'd per curiam*, 1978-2 Trade Cas. (CCH) ¶ 62,405 (2d Cir. 1978); *United States v. ITT*, 1971 Trade Cas. (CCH) ¶ 73,619 (N.D. Ill. 1971); *United States v. ITT*, 324 F. Supp. 19 (D. Conn. 1970); *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969); *United States v. Pencik & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965).

## major antitrust scrutiny unless they eliminate potential competition

For a general discussion of the entrenchment theory, see *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *United States v. United Technologies Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y. 1978), *aff'd per curiam*, 1978-2 Trade Cas. (CCH) ¶ 62,405 (2d Cir. 1978); *United States v. Consolidated Foods Corp.*, 1978-1 Trade Cas. (CCH) ¶ 62,063 (E.D. Pa. 1978); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976). For a general discussion of the alternative potential competitor theories, see *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

These merger cases evidence a decisional analysis that is less favorable to the Jeffersonian value of stabilization of the small competitor and more favorable to the emerging concern for positive use of economies and efficiencies. For example, the Warren Court's analysis in *Procter & Gamble* focused on structural evidence regarding entry barriers and the entrenchment effect that the merger allegedly would produce. Implicit in the Court's analysis is the notion that mergers increase barriers to entry for new competition and produce increased likelihood for oligopoly pricing and predatory pricing. Moreover, the Court disapproved of a balancing analysis which weighed economies. 386 U.S. at 580. It reasoned that Congress, in adopting the legislative framework, had already "struck the balance" against the positive use of an efficiency analysis. *Id.* Justice Harlan disagreed. In conglomerate mergers, he argued that the Court should entertain a "full investigation and analysis, whatever the cost in delay or immediate effectiveness." *Id.* at 590 (Harlan, J., concurring); see Edwards, *Tests of Probable Effect Under the Clayton Act*, 9 ANTITRUST BULL. 369, 377 (1964). Justice Harlan urged that economic theory can inform antitrust decisionmaking and opined that operational efficiencies were some of the reasons Congress favored competition. "[A] firm's ability to achieve economies enhances its competitive position. . . ." 386 U.S. at 597 (Harlan, J., concurring). "[W]hen the case against a conglomerate or product-extension merger rests on a market-structure demonstration that the likelihood of anticompetitive consequences has been substantially increased, [the analysis] should then move on to examine and weigh possible efficiencies arising from the merger in order to determine whether, on balance, competition has been substantially lessened" through "countervailing economies." *Id.* at 598-99 (Harlan, J., concurring). Justice Harlan concluded by observing that the Court should recognize substantial economies as a defense where they promote competition in production, distribution, marketing or advertising. *Id.* at 599-604 (Harlan, J., concurring). His analysis anticipated the broader use of a more wide-open merger analysis and less emphasis on rigid decisionmaking rules. A majority of the Court, however, was unprepared to accept the broader based balancing approach until 1974. See *Ford Motor Co. v. United States*, 405 U.S. 562, 570 (1972) ("A merger is not saved from illegality . . . 'because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already [by Congress].'"); see also *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 540-43 (1973) (Douglas, J., concurring in part) ("[T]he desirability of retaining 'local control' over industry and the protection of small businesses . . . [was] one of the purposes of strengthening § 7 . . . . By reason of the antitrust laws, efficiency in terms of the accounting of dollar costs and profits is not the measure of the public interest nor is growth in size where no substantial competition is curtailed."). *But see* 405 U.S. at 586-87 (Burger, C.J., concurring and dissenting).

Beginning with *General Dynamics* in 1974, the Court accepted a more wide-open realist analysis for challenges to conglomerate and market extension mergers. In *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), the Burger Court rejected the rigid structural analysis advanced earlier and accepted a weighing analysis for determining the viability of

or evidence a rather direct "horizontal overlap between parties to the transaction."<sup>198</sup>

Section seven should be able to recognize and accommodate the widest range of normative options, including economic analysis as well as socio-political considerations. Otherwise, the legal analysis in the realist tradition will be unable to reconcile on a case-by-case basis the competing pluralistic demands on the economy. This broader-based ad hoc balancing analysis will increase the process costs of decisionmaking.<sup>199</sup> However, rigid analytical rules deny the benefits of a careful case-by-case balancing process that weighs current but often changing competitive and socio-political values, policies, and experience. The benefits of a more rational, and less mechanical, antitrust jurisprudence are qualitatively obvious.<sup>200</sup>

Recently, the Justice Department's Antitrust Division reconsidered the Department's 1968 Merger Guidelines. The new 1982 revision introduces significant changes.<sup>201</sup> Foremost among the changes is the desire that the analytical framework for evaluating mergers include broader bases of inquiry than the Warren Court's analytical approach. While a structural analysis remains central to the evalua-

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the potential competition doctrine. Thus, in each subsequent market extension merger, the Court will consider whether the concentration statistics are the most relevant competitive factors of market behavior, and will balance structural data against other economic evidence of future competitive ability. Economic evidence that may be relevant in the decisional approach includes: ease of entry into the market, market trends away from competition, continuation of price competition, financial weakness of the merged firm, competitive market weakness of both firms, and actual independence of the merged firm after the acquisition. *See, e.g.,* Kaiser Alum. & Chem. Corp. v. FTC, 653 F.2d 1324 (7th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *United States v. International Harvester Co.*, 564 F.2d 769 (7th Cir. 1977); *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Babcock & Wilcox Co. v. United Technologies Corp.*, 435 F. Supp. 1249 (N.D. Ohio 1977); *FTC v. Tenneco, Inc.*, 433 F. Supp. 105 (D.D.C. 1977); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976); *United States v. Hughes Tool Co.*, 415 F. Supp. 637 (C.D. Cal. 1976). *See generally* 5 P. AREEDA & D. TURNER, *supra* note 165, at 1-293.

198 *Proposed Purchase of Marathon Oil Company by Mobil Oil Corp.: Joint Hearings Before the Senate Comm. on Commerce, Science, and Transportation and the House Comm. on Energy and Commerce*, 97th Congress, 1st Sess. (1981) (statement of William Baxter, Assistant Attorney General).

199 The Burger Court has implicitly recognized that economic and statistical evidence can drive the process cost of litigation so high that the cost outweighs the value of the analysis. *See, e.g.,* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, [Jan.-June] ANTITRUST AND TRADE REG. REP. (BNA) F-1, F-3 (U.S. May 26, 1981); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

200 P. AREEDA & D. TURNER, *supra* note 165; *see also* Williamson, *Economies As An Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977); Williamson, *Economies As An Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

201 *Merger Guidelines of Department of Justice—1982*, 1 TRADE REG. REP. (CCH) ¶ 4501-4504 (June 16, 1982) [hereinafter cited as *1982 Guidelines*].

tive process, the Guidelines indicate that nonmarket share data will also play a role in the process. A more detailed economic and factual examination of the facts seems apparent, and market intervention may be less frequent.

The Guidelines state that they represent enforcement policy regarding merger conduct under both section seven of the Clayton Act and section one of the Sherman Act.<sup>202</sup> This may portend that mergers or acquisitions henceforth will be challenged only where the restraint is actual rather than threatened or incipient. More reliance may be placed on determining competitive significance in section one cases than in section seven cases.<sup>203</sup> The underlying rationale of the new Guidelines centers on countering mergers that may facilitate cartel behavior. Through a price theory orientation, the Guidelines will attempt to identify mergers that will increase market power and the likelihood of cartelization.<sup>204</sup> The new Guidelines reject the 1968 Guidelines' approach to vertical and conglomerate mergers, and use price and supply factors and concentration data to predict cartel behavior.<sup>205</sup>

In order to evaluate market concentration and market power, the product and geographic market must be defined. The new Guidelines, grounded in the economic policy of price theory, introduce new market definition standards which require evaluations of price and supply factors.<sup>206</sup> The cross elasticity between products in response to price changes, including the ability to interchange or substitute products, is a key factor in defining the product market. Cross elasticity will be measured according to how a one year, five percent price increase in the relevant product affects product substitution.<sup>207</sup> This standard of responsiveness, which seeks to measure the number of actual and potential sellers in the market by the effect of a price increase, will undoubtedly be difficult to measure empirically or otherwise. By defining the market in terms of sellers who compete or potentially *could* compete with the merging firm, the new Guidelines dilute the merging firm's market share from the corresponding calculation under the 1968 Guidelines, which included only market share

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202 *Id.* at ¶ 4501.

203 *See, e.g., Panel Discussion with William F. Baxter, Assistant Attorney General, Antitrust Division*, 50 ANTITRUST L.J. 151, 158-59 (1981).

204 *See 1982 Guidelines, supra* note 201, at ¶ 4501.

205 *See id.* at ¶ 4501-4504.203.

206 *Id.* at ¶ 4502-4502.40.

207 *Id.*

data for current producers (sellers).<sup>208</sup> The new Guidelines' utility in promoting certain or predictable results is questionable. The Guidelines' method of identifying relevant sellers in the market in order to then consider concentration factors and market power, while perhaps economically rational, may be unworkable.

Once the market is defined, the analytical process under the Guidelines seeks to determine whether the merger is likely to facilitate collusive exercise of market power.<sup>209</sup> Concentration evidence remains highly relevant in identifying market power that might lead to cartel behavior. The new Guidelines, however, employ a new standard in predicting concentration problems, the Herfindahl-Hirschman Index (HHI).<sup>210</sup> This change from the four-firm concentration standard utilized in the 1968 Guidelines<sup>211</sup> does not expressly focus on prohibiting mergers in industries that exhibit increased concentration trends over time; only market share data at given times (pre- and post-merger levels) are scrutinized to determine concentration and market power significance.<sup>212</sup> Use of the HHI to measure concentration and to assess probability of collusion will likely increase the permissible size of market shares that may be combined through a merger.

In at least one important respect, the new Guidelines do not alter the 1968 Guidelines' rejection of efficiency-based defenses as a justification for the merger. Since the 1968 Guidelines were issued, analysts have frequently discussed whether a merger that produced economies through increased efficiency in the market should be sanctioned.<sup>213</sup> The viability of efficiency-based defenses requires inquiry into whether the economies can be measured and, if so, whether cost savings produced by expansion through acquisition will in the long run offset the advantages of internal expansion. While the new Guidelines state that an efficiency defense will not mitigate an otherwise challengable merger except in extraordinary cases,<sup>214</sup> the Guide-

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208 See *Merger Guidelines of Dept. of Justice—1968*, 1 TRADE REG. REP. (CCH) ¶ 4510 [hereinafter cited as *1968 Guidelines*].

209 *1982 Guidelines*, *supra* note 201, at ¶ 4501.

210 *Id.* at ¶ 4503.10.

211 *1968 Guidelines*, *supra* note 208, at ¶ 4510.

212 See *1982 Guidelines*, *supra* note 201, at ¶ 4503.101. The change from the 1968 Guidelines' four-firm concentration standard represents a major shift from previous law. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

213 Compare Williamson, *Economies As An Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977), and Williamson, *Economies As An Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968), with R. POSNER & F. EASTERBROOK, *ANTITRUST*, 463-64, 920-21 (1981).

214 See *1982 Guidelines*, *supra* note 201, at ¶ 4505.10.

lines identify a larger array of factors in addition to market share data that will be considered. Included economic and non-economic conduct factors in the merger analysis are: 1) the ease of market entry, 2) the nature of the product (i.e. homogeneity), 3) the terms of the sale, 4) the availability of market information about specific transactions, 5) the existence of prior horizontal collusion among firms in the market, and 6) the prevalence of industry-wide trade practices (i.e. mandatory delivered pricing, exchange of price or output information, or standardization or price protection clauses).<sup>215</sup> Each, apparently, serves to evaluate market power and the potentiality of horizontal collusion and eventual cartelization. The weight assigned to these individual nonmarket share factors and their utility relative to the HHI's individual concentration classifications is unclear.

Since the Supreme Court is not bound to follow the new Guidelines, predicting how the Court will receive the new analytical standards is difficult. While the Guidelines' continued emphasis on structural data such as market share is contrary to *General Dynamics*, the Court has rather consistently embraced economic-based evidence as a rationale for antitrust decisionmaking. To the extent that the new Guidelines continue the trend of analyzing market conduct through a greater array of competitive criteria, the Guidelines seem at least partially compatible with current judicial trends, but contrary to the Warren Court's interpretation of section seven. If used as litigation standards, the Guidelines will greatly increase the transaction costs of litigation and significantly alter the decisional process in section seven cases.

#### 4. Monopolization

The Burger Court's unwillingness to review a section two monopolization case illustrates the Court's judicial restraint. The last major section two cases decided by the Supreme Court came down in 1966-67,<sup>216</sup> well within the Warren Court era. Circuit court decisions<sup>217</sup> largely govern the law's interpretation in monopolization

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215 1982 Guidelines, *supra* note 201, at ¶ 4503.20 - 4503.304.

216 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); United States v. Grinnell Corp., 384 U.S. 563 (1966).

217 See, e.g., Northeastern Tel. Co. v. A.T. & T. Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 452 U.S. 917 (1981); SCM Corp. v. Xerox Corp., 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1708 (1982); California Computer Products, Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d



cases today. For this reason, discussions regarding the present Supreme Court's jurisprudential approach under section two of the Sherman Act must be tentative. Comparisons between Warren Court precedents and present lower court trends, however, may help predict the Court's future analysis.

From its early origins, decisional law has viewed section two from a behavioral and structuralist perspective. Courts have used market structure and power, together with conduct, as analytical measures for predicting or confirming a firm's performance. Since courts have not interpreted section two to condemn the mere possession of market power,<sup>218</sup> the decisional process turns on the relationship between a firm's market power and its conduct.<sup>219</sup> Throughout the years of antitrust litigation, courts with changing philosophies have analyzed that relationship differently.

Early decisions evidenced the Court's willingness to weigh whether the business conduct was reasonable under the circumstances of the firm's market power.<sup>220</sup> The Court provided no absolute proscriptions nor exact analyses to guide lower courts. Once monopoly power had been demonstrated, the challenged conduct was to be weighed against "normal" methods of industrial development.<sup>221</sup> The analysis essentially centered on the nature of the behavior and its closeness to and effect on market power. To be illegal, the conduct had to be similar to conduct condemned under section one as a restraint of trade. From such conduct, the Court inferred the requisite illegal intent. Conduct short of that recognized as restraint under section one was presumably lawful.

The Supreme Court's strict interpretation of section two's monopolization test was challenged in 1945 by the decisional style of

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48 (2d Cir. 1979); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Central Savings & Loan Ass'n v. Federal Home Loan Bank Bd.*, 422 F.2d 504 (8th Cir. 1970). *See also* In re E.I. DuPont de Nemours & Co., [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 987, at F-1 (Oct. 30, 1980).

218 *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

219 P. AREEDA, ANTITRUST ANALYSIS 147 (3d ed. 1981).

220 *See United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

221 *See United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

*United States v. Aluminum Co. of America (Alcoa)*.<sup>222</sup> In *Alcoa*, the Second Circuit, sitting by special Congressional authority,<sup>223</sup> shifted the analytical framework towards a more structural economic analysis which focused on Alcoa's market power.<sup>224</sup> Judge Hand, writing for the court, valued protection of small competitors over an efficiency-enhancing firm which held a large market share.<sup>225</sup> This normative approach was advanced by the court's refusal to weigh "the extent and effect" of the firm's behavior "against its industrial or commercial advantage."<sup>226</sup> The Court's analysis devalued economies achieved through strategic planning such as capacity expansion to encourage and meet demand. "[G]reat industrial consolidations [were deemed] inherently undesirable, regardless of their economic results."<sup>227</sup> The Court employed a straightforward analysis to draw inferences regarding monopoly power from market share data. Size alone "carried with it an opportunity for abuse,"<sup>228</sup> and abuse could be demonstrated by nonpredatory deliberate conduct. Conduct such as excess productive capacity, though innocent standing alone, could be considered abusive and exclusionary in light of the firm's market power. The thin line between deliberateness of the conduct and the defense of "superior skill, foresight and industry" became ambiguous at best. The contrast to the earlier cases requiring conduct evidence of predation to trigger a monopolization charge was striking.

The year following the *Alcoa* decision, the Supreme Court endorsed the Second Circuit's analytical approach.<sup>229</sup> Subsequent cases reaffirmed *Alcoa*.<sup>230</sup> Often the courts cast the deliberateness test in terms of whether the challenged conduct evidenced harmfully restrictive or exclusionary features. The "exclusionary" test may have served as an analytically distinctive middle ground between *Standard*

222 148 F.2d 416 (2d Cir. 1945). See also *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

223 322 U.S. 716 (1944); Act of February 11, 1903, 32 Stat. 823, § 2, 15 U.S.C. § 29 (1903), amended by Act of June 9, 1944, ch. 239, 58 Stat. 272 (current version at 28 U.S.C. § 2109 (1980)).

224 Cf. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

225 148 F.2d at 429. "[O]ne of . . . [the] purposes [of section two] was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units. . . ." *Id.* (emphasis added).

226 *Id.* at 428.

227 *Id.*

228 *Id.* at 430 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932)).

229 *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

230 See *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. United Shoe Mach. Corp.*, 266 F. Supp. 328 (1967), *rev'd*, 391 U.S. 244 (1968).

*Oil's* predation test and *Alcoa's* deliberateness standard, but even these behavioral standards lacked dispositive clarity. The relationships between conduct and dominant market position or power became the determining analytic factor, and efficiency justifications were not weighed. The greater the market power, the less behavioral analysis was required. The Court analyzed a clear monopoly under a stricter standard with a narrower range of decisional options than a near-monopoly.<sup>231</sup>

The Warren Court sanctioned *Alcoa's* populist hostility toward firms having dominant market positions. In *United States v. Grinnell Corp.*,<sup>232</sup> the Supreme Court's last major section two case, the Court reaffirmed that a firm holding monopoly power cannot utilize its power to advance or maintain its dominant market position. The Court, speaking through Justice Douglas, expressly observed that wilful use or maintenance of monopoly power was distinct from market growth or development occasioned by benign factors such as business acumen, product superiority, or historical accident.<sup>233</sup> Implicitly, *Grinnell* suggested that the monopolist was not confined to a passive industrial role. "Business acumen" implied conscious strategic decisionmaking. Clearly, conscious use of market power to engage in exclusionary or competitively ruinous conduct, such as buying up competitors, met the standard of monopolization.<sup>234</sup> Unclear judicial guidelines left structural factors to resolve the distinctions between business acumen and a positive drive to maintain market power. The Burger Court has refrained from entering the judicial analysis in section two cases, an area which the Court must address in the 1980's.

In the mid 1970's, the lower federal courts were confronted with the analytical tension created between the divergent analyses in monopolization cases. The courts had not comfortably dealt with, and indeed in many respects, as evidenced by *Alcoa* and its progeny, were hostile to, strategic business planning as a procompetitive factor. Courts had recognized efficiencies defenses in other areas of antitrust jurisprudence,<sup>235</sup> but not in section two cases. The conduct standards recognized under section two seemed statically wedded to the structuralist models of how industry and markets interact.<sup>236</sup> The

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231 3 P. AREEDA & D. TURNER, *supra* note 165.

232 384 U.S. 563 (1966).

233 *Id.* at 570-71, 576-80.

234 *Id.* at 576.

235 See text accompanying notes 92-96 *supra*.

236 See, e.g., J. BAIN, INDUSTRIAL ORGANIZATION (1959).

prevailing preference in antitrust jurisprudence for absolute rules over a balancing analysis added to the analytical narrowness.

Beginning with the Tenth Circuit's decision in *Telex Corp. v. IBM Corp.*,<sup>237</sup> the courts began to develop an analytical framework for accommodating new issues concerning market strategies. Issues included price and nonprice conduct which sought to optimize strategic decisionmaking through market responses ranging from cost efficiencies to predation. As industry reacted to changed competitive conditions, the law also changed to relate to altered strategic conduct and changed competitive values. The emerging decisional trend indicates that courts should balance structural evidence, including market share, concentration, and entry barrier data, with a greater understanding and emphasis on the purpose and effect of the conduct involved in order to determine the competitive injury.<sup>238</sup>

In the *Telex* litigation, the Tenth Circuit held that price cutting by the dominant producer of ancillary computer units in order to retain its market position against increased competition did not amount to monopolization under section two. The court characterized the defendant's price cutting, which still yielded a 20 per cent profit on the ancillary units, as a normal competitive response and thus not predatory.<sup>239</sup> The Ninth Circuit reached a similar result in *California Computer Products, Inc. v. IBM Corp.*,<sup>240</sup> where the court held that price predation under section two did not include a monopolist's lowering of prices which were still profitable in order to meet competitors' prices. "[S]hrewdness in profitable price competition,"<sup>241</sup> even by a dominant firm, was encouraged, as it comes within *Grinnell's* business acumen standard.<sup>242</sup> The courts in both cases rejected

237 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975).

238 *See, e.g.*, *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir. 1977), *cert. denied*, 434 U.S. 879 (1977); *United States v. Empire Gas Corp.*, 537 F.2d 296 (9th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

239 *See generally* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (pricing above marginal cost or average variable cost should be deemed lawful).

240 613 F.2d 727 (9th Cir. 1979). *See also* *Memorex Corp. v. IBM Corp.*, 555 F.2d 1379 (9th Cir. 1978); *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *In re IBM Peripheral EDP Devices*, 481 F. Supp. 965 (N.D. Cal. 1979).

241 613 F.2d at 742.

242 384 U.S. at 571. *Contra* *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 338-39 (1897). As *Brown Shoe* articulated earlier, the antitrust laws were enacted to promote competition, not to insulate rival competitors from price competition.

*Alcoa's* "deliberateness" test as a basis for supporting a monopolization charge. Antitrust analysis returned to a more realist methodology of balancing countervailing competitive factors as courts weighed the competitive virtues of the conduct against anticompetitive consequences.

In the celebrated case of *Berkey Photo, Inc. v. Eastman Kodak Co.*,<sup>243</sup> the Second Circuit implicitly rejected its earlier opinion in *Alcoa*. In attempting to define the standard of predation and exclusionary conduct under section two, Judge Kaufman, writing for the court, held that "an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of its control over the market, . . . is not a use of power."<sup>244</sup> Berkey had challenged Kodak's practice of using its market power in the film industry to promote its new instamatic camera. Berkey argued that Kodak should have given its competitors premarketing disclosure of the new camera and film to enable competitors to compete at the time the new Kodak products were introduced. Berkey urged that failure to predisclose constituted a monopolization. The Second Circuit disagreed.

In reversing the district court, the Second Circuit reasoned that Kodak's simultaneous introduction of the new film format and the new camera was due to efficiencies and integration rather than market power in the film market. The court advanced a policy to encourage strategic business planning, even by a firm holding monopoly power, which was not competitively unnatural and which resulted in economies.<sup>245</sup>

In rejecting the predisclosure requirement for product development and innovation, the court observed that "even a monopolist . . . has a right to the lead time that follows from its success" due to economies.<sup>246</sup> The court based its reasoning on the premise that the Sherman Act was designed to encourage aggressive competition on the merits, even competition by a monopolist.<sup>247</sup> Without this protection, competitive incentives would be lost.

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243 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

244 *Id.* at 291 n.50.

245 While *Berkey* reaffirmed *Griffith's* proscription that a monopolist in one market cannot use its market power in that market to achieve a competitive advantage in another, it found insufficient evidence on this leverage theory to support the argument that Kodak used its monopoly position in the film market to introduce the new camera format in the weaker camera market. *Id.* at 282.

246 *Id.* at 283. The court also seemed concerned with the costs associated with establishing "workable guidelines" for giving advance notice to competitors. *Id.* at 282.

247 *Id.* at 281.

The Second Circuit and other circuits have embraced a competition efficiency analysis as the central antitrust objective. Courts have largely abandoned *Alcoa*, and have devalued the deconcentration of monopoly power and the stabilization of small competitors as antitrust goals. Economic models focusing on industry structure have been replaced with economic models that attempt to predict behavior based on allocative efficiency. Although the economically-based jurisprudential approach adopted by the Burger Court in other antitrust contexts, as evidenced in *Broadcast Music* and *Sylvania*, seems to have influenced section two analysis, the Court itself has refused to enter the debate.

The shift in monopolization analysis has not been lost on the Federal Trade Commission. In *In re E.I. DuPont*,<sup>248</sup> the Commission considered whether DuPont, which held a 42 percent share of the titanium dioxide pigment market but which aggressively sought to obtain a 65 percent share, had attempted to monopolize the market. DuPont was charged under section five of the FTC Act with premature capacity expansion, exploitation of cost advantage by pricing products high, and refusal to license its cost-saving technology to rivals.<sup>249</sup> After reviewing the decisional changes in the circuit law, the Commission held that DuPont had not violated section five. The Commission analyzed DuPont's strategic behavior under a broad balancing analysis that weighed market structure, DuPont's position within the market, the nature of the strategic conduct, alternative conduct, and the competitive consequences of the market strategies. The Commission deemed it essential to "weigh the relative competitive virtues and evils of dominant firm behavior even in the monopoly context."<sup>250</sup> This "strategic" analysis extended beyond mere acceptance of efficiency defenses. The Commission weighed cost superiority and economies against the exclusionary effects of the strategic planning, and evaluated conduct not only with regard to its efficiency-enhancing qualities but also with regard to "entry barriers

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248 [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 987, at F-1 (Oct. 30, 1980).

249 *Id.* See generally M. PORTER, *COMPETITIVE STRATEGIES* (1981); Baumol, *Quasi-Permanence of Price Reduction: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Easterbrook, *Predatory Strategies and Counter Strategies*, 48 U. CHI. L. REV. 263 (1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979); Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Spence, *Entry, Capacity, Investment and Oligopolistic Pricing*, 8 BELL J. OF ECON. 534 (1977); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

250 [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 987, at F-7 (Oct. 30, 1980).

and rival firm behavior.”<sup>251</sup> The Commission concluded that DuPont’s strategic conduct resulted from its “technological capacity and market opportunities”<sup>252</sup> which were not designed to produce unnatural entry barriers nor to unnecessarily exclude competition.<sup>253</sup> In short, the Commission employed a multifaceted economic balancing analysis that included both structural and actual competitive factors. Analytical resolution required an evaluation of the challenged conduct’s *net* competitiveness.

The development of the decisional law’s analysis clearly indicates the ascendancy of efficiency criteria as a valid defense under section two. The precise weight to accord efficiency criteria in light of other relevant market factors remains unclear, however. *Berkey* and *DuPont*, while exceedingly helpful, do not fix the parameters of the analysis. In attempting to foresee the Burger Court’s approach to section two, it is interesting to note that three members of the present Court would have granted certiorari in the *Berkey* case. Specifically, Justices Powell and Rehnquist opined that a competition policy that requires competitors to predisclose strategic marketing decisions to other competitors is disquieting.<sup>254</sup> Moreover, the dissenting justices implied that the expansive language in *Grinnell* was intended to undercut *Griffith*’s rigid analysis. *Grinnell*’s “business acumen” and “superior product” references then may not be limited by the earlier *Alcoa*, *Brown Shoe* and *Griffith* pronouncements. Recent developments in the circuit courts call into question the continuing vitality of these decisions.

#### IV. Towards a More Balanced Consensual Analysis

The Burger Court’s antitrust decisions reflect many of the post-realist criticisms dating from the 1950’s. The Court has employed antirealist notions that law should not be a means to achieve social policy and that courts should not create new law to achieve desired social results. The Court has, however, adopted in its decisional methodology certain realist-like qualities such as the use of empirical

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251 *Id.* at F-10 n.38.

252 *Id.* at F-11.

253 *Id.* at F-10 (citing *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953)).

254 444 U.S. at 1094. Justice Rehnquist commented that the reason for these complex antitrust cases is “either that the forest is being lost sight of because of the trees, or that an Act of Congress has been battered, tortured, and encrusted with layer after layer of refinement not required by any necessary construction of the Act, but by the results wrought by a century of case-by-case adjudication of it in this court and other federal courts.” *Id.* at 1095.

and behavioral evidence. In seeking to bring objective benchmarks to the analytic style, the Court has rejected a qualitative decision-making approach and has accepted a juristic balancing analysis. The narrow balancing analysis has been confined to an economic inquiry into whether the challenged conduct will enhance competition through efficiency. The Court generally has rejected any open-ended inquiry that includes socio-political considerations.<sup>255</sup>

For the Court to say that it rejects a broader-based weighing analysis because it is ill-equipped to weigh considerations other than economic competitive factors is inconsistent with other decisional trends that implicate antitrust policy. For instance, the Court recently subordinated the importance of antitrust policy (and its competitive efficiency goal) when it conflicted with admittedly anticompetitive state statutes.<sup>256</sup> In deciding these cases, the Court implicitly balanced noneconomic interests in advancing its theme of federalism. In each case, the Court decided that the state's right to engage in economic regulation outweighed the regulation's anticompetitive consequences. Consistency, then, seems to be a selective decisionmaking factor, dependent upon the normative objective behind the analysis.

While the Court may state that its analysis must necessarily be narrow so as not to engage in social legislation, the values inherent in the Court's efficiency model clearly advance certain social, economic, and political goals. The results are not value neutral. Economic efficiency has replaced the Warren Court's competitive equality populism as the central goal of antitrust policy.<sup>257</sup> The one-dimensionalism of this analysis, however, excludes other relevant and perhaps socially preferable considerations. Though the present court

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255 See, e.g., *Community Communications Co. v. City of Boulder*, 50 U.S.L.W. 4144, 4151 (U.S. Jan. 12, 1982) (Rehnquist, J., dissenting) ("The Sherman Act should not be deemed to authorize federal courts to 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' . . . The federal courts have not been appointed by the Sherman Act to sit as a 'superlegislature to weigh the wisdom of legislation.'"). Justice Rehnquist feared that such a decisional process would be "reminiscent of [the] *Lochner* era" where the Court was charged with imposing social policy, without legislative directive, in the exercise of judicial review. *Id.*

256 *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). *But cf.* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

257 See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).



does not apply as rigid a rule orientation as did the Warren Court, use of this efficiency paradigm may nevertheless result in a mechanical rather than functional jurisprudence. Other competitive factors beyond efficiency have certainly found acceptance in the history of antitrust analysis, as illustrated most recently in the FTC's *DuPont* decision.

Analytical concerns addressed by the post-realists aid in understanding and evaluating the Burger Court's antitrust jurisprudence.<sup>258</sup> Key inquiries focus on whether the Burger Court's antitrust decisions have been based on a "reasoned elaboration" of the competing policies and values present in each case, whether the opinions are internally consistent, and whether the Court's analytical reasoning is based on a generally accepted consensus regarding the ultimate values and policies involved.

Most observers would probably agree that the present Court has generally set forth rather clearly its analytical process. Criticism comes, however, when one considers that the Court prefers *ad hoc* decisionmaking to establishing a coherent antitrust jurisprudence that weighs fully the competing policies and values presented in each case. The Court can be faulted, in addition, for failing to attempt to reconcile conflicting decisions.<sup>259</sup>

Wechsler's "consensual value" theory isolates the central weakness of the Court's approach. The key issue under the "consensual value" theory is whether widely held beliefs support the analytical framework and the relevant values and interests. If the Court's economic efficiency analysis does not enjoy wide support as the model for interpreting antitrust policy, the post-realist would posit that the result was not worthy of legitimacy.

The Burger Court has been influenced significantly by the current literature advocating neoclassical economic price theory and sys-

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258 As noted previously, the post-realists' model concerned constitutional interpretation. Largely because of the open-endedness of the antitrust laws, courts have interpreted antitrust legislation as a constitution-like "charter of economic liberty." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Consequently, the jurisprudential models of constitutional interpretation serve as useful analytic measures in understanding antitrust decisionmaking. Although it can be argued that the need for judicial restraint decreases when interpreting a document which the legislature can change, congressional intervention or correction regarding antitrust interpretation has been infrequent. Perhaps congressional inaction affirms that the Court's approach is faithful to the legislative policy underlying the antitrust laws. Other explanations are equally plausible.

259 *Compare* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *with* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980); and *compare* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), *with* *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

temic efficiency objectives.<sup>260</sup> The Warren Court also used economics as an analytical device, employing economic models that focused exclusively on structure, power, and entry barriers. This structural approach advanced a *per se* decisional orientation. In contrast, the Burger Court prefers economic models that attempt to explain and predict market behavior based on efficiency criteria, and places less emphasis on *per se* rules.

The decisional approaches of both the Warren and Burger Courts suffer from internal narrowness. Both rely on rigid, quantitative factors to predict competitive behavior. Each Court has used economics positively to establish a normative standard for setting antitrust policy, and each has interpreted the law according to its own value orientation. One sanctioned an approach that sought to rectify competitive inequality; the other fashioned an analysis that promoted competitive efficiency.

Questions remain about which economic analysis will better promote competition and how competition will be defined. Application of Wechsler's "consensual value" theory reveals that no solid consensus currently exists as to which economic theory can better inform and facilitate antitrust analysis and policy.<sup>261</sup> Economic modeling is based, among other things, upon many assumptions concerning behavior, and many of the assumptions draw on social and political values and experience. Though cast in objective terms, the models often used have a subjective context. Consequently, the positive use of economics cannot be separated from socio-political considerations. It is difficult, if not impossible, to precisely quantify an economic model that measures all of the relevant antitrust concerns. Many analysts recognize a wide discrepancy between economic theory and actual market conduct.<sup>262</sup> How, then, should the Court define and shape antitrust analysis?

Antitrust policy has historically sought, at least in part, to protect the small, even less efficient competitor. Efficiencies analysis now threatens to undermine that legacy. The nature of the judicial inquiry will differ depending upon the normative approach employed. Antitrust analysis, like much of antitrust conduct, seems cyc-

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260 See, e.g., R. BORK, *THE ANTITRUST PARADOX*, *supra* note 139; Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

261 Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981). See also *In re E.I. DuPont de Nemours & Co.*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 987, at F-10 (Oct. 30, 1980).

262 S.C. OPPENHEIM, G. WESTERN & J.T. MCCARTHY, *FEDERAL ANTITRUST LAWS* 263 (1981).

lical. Yesterday the Warren Court advanced structuralism. Today the Burger Court embraces efficiency. The uncertain ideologies of each approach deny a clear consensus of opinion.

The cyclical history of antitrust analysis does not suggest, however, that a rational antitrust analysis will not evolve. Indeed, the recent *DuPont* decision suggests a realist approach that weighs theoretical quantitative factors within a qualitative functional framework. The strength of this approach lies in its inherent analytical flexibility. The Commission in *DuPont* blended the structural and efficiency analyses of the Warren and Burger Courts by utilizing a balancing approach. The Commission evaluated market structure and conduct, including entry-detering conduct such as product innovation and capacity preemption, in light of cost economies. In determining whether competition was exploited unreasonably,<sup>263</sup> the Commission balanced anticompetitive consequences against efficiencies and abandoned *per se* rules. The analysis weighed the competitive harms and benefits within their "market setting," including the market's structure, the defendant's power, and the nature of the challenged conduct.<sup>264</sup>

[S]ome of the factors that appear especially pertinent to the . . . analysis include: 1) the extent to which the conduct enhances efficiency or innovation, including profitability considerations; 2) the extent to which the conduct is a reaction to competitive behavior, demand shifts, new technology or other market conditions; 3) the permanence or reversibility of the challenged actions; 4) the alternatives available to the firm and 5) the effect of the conduct on entry barriers and rival firm behavior.<sup>265</sup>

In sum, the Commission's analysis significantly redefines competition according to a more broadly based strategic planning model. This "strategic approach" to decisionmaking, using the learning from both structural and efficiency oriented theories, is only now gaining recognition as an antitrust jurisprudential model.<sup>266</sup> The appeal of this analytical approach lies in its rejection of a one-dimensional antitrust analysis, favoring instead an open-ended inquiry that considers market experience and conduct more relevant than theoretical logic. The importance of this decisionmaking perspective tran-

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263 In re E.I. DuPont de Nemours & Co., [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 987, at F-1, F-6 (Oct. 30, 1980).

264 *Id.* at F-8 & F-10 n.38.

265 *Id.* at F-10 n.38.

266 See generally S. SALOP, STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (1981); cf. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

scends all areas of antitrust analysis.<sup>267</sup>

To be sure, use of economics in the decisional process has helped to make antitrust more economically rational. However, decisional analysis should weigh market performance and efficiency against market structure and practice. Efficiency should not be the single measure of legality. Hopefully, as the courts continue to define consumer welfare and competition in the context of antitrust laws, they will not reject the realist ideal that public policy decisionmaking should include an appreciation of the historical, socio-political, and economic background that has shaped the antitrust laws. Normative judgments concerning what the law should be ought not exclude as outdated the original understanding of the antitrust laws. Political theory should not be replaced entirely with price theory. Almost one hundred years of antitrust enforcement has demonstrated that experience rather than strict formalist logic best guides antitrust analysis. Courts should apply a broadly focused industrial welfare analysis and carefully weigh welfare tradeoffs according to relative impact in each segment of the economy. In a pluralistic economy, interests and values must continually be reevaluated and reconciled. Antitrust law is no exception.

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<sup>267</sup> The strength of the analysis lies in its attempt to assimilate the structure and efficiency schools of thought into a strategic planning approach. The analysis recognizes that structuralists probably err in placing too little emphasis on technical efficiencies and that the efficiency school ignores the dangers of market concentration. This approach allows not only the efficiency defenses but also evidence of exclusionary effects of strategic planning. It places faith in the court's ability to weigh the competing economic factors and make enlightened decisions that determine the future economic structure. As increased emphasis is placed on expert economic testimony in trying to ascertain the viability of potential competition, the scale required for efficient competition, the concentration of the industry, and other matters relevant to a full economic inquiry, the transaction costs of litigation will increase. If such a thorough inquiry is required for a legitimized antitrust policy, then it cannot be considered a waste of judicial resources.