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The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of The Sherman Act

Lee Goldman

In 1991, the United States Department of Justice brought an antitrust suit against the Massachusetts Institute of Technology (MIT) and several Ivy League schools that challenged the schools' long-standing agreements to award financial assistance exclusively on the basis of need and cooperate in calculating the financial aid requirements of commonly admitted students. All schools except MIT agreed to a pre-trial consent decree with the government. MIT went to trial. Although the United States District Court for the Eastern District of Pennsylvania found that the schools' agreements constituted illegal price fixing, the United States Court of Appeals for the Third Circuit reversed and remanded. The Third Circuit agreed with the lower court that the Sherman Act applied to the defendant's conduct, but held that the district court erred in failing to give appropriate consideration to the defendant's noncommercial, public service justifications. Given the Third Circuit's opinion, congressional pressure on the Justice Department to drop its price fixing case, and the government's subsequent settlement on terms favorable to MIT, commentators have speculated that the government and the courts will be increasingly receptive to a social welfare defense to antitrust challenges.

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2. Id. at 664.
3. Id.
4. Id.
5. Id. at 678.
6. Id. at 665-68.
7. This Article uses the terms noneconomic and noncommercial interchangeably. Noncommercial means unrelated to an effect on price or non-price competition in the marketing or purchase of goods or services. A noncommercial, noneconomic, public interest or social welfare justification for challenged conduct, therefore, is an antitrust defense unrelated to the conduct's effect on competition (i.e. the free market rivalry among firms in the same industry).
8. Brown Univ., 5 F.3d at 678. MIT, in part, argued that the inter-school agreements permitted the schools to offer assistance to a greater number of needy students and resulted in increased minority representation on campus. Id. at 675.
The purpose of this Article is not to critique the Justice Department's suit against MIT. Rather, the purpose is to address more generally how section 1 of the Sherman Antitrust Act should treat agreements that have noncommercial justifications. Widespread acceptance of a social welfare defense would have dramatic ramifications. A noncommercial or public service justification might be raised for each of the following agreements that might otherwise violate the antitrust laws:

(1) reacting to the growing criticism of health care costs, the major drug companies agree to limit price increases or roll back current prices of popular medications;

(2) sensitive to the alleged negative societal effects of violence on television and in the movies, the commercial television networks agree to limit or eliminate programming containing depictions of violent conduct;

(3) African-American businesses in a small city agree to purchase supplies exclusively from businesses with significant minority representation;

(4) universities, through the National Collegiate Athletic Association ("NCAA"), agree to impose minimum educational requirements for incoming student athletes and to restrict scholarship aid to eligible student athletes;

(5) members of the National Association of Broadcasters agree to restrict advertising by beer companies during programming targeted to teenagers;

(6) hospital administrators agree to fix the price of elective surgery in order to subsidize emergency surgery for low income community residents;

(7) consumer groups, organized by Citizens for a Moral Society, agree to boycott a supermarket that carries Playboy magazines;

(8) the National Organization for Women organizes a boycott of Dominos Pizza to protest owner Tom Monaghan's pro-life position on abortion.

The majority of commentators who have addressed the issue recommend that the antitrust laws recognize noneconomic or social welfare justifications.


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Most of these commentators, however, limit their consideration of this defense to a particular industry or to part of an analysis regarding an individual case. This Article undertakes a comprehensive analysis of this issue and concludes that, despite the appeal of encouraging businesses to act in a socially responsible manner, noneconomic justifications proffered by business combinations for anticompetitive conduct should not be recognized under the Sherman Act.

Part I of this Article begins with a brief description of the two modes of analysis by which agreements may be analyzed under the Sherman Act. It then argues that social welfare justifications should neither be allowed to avoid application of the per se rule nor be considered under the Rule of Reason. Courts are ill-suited to determine the true motives of antitrust defendants, and, in any event, presumptively self-interested and unaccountable private parties are not the appropriate persons to balance subjective or abstract benefits to society against anticompetitive harm. Neither the availability of judicial review nor the possibility of post-decision legislative action alters that conclusion.

Part II reviews the relevant Supreme Court case law. Although the Court has never decided dispositively whether truly public-spirited conduct can justify anticompetitive effects, the weight of authority supports rejection of noneconomic justifications.

Finally, Part III discusses when, if ever, noncommercially motivated restraints on competition should be exempt from review under the Sherman Act. This Article contends that policy, precedent, and legislative history support the proposition that the Sherman Act should not apply to noncommercially motivated restraints on competition by noncommercial entities. Part III explains that there are important differences between public-spirited restraints imposed by commercial/business combinations and those imposed by noncommercial entities. Accordingly, this Article concludes that exclusion from antitrust scrutiny of noneconomically motivated restraints by noncommercial

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14. See, e.g., Gulland et al., supra note 13; Kirby, supra note 13; Seib, supra note 13; Note, Intercollegiate Athletics, supra note 13; Note, Motion Picture Industry, supra note 13.

15. This Article uses the terms motive and purpose interchangeably. Purpose refers to the "goal which is desired not as a means, but in and for itself." Coons, supra note 13, at 711. Thus, if African-American citizens boycott white businesses in an effort to pressure them to adopt non-discriminatory practices, the purpose is to change employment practices, while economic pressure merely is the means of achieving that goal.

16. A noncommercial entity refers to a party whose general character or reason for existing is not related to the marketing of goods or services. Religious, social, and political organizations, such as the National Organization for Women, the NAACP, and Citizens for a Moral Society, are examples. Nonprofit status does not qualify an organization as a noncommercial entity. Nonprofit organizations, such as hospitals, universities, or trade associations, frequently engage in commercial transactions and sometimes distribute revenues in the form of inflated salaries or benefits. Courts repeatedly have subjected such organizations to the Sherman Act. See, e.g., NCAA v. Board of Regents, 468 U.S. 85, 100 n.22 (1984); American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 576 (1982); American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943).
entities should have no implication for the status of such restraints when undertaken by commercial businesses.17

I. THE PROPER ROLE OF NONCOMMERCIAL OR SOCIAL WELFARE JUSTIFICATIONS

A. The Rule of Reason and the Per Se Rule

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 18 The Supreme Court, however, has acknowledged that section 1 cannot be applied literally: "Every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence." 19 Thus, the Court has interpreted section 1 to forbid only "unreasonable" restraints of trade. 20

Although the Sherman Act outlaws only "unreasonable" restraints of trade, "there are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . ." 21 Such arrangements are considered unreasonable per se and, thus, are illegal without detailed inquiry into the precise harm they cause or the reasons for their adoption. 22 The rationale for per se rules, in part, is to avoid burdensome and costly inquiry into actual market conditions in situations where experience has proven that the likelihood of anticompetitive practices is great. 23 Also, by clearly demarcating certain types of prohibited conduct, the per se rule provides guidelines by which businesses may structure their affairs. 24

By contrast, traditional Rule of Reason analysis requires an examination of the nature, purpose, and competitive effects of any challenged agreement before a decision is made concerning its legality. 25 Although the analysis

17. Thus, of the eight hypothetical situations presented above that illustrate situations in which a noneconomic justification might be raised, the Sherman Act would cover all cases except (7) and (8).
20. Id. at 238; Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
22. Id.
23. Id. The following cases illustrate the types of conduct that the Court has determined are illegal per se: Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (horizontal market division); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 332, 343-44 (1990) (concerted refusal or concerted refusal to deal); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (some tying arrangements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (naked price fixing); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (resale price maintenance).
25. The Court first articulated the broad contours of the Rule of Reason analysis in Chicago Bd. of Trade v. United States:

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
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generally requires an elaborate inquiry into market effects, a court that applies the Rule of Reason does not consider every facially reasonable argument in favor of a challenged restraint. The focus of the court's analysis must be on the "market impact" of the challenged restraint. This typically requires a two-fold inquiry. First, the court must identify the restraint's effect in the relevant market. Often, this involves a determination of a relevant product and geographic market. Second, the court's analysis must consider the justifications for the challenged practice. An apparently illegal anticompetitive restraint can be redeemed only if it is the least restrictive alternative or is at least reasonably necessary to further a legitimate purpose. A court's ultimate conclusion concerning a restraint's competitive impact may involve some balancing of the practice's anticompetitive and procompetitive effects.

Frequently, however, the reasonableness equation does not require extensive analysis. Where the harm resulting from a restraint is clear, and the benefit is dubious or minor, the restraint may be condemned without establishing market power or making detailed findings. This so-called "quick look" or "truncated Rule of Reason" analysis provides the flexibility to consider the defendant's proffered justifications and uphold conduct that is harmless to competition without sacrificing the litigation cost savings and business predictability provided by a per se rule.

Recent Supreme Court decisions demonstrate a preference for the Rule of Reason analysis. The Court has indicated concern that the application of a
per se rule might create overdeterrence, particularly when the defendants lack market power. Thus, even if parties have "literally" fixed the price of goods, the Court generally will reject per se analysis if the defendants can offer a plausible justification for their challenged agreement other than arguing that the Sherman Act should not apply to them.

36. See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) (holding defendants' packaging of members' copyrighted musical compositions at a price set by defendants legal under Rule of Reason because substantial reduction of transaction costs permitted defendants to offer new product that otherwise would not have been available); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (holding that vertically imposed territorial restrictions on television retailer were subject to Rule of Reason because improvement in competition among brands (interbrand competition) as a result of such restrictions could be more than offset harm to competition among sellers of single brand (intra brand competition)).

37. If the defendants lack market power, defined as the ability to exercise control over prices and production in an industry, a price or other agreement cannot have long-term effects on the market. For example, if the defendants agree upon an artificially high price, consumers simply will buy elsewhere. The defendants eventually will be forced to lower their prices. See E. THOMAS SULLIVAN & JEFFERY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 86 (1988). Accordingly, if rational defendants lack market power, it might be presumed that their agreement must not be designed to tamper with market forces, but to provide some benefit to the public in the form of improved competition or the elimination of some market imperfection.

38. In the few recent Supreme Court cases nominally employing the per se rule, the defendants failed to offer an acceptable justification for their conduct. In Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 357 (1982), the Court, in a 4-3 decision, determined that the agreement among the defendant doctors was illegal per se. Despite the per se label, the Court ultimately examined the defendants' justifications for their restraint and found them to be insufficient. Id. at 351-54. The Court also suggested that if the defendants had been pursuing some ethical norm, formal adoption of the Rule of Reason would have been justified. Id. at 349.

In Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648-49 (1980), the Supreme Court held that an agreement among beer wholesalers to eliminate short term credit to beer retailers was per se unlawful price fixing. Id. at 648-49. The defendants claimed that their agreement was procompetitive because it lowered barriers to entry and increased price visibility. Id. at 649-50. The Court summarily dismissed these justifications because such defenses would insulate even the most anticompetitive agreements from antitrust attack. Id. Absent any cognizable justification, the Court properly viewed the defendants' restraint as a naked price-affecting scheme subject to per se treatment. Id. at 650.

Similarly, in Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990), the Court applied the per se rule because of the lack of a plausible justification. In Palmer, the defendants, providers of bar review courses, agreed to allocate territories. Id. at 47. The defendants offered no justification for the agreement. Id. at 49. Instead, they argued that they did not divide the market in which they previously competed, but merely reserved that market to one of the defendants (on the condition that this defendant would not compete elsewhere). Id. The Court summarily rejected this distinction and found the defendants' horizontal market division unlawful on its face. Id.

Finally, in FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), the lawyer-defendants agreed to refrain from representing indigent criminal defendants in order to pressure the District of Columbia government to increase the fees paid for such services. Id. at 414. The defendants alleged that the purpose of their conduct was to ensure effective representation of the indigent criminal defendants' Sixth Amendment rights and was protected by the lawyers' own First Amendment rights. Id. at 426. The Supreme Court dismissed the first issue for lack of relevance and addressed the latter. Finding that the lower court exaggerated the significance of the expressive component of the defendants' conduct, the Court rejected the First Amendment defense. Id. at 450. Without this defense, the agreement constituted a horizontal restraint that clearly impacted the market. Id. at 427-28. Inevitably, the Court held that the per se rule applied to the defendants' boycott.
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B. **Social Welfare Arguments to Avoid Application of a Per Se Rule**

The first step in any section 1 analysis is to decide the appropriate mode of review: per se or Rule of Reason. Although the Supreme Court has admonished courts to focus on the competitive impact of a challenged restraint in deciding which rule to apply, one may argue plausibly that the presence of noneconomic values justifies treatment under the Rule of Reason rather than the per se rule. The Rule of Reason furnishes the flexibility to ensure that actual market harm exists before a court second-guesses the defendant's actions and proscribes potentially beneficial conduct.

The policies underlying the per se rule and the Court's fear of overdeterrence also seem to support application of the Rule of Reason to otherwise illegal agreements—whether horizontal or vertical—that have social welfare justifications. When public interest concerns motivate an agreement, that agreement does not lack "redeeming virtue." Rather, agreements that promote the public interest without producing competitive harm result in a net benefit to society. Businesses, as active participants in the market, are often in the best position to detect and react to market failures. Where actual market effects are absent, antitrust law should not discourage socially responsible remedial conduct. Certainly the Court and society should be reluctant to label socially responsible conduct as illegal without some countervailing injury.

In antitrust matters, the Court has been reluctant to attempt the "ultimate reckoning of social and economic debits" that a weighing of noneconomic and economic factors would entail. The Court has reasoned that this task is more appropriately addressed by Congress. In the absence of competitive effects, however, consideration of public interest and other noneconomic values neither requires the "reckoning" the Court fears nor usurps congressional power. In such a case, there is simply no weight to balance against the noneconomic values. Thus, even if courts did not allow public interest values to offset actual anticompetitive effects, they could permit such values to trigger the Rule of Reason; that might promote public interest goals without jeopardizing a

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39. See supra note 27 and accompanying text.
41. See supra notes 23-24 and accompanying text.
42. See supra note 36 and accompanying text.
43. A horizontal agreement is one between two or more competing firms at the same stage of production. A vertical agreement is an arrangement between two firms at different stages of production. See infra note 51 and accompanying text.
44. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); see also supra note 21 and accompanying text.
46. Id.
competitive marketplace. Further, although the Rule of Reason's elaborate inquiry has its costs, the Court's relatively new "quick look" or "truncated Rule of Reason" approach can alleviate many of the difficulties and expenses inherent in full Rule of Reason analysis.

Common sense seems to support the recognition of social welfare defenses to escape application of the per se rule under the Sherman Act. Why make conduct that creates no harm and may provide benefits illegal? Nonetheless, this Article recommends that the Sherman Act should not allow noneconomic justifications for agreements among competitors to avoid application of the per se rule. This conclusion rests on the assumption that social welfare justifications should not be allowed to offset actual anticompetitive effects under a Rule of Reason analysis, as explained in detail below. Given this assumption, the benefits from allowing noneconomic values to circumvent an otherwise applicable per se rule for horizontal restraints are illusory and accompanied by real costs.

If noneconomic values were not factored into a Rule of Reason analysis, an agreement would be legal under the Rule of Reason only if there were procompetitive benefits to offset market harm or no market effects at all. If there were procompetitive benefits, however, it would not be necessary to consider social welfare justifications to avoid the per se rule. The Supreme Court has acknowledged that, at least for horizontal agreements, procompetitive benefits justify Rule of Reason treatment. On the other hand, if no market

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47. Although the Supreme Court has repeatedly emphasized market effects rather than noneconomic values, see National Soc'y of Professional Eng'rs, 435 U.S. at 690, 692, the case law is hardly dispositive. The cases rejecting noneconomic interests generally have involved a finding of substantial harm under the Rule of Reason. See Goldman, supra note 40, at 221-22 & n.134. Furthermore, the Court has stated that it is "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." Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975); see also FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986). If courts follow the Supreme Court's admonition, it would seem that they would have to recognize some noneconomic values. But see infra notes 150-53 and accompanying text.

48. See supra notes 33-34 and accompanying text.

49. See infra Section I.C.

50. If a court were to consider the challenged agreement illegal under a Rule of Reason analysis, there would be no benefit from permitting social welfare arguments to avoid the per se rule.


In the vertical context, however, the Court does not recognize all procompetitive benefits. Here, unlike in the horizontal context, there may be a benefit to allowing social welfare defenses to justify Rule of Reason treatment. By escaping the per se rule, vertical price agreements with procompetitive benefits that cause no harm can be upheld. For example, consider a small drug manufacturer with little market power that fixes the retail price of its product to combat retailer price gouging and provide greater access to needed medicines. Without consideration of the public welfare justification, the agreement would constitute per se illegal resale price maintenance. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (finding resale price maintenance per se illegal); Albrecht v. Herald Co., 390 U.S. 145 (1968) (applying per se illegality of resale price maintenance to maximum retail price fixing). Considering the public interest justification could save this vertical agreement, which seems to increase competition as well as the availability of drugs to lower income persons.

Recognizing noneconomic justifications for vertical restraints, however, might be interpreted as a
effects were present, the defendants in an antitrust suit would not have market power. Without market power, either the defendants' agreement would not achieve its asserted social welfare goals or the defendants could have accomplished such goals independently. In either case, the challenged agreement would not produce any benefit and, thus, should not justify Rule of Reason treatment for what would otherwise be illegal per se.

To illustrate, consider the agreement between MIT and the Ivy League schools to share students' financial-need information, award financial assistance only on the basis of need, and standardize the awarding of scholarships. Such an agreement normally would constitute price fixing and would be illegal per se. In the MIT case, however, the participating schools offered public welfare justifications for their agreement, including that it produced a more diverse student body, which ultimately benefited the schools, their students, and society as a whole.

Such benefits, however, either could have been achieved by the schools independently or would have required an agreement among schools with market power. If a school could benefit from offering aid only to needy students, that school might independently refuse to enter a bidding war for talented students. The unwillingness of the individual schools in the MIT case to do so, however, can be attributed only to the fear that if one school chose not to bid for

disingenuous tactic to overrule the often criticized per se rule against vertical price fixing. Undoubtedly, this overruling function would be the attraction for many. See William F. Baxter, The Viability of Vertical Restraints Doctrine, 75 CAL. L. REV. 933 (1987); Richard Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. CHI. L. REV. 6 (1981); Frank Easterbrook, Maximum Price Fixing, 48 U. CHI. L. REV. 886 (1981); Robert H. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (Part II), 75 YALE L.J. 373 (1966) (all criticizing application of per se rule to vertical agreements). Although there is an element of truth to this interpretation, the differential treatment of vertical restraints can be viewed as consistent with per se rule jurisprudence. The primary rationale for the per se rule is to avoid the burdensome inquiry the Rule of Reason requires when the challenged conduct has remote benefits and likely harms. See supra note 23 and accompanying text. In effect, the current per se rule assumes \( B - H < \) the cost of a Rule of Reason inquiry, where \( B \) is the potential procompetitive benefits and \( H \) is the likely harm produced by the agreement. That assumption does not necessarily mean \( B + ? - H < \) the cost of a Rule of Reason inquiry, where \( ? \) represents the possible noneconomic benefits from the agreement.

52. See supra note 37.

53. One might question whether a court should find liability when the defendants have a public interest goal but are unable to accomplish their goal or to cause harm to competition because they lack market power. Absent any effects, it may seem inappropriate to punish a "public-spirited" defendant. Nevertheless, this Article concludes that liability is proper. If the law indicates that a public interest motive cannot excuse anticompetitive effects, as this Article recommends, see infra Section I.C, this "public-spirited" defendant is seeking to break the law to the same extent as the greed-driven competitor. Courts should neither reward nor encourage such conduct. The likelihood of harm from the challenged conduct, as well as the amount of actual recognized benefits, does not change with the defendants' motive. If it is not cost-effective to inquire into actual market effects when the conduct is economically driven, it should be equally inefficient to investigate actual harm when there is a good, but unaccomplished, motive. Given the defendants' goal to break the law, one even might question whether their motive is properly labeled "public-spirited." In any event, a decision to subject "public-spirited" defendants to potential antitrust liability may have little practical significance. Absent market effects, private parties would lack standing to seek damages, see 15 U.S.C. § 4 (1994), and, given its limited resources, the government likely would not bring suit.

students, that school would be competitively disadvantaged. In other words, talented students always would choose to attend a bidding school, and non-bidding schools would be left with an inferior student body.

The schools' collective response to the problem, an agreement under which MIT and certain Ivy League schools awarded financial scholarships only to needy students, seemed logical. However, if MIT and the Ivy League schools participating in the agreement did not have market power, the superior student still would have faced a competitive market and would have chosen to attend a bidding school that did not participate in the agreement. Under these circumstances, such an agreement would have been unable to achieve its purpose.

Alternatively, if MIT and the participating Ivy League schools had market power, the agreement would have resulted in market harm—the reduction of total scholarship aid to a number of prospective students wishing to attend an "Ivy-League type" school. These students would have been unable to benefit from a bidding war for talented students that would exist in a free market. Consequently, for agreements such as that by MIT and the Ivy League schools in which the parties offer public welfare justifications for an otherwise per se illegal agreement, only two possible conclusions exist: (1) the agreement cannot be necessary to further the asserted social welfare goal; or (2) the agreement results in competitive harm.

Therefore, given the extreme unlikelihood that consideration of social welfare justifications for horizontal restraints will have an impact upon the ultimate legal result, the courts should not undertake the burden of analyzing whether the asserted social welfare justifications actually benefit the public or have been achieved by the defendants. Again, however, this conclusion depends upon the assumption that social welfare goals should not be considered in a Rule of Reason analysis. This Article now turns to that critical assumption.

C. Noneconomic Justifications Within the Rule of Reason

A strong argument exists that social welfare justifications should be permitted to offset anticompetitive effects, at least when the benefits from the challenged conduct are clear and the harm is relatively benign. Competitors are often in the best position to identify and respond to market failures. At a

55. Market failures are "imperfection[s] in a price system that result in an inefficient allocation of resources." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 756 (15th ed. 1995). Imperfect information is one cause of market failures. For example, many student athletes overestimate their chance of success in professional sports and underestimate both the stress accompanying a professional career and the value of a college degree. As a result, too many student athletes ignore their studies or leave school prematurely. University administrators and athletic coaches, although subject to their own pressures, may be in a better position than student athletes to objectively evaluate athletes' ability and maturity levels and the importance of an education. As a result, an agreement among schools to discourage student athletes from leaving college early or to raise academic standards may provide net benefits to society as well as individual students. Yet, if courts do not consider the schools' public service goals, such agreements may be illegal under the antitrust laws. See GOLDMAN, supra note 40,
time when the political process appears incapable of responding to the many social problems crippling society, one may believe that the law should not discourage, much less penalize, socially responsible behavior by private parties.

Nevertheless, this Section argues that noneconomic justifications should not be permitted to offset actual anticompetitive effects under the Rule of Reason. Competitors can claim social welfare justifications too readily, and courts cannot easily discern the parties' true intent. More fundamentally, private parties simply are not the appropriate persons to balance social harms and benefits resulting from anticompetitive conduct. Competitors may be influenced by self-interest; they may have idiosyncratic views regarding the public's interest; they are not politically accountable for their actions; and they are not required, and often do not provide, a hearing to all persons interested in or affected by the challenged conduct. While judicial review or subsequent congressional action may prevent the worst abuses of private power, neither process can substitute for decisionmaking in the first instance by disinterested and accountable policymakers.

1. *Competitors Cannot Properly Balance Competing Public Interests*

The initial problem with allowing assertions of good motive to insulate anticompetitive conduct from legal challenge is the ease with which competitors can manufacture public interest justifications for even the most blatant violations. For example, if Ford, General Motors, and Chrysler agreed to double the price of automobiles, they might claim that the agreement was necessary to preserve jobs and avoid the massive dislocation that otherwise would result from factory shutdowns. Alternatively, they could allege that the increased revenue would be used to subsidize research on energy-efficient fuels or new safety equipment. For that matter, the car makers simply might contend that they intended to use the increased revenue to subsidize the transportation needs of poor individuals or to support unrelated charities.\(^5\)

To ascertain the legality of an agreement, a court would have to determine the defendants' true or predominant motive. The judicial system is ill-suited to perform this task. First, a court would need to examine the economic benefits that the defendants received from the challenged agreement. That inquiry often

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\(^5\) See United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972) (competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy"); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963) ("anticompetitive effects in one market [cannot] be justified by procompetitive consequences in another").

56. The "public safety" justifications that the defendants offered to justify their price restraints in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), and FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986), illustrate the ease with which a party can invent social welfare justifications. For a discussion of those cases, see *infra* notes 104-16 and accompanying text.
would require scrutiny of the defendants' revenues and costs. The court also would have to predict what would have occurred in the absence of the challenged agreement. Finally, the court would be required to monitor the defendants’ market and conduct to guarantee that the competitors’ intent did not change over time.\footnote{57}

In the MIT case, for example, the defendant claimed that the challenged agreement was revenue neutral—that all increased revenues resulting from the “Overlap Agreement”\footnote{58} would subsidize additional needy students, rather than increase the profitability of the participating schools.\footnote{59} The court could not evaluate that assertion without examining the defendants’ books.\footnote{60} The court would need to assume the absence of the agreement and ask: Would schools have cut faculty or administrative salaries? Was the base tuition price fair? Would it always remain so? In effect, the judicial inquiry required to evaluate the defendants’ motive would demand a form of constant price regulation that virtually all commentators criticize,\footnote{61} and that the Supreme Court typically has eschewed.\footnote{62}

Even assuming that the defendants genuinely intend to benefit the public, they still cannot be trusted to balance properly the asserted public interest benefits against the resulting harms to competition so long as they receive direct financial advantages. Their self-interest creates a natural tendency to overvalue public benefits and undervalue the harms to competition. Can universities, for example, objectively evaluate the advantages of “amateur” athletics when the alternative—salaried student athletes—would create tremendous additional costs to the schools?

To alleviate the problem of self-interested decision making, some commentators suggest that the law should recognize noneconomic justifications only if the challenged agreements appear to injure, rather than benefit, the defendants.\footnote{63} For example, if television networks impose limits on popular but violent and possibly harmful programming, or if white-owned businesses forgo sales to businesses that discriminate against minorities, the agreements would

\footnotesize{57. See Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332, 348 (1982).}
\footnotesize{58. In 1958, MIT and eight Ivy League schools formed the “Ivy Overlap Group” to determine collectively the amount of financial assistance to award to commonly admitted students. Brown Univ., 5 F.3d at 662.}
\footnotesize{59. See Defendant-Appellant’s Brief at 10, 13, 38, Brown Univ., 5 F.3d 658 (3d Cir. 1993).}
\footnotesize{60. Brown Univ., 5 F.3d at 664. In Brown University, the United States District Court for the Eastern District of Pennsylvania heard “conflicting and complex expert testimony” that left the court “unsure” of whether the defendant’s restraint was revenue neutral. Id. The court did not make a finding on that issue because it did not consider revenue neutrality to be relevant to the determination of the restraint’s competitive effects. Id.}
\footnotesize{62. Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332, 350 (1982).}
\footnotesize{63. See Coons, supra note 13, at 728; Einer Richard Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 668, 739-40 (1991).}
appear to contradict their economic self-interest. In such cases, one might be tempted to conclude that the public interest justification is the defendants' true motive, and that the benefits of the agreement must outweigh the potential harm. Yet despite the logical appeal of this formulation, it is still inappropriate to delegate policymaking authority to seemingly disinterested private parties.

Even if commercial defendants do not receive immediate financial benefits from their agreement, it is virtually impossible to eliminate the danger that their self-interest will influence their decision making. Businesses almost always have some self-interested motive when engaging in overtly altruistic conduct. For example, television networks that forgo profitable but violent programming may primarily be motivated by a desire to improve public relations or forestall more intrusive government intervention rather than by an interest in eliminating the perceived negative societal effects of television violence. Indeed, if the defendants' conduct is not even arguably in their short-run or long-run economic interests, the defendants' officers and directors may be subject to shareholder suits for breach of fiduciary duty. In any event, the remote possibility that the defendants are not influenced by some type of self-interest cannot justify the litigation costs associated with the inquiry into and subsequent monitoring of their motives.

Even if the defendants are completely disinterested, there is no reason to believe that they would properly balance the asserted benefits of their conduct against the harm to third parties. For that matter, nothing ensures that the defendants' asserted noneconomic justifications actually further the public's interests as opposed to the defendants' parochial, albeit noneconomic, goals. For example, medical equipment manufacturers might agree to boycott any hospital that permits abortions to be performed on its premises; white-owned businesses in a small town might refuse to deal with minority companies. Although self-interest may not motivate this conduct, are such agreements

64. See Kenneth R. Clark & Jessica Seigel, Critics Unsatisfied with TV Warnings: Violence Won't Be Curbed, They Say, CHI. TRIB., July 1, 1993, at 7; Ellen Edwards, Issue of TV Violence Still Simmering, PHILADELPHIA INQUIRER, Oct. 5, 1993, at El.

65. See, e.g., Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919). In Dodge the court stated:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Id.

Normally, an altruistic corporation—or more accurately, its officers and directors—can defend a shareholder suit by asserting a putative belief, as a matter of "business judgment," that any short-run sacrifice of profits would be in the corporation's long-run interests. See David L. Engel, An Approach to Corporate Social Responsibility, 32 STAN. L. REV. 1, 16 (1979). Given the broad scope of the "business judgment rule," a defense against breach of fiduciary duty claims based on this rule almost always succeeds absent a showing of bad faith or conflict of interest. Id.; Shlensky v. Wrigley, 237 N.E.2d 776, 779-80 (Ill. App. Ct. 1968). Nevertheless, a corporation that, as part of its antitrust defense, denies any short-run or long-run benefits from its actions may effectively be precluded from relying on the business judgment defense.
really in the public interest?66

Of course, the mere fact that some private decision making may be idiosyncratic or further minority viewpoints does not necessarily mandate a complete refusal to recognize noneconomic justifications. Perhaps public interest benefits might be allowed to offset anticompetitive effects when the defendants' actions advance widely held values, as opposed to idiosyncratic or minority values. For example, many people agree that society would be better off with less violence on television.67 Similarly, most of the public would like to see student athletes improve their academic performance.68 The law might view conduct promoting such interests more favorably than the hypothesized agreements seeking to further highly controversial views about abortion or race relations.

Frequently, however, the same agreement may implicate competing widely held values. Do network programming agreements limit violence or encroach upon cherished First Amendment freedoms? Do NCAA academic requirements further the education of student athletes or deprive minorities of equal access?69 There is no reason to defer to private decision makers' judgments about what should be the prevailing public policy. Moreover, if the defendants' conduct truly promotes widely held and nonconflicting values, private action might not be necessary. Despite frequent gridlock on controversial issues, Congress often has demonstrated an ability to react relatively quickly when there is a consensus that an amendment to or an exemption from the Sherman Act is needed.70

66. History demonstrates that many businesses motivated by noneconomic interests engage in anticompetitive acts of questionable public benefit. See Community Blood Bank v. FTC, 405 F.2d 1011 (8th Cir. 1969) (boycott of blood bank to prevent "immoral" selling of blood for profit); Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967) (group action to enforce racial discrimination in housing); American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943) (expulsion and boycott of two member doctors for engaging in "unethical" salaried medical practice); Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920) (boycott of plaintiff's magazines because opinions were "un-American"); Young v. Motion Picture Ass'n, 28 F.R.D. 2 (D.D.C. 1961), aff'd, 299 F.2d 119 (D.C. Cir. 1961), cert. denied, 370 U.S. 922 (1962) (movie industry blacklist of alleged communists); Coons, supra note 13, at 728 (describing unreported case in which Southern buyers ceased to deal with manufacturer that sponsored television program sympathetic to plight of Southern African-Americans).


68. See Steve Weiher, Latest Rates 'Validate Prop 48,' USA TODAY, July 2, 1993, at 12C.

69. See Ed Sherman, Power Struggle: Presidents, Coaches Spar For Control, CHI. TRIB., Jan. 16, 1994, §4, at 1 (describing black coaches' belief that many new NCAA regulations disproportionately and unfairly impact minorities).

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As an alternative means of avoiding antimajoritarian private decision making, the law might recognize noneconomic justifications that promote values finding support in congressional legislation. For example, the federal policy against discrimination expressed in the Fourteenth Amendment and numerous antidiscrimination statutes might be cited to justify a boycott of white-owned businesses that discriminate against minorities. Unfortunately, this proposal also proves unworkable. It is too easy to find (or manufacture) congressional support for anticompetitive conduct. In Arizona v. Maricopa County Medical Society, the federal policy favoring improved health care could have justified the defendants' price fixing scheme. In FTC v. Superior Court Trial Lawyers Ass'n, the defendants actually sought to justify their horizontal boycott by claiming a desire to protect indigent defendants' Sixth Amendment right to effective assistance of counsel. Similarly, the federal policy supporting product safety could have justified the engineers' agreement in National Society for Professional Engineers v. United States (or, for that matter, a price fixing agreement by any manufacturing group). Of course, the Supreme Court held the agreements in each of those cases to be per se illegal.

In any event, there remains the congressional policy favoring competition expressed in the Sherman Act. Thus, there is always a competing congressionally supported value that courts must balance against the defendants' asserted justification. Consequently, the fundamental problem is not identifying valid public interests, but deciding how much anticompetitive harm those public interests may justify.

to adopt common standards for evaluating student need).

{}\footnote{71. See Hertz Corp. v. New York, 1 F.3d 121, 131 (2d Cir. 1993), cert. denied, 114 S. Ct. 1054 (1994); Defendant-Appellant's Brief at 31-32, United States v. Brown University, 5 F.3d 658 (3d Cir. 1993); Elhauge, supra note 63, at 744; Coons, supra note 13, at 749.}


{}\footnote{73. 457 U.S. 332 (1982).}

{}\footnote{74. See Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (1988).}

{}\footnote{75. 493 U.S. 411 (1990).}


{}\footnote{77. 435 U.S. 679 (1978).}

{}\footnote{78. See Engel, supra note 65, at 37-41. It is possible to hypothesize a case in which the legislature might be viewed as implicitly approving the defendants' balance of interests. For example, consider the situation in which corporations guilty of dumping pollutants in a local river are subject to a criminal penalty, but the corporations' acts escape detection or the costs of proof exceed the benefits of prosecution. If voluntary compliance would create additional corporate costs, competitive pressures may preclude individual choice to obey the statutory mandate. In such a case, an agreement among competitors to obey the law and to refrain from polluting the river, although raising costs and, consequently, consumer prices, may have implicit legislative approval. Id.

{}Nevertheless, this Article concludes that courts still should not allow social welfare arguments to justify harm to competition. In the hypothesized case, the corporations could petition Congress for a
Because there is no logical or objective method to balance such disparate conflicting interests, it is critical that the decision making process be fair. For this reason, our democratic system leaves such policy decisions to elected officials. Private parties, unlike legislative bodies, do not provide the procedural safeguards that further fundamental fairness and minimize the risk of arbitrary or misguided decisions. Specifically, private parties lack elaborate fact-finding mechanisms, do not offer interested parties an opportunity to be heard, and are subject to limited, if any, accountability.

The opportunity to be heard that typically accompanies the legislative process guarantees that all interested parties may provide information to further their case. This not only improves the accuracy of the decision making process, but it also makes parties more willing to accept the decision ultimately reached. Through hearings and congressional subpoena power, legislators can consider information that may not be available to private decision makers. This also enhances the accuracy and reliability of the balancing process. Finally, although they may be subject to personal and political pressures, legislators act under public scrutiny. The electoral process inhibits legislators from pursuing their self-interests. Few legislators would be willing to favor anticompetitive conduct publicly. Accordingly, whereas private decision

specific exemption permitting the agreement or they might file for approval under the Justice Department's business review procedure. See 28 C.F.R. § 50.6 (1995). It is hard to imagine that legislative or executive approval would not be immediately forthcoming. Indeed, a failure to act might undermine any claim of implicit legislative approval. It seems equally unlikely that anyone ever would bring suit. The chances of the hypothesized situation arising, Congress refusing to enact an exemption, and a proper plaintiff bringing suit are sufficiently remote to suggest that the law should ignore the possibility rather than incur the costs that identifying it would entail.

79. The law might allow private parties to balance public and private interests if they could demonstrate that the decisionmaking process was fair and included an opportunity for all interested parties to be heard. Cf. Robert Eisig Bienstock, Comment, Municipal Antitrust Liability: Beyond Immunity, 73 CAL. L. REV. 1829, 1847 (1985) (discussing "fair procedures" requirement for municipal antitrust liability analysis). Unfortunately, such a fair procedures requirement is not practical. Antitrust litigation is already complex. Inquiries into the procedures that private decisionmakers employ would only further complicate judicial proceedings. There also would be no obvious standard to measure the fairness of private hearings. For example, if students are able to speak at NCAA conventions, but have no real impact on decisionmaking, are the procedures for implementing restrictions on student athletes fair? If not, how are other courts to determine the "real" impact of interested parties? If the procedures are treated as fair, a fair procedures rule simply might encourage sham hearings by all business combinations. In any case, procedural review would not guarantee that decisionmakers are held accountable for self-interested, idiosyncratic, antimajoritarian, or arbitrary decisions.

80. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 n.9 (1985); Elhauge, supra note 63, at 703 & n.172. Some businesses or special interest groups may "capture" legislators or regulators. See generally John Shepard Wiley, Jr., A Capture Theory of Antitrust Freedom, 99 HARV. L. REV. 713 (1986) (suggesting that many special interest groups control or "capture" the legislative or regulatory bodies that are supposed to regulate them). "Regulatory captures," however, do not exist in all markets or control all decisions in markets in which they do exist. More fundamentally, instances of regulatory capture cannot be easily identified and constitute more of a political than an antitrust problem. See HOVENKAMP, supra note 34, at 632. Consequently, the possibility of legislative or regulatory capture cannot and should not dictate antitrust policy.

mackerers may act primarily on their own behalf, the law can assume that
legislators will seek to further the public's interest. Thus, it is inappropriate
to delegate policymaking authority to private parties. Yet, allowing defendants
to assert public interest justifications for their anticompetitive agreements
effectively does just that.

2. Judicial or Legislative Oversight is an Inadequate Safeguard Against
Improper Private Decision Making

Permitting private parties to balance noneconomic benefits against
anticompetitive effects would not abdicate all governmental decision making
authority. Competitor agreements would continue to be subject to judicial
review. If a court found that private decision makers did not properly balance
the public and private interests, competitors would remain liable for their
anticompetitive practices. Thus, the judicial process could eliminate the most
egregious problems created by self-interested or idiosyncratic private decision
makers. Moreover, even if a court inappropriately approved the private parties’
balance of interests, Congress could pass legislation to override that judicial
decision. Nevertheless, neither judicial review nor post-decision congressional
action provides adequate safeguards against self-interested, arbitrary, or
misguided decisions.

The judicial process does not provide the same institutional legitimacy as
the legislative process. The quality of the evidence that the parties present
limits a court's decision making ability. All affected parties may not be present
at trial. Those that are present may not be adequately represented by counsel
or may not be able to bear the cost of the elaborate fact-finding process
required to balance complex competing policies properly.

Even if presented with a complete and thorough record, judges may not be
the proper persons to make difficult decisions concerning public policy. Judges
would be called upon to “decide cases based on nothing more convincing or persuasive than their own set of values and policy prefer-
ences.” There is no guarantee that judges’ decisions would reflect public senti-

82. See Hallie, 471 U.S. 34, 45 (1985); supra notes 38, 56.
(discussing studies which show that legislative action, rather than Supreme Court decisions, better reflect
public’s interest).
84. Bird, supra note 13, at 279.
85. Id. Similarly, the Supreme Court has recognized that the consideration of noneconomic values
requires “some ultimate reckoning of social or economic debits” that is best left to Congress. United
States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963); see also Ford Motor Co. v. United States,

Although the 1890 Congress used sweeping language and intended to grant courts common law
power to make substantive policy, see Nonprofit Entities, supra note 13, at 813; Wiley, supra note 80,
at 776-77, there is no indication that Congress intended the courts to balance disparate interests. See
Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). Rather, Congress wanted courts to adopt
substantive policies that best furthered competition and consumer interests. See NCAA v. Board of
Regents, 468 U.S. 85, 104 (1984); Bork, supra note 24, at 838-39. The unfortunate experience during
ments. Federal judges, who are appointed for life, are not accountable to the public through the electoral process. Many judicial decisions are not even published. Furthermore, judicial decision making, unlike congressional action, does not provide clear guidelines. Different circuits, or even judges within the same circuit, frequently reach conflicting conclusions. The result could be arbitrary decision making and diminished predictability for businesses.

Although Congress can always override judicial decisions that improperly balance competing interests, that recourse neither justifies unguided extensions of judicial power nor provides sufficient protection against self-interested or antimajoritarian private decision making. Petitioning Congress for action is difficult and costly. Often the costs of petitioning will exceed the benefits. At other times, the net benefits of congressional action may exceed the costs, but the benefits are so dispersed that no single person has an incentive to initiate action. Costs and inadequate incentives aside, there is no guarantee that petitioning Congress will provide acceptable relief. Congress has limited resources. It cannot respond to every request. When it does react, institutional realities often produce delayed or ineffective solutions. At a minimum, interim harm results.

3. Business Competitors Should Bear the Burden of Seeking Legislative Action

Arguably, where the defendants do not receive direct financial benefits from an agreement and a court finds their balance of policy considerations reasonable, there should be a presumption that public benefits outweigh anticompetitive effects. The law then might require the claimed victims of the allegedly anticompetitive conduct rather than competitors to bear the burden of seeking congressional action. Despite the initial appeal of such a proposal, this Article recommends against such a presumption.

In deciding who should bear the burden of petitioning the legislature, it is

the Lochner era, when the Supreme Court engaged in economic policy-making under the guise of substantive due process, illustrates the dangers of unguided judicial policy-making. See Bienstock, supra note 79, at 1846.

86. Bird, supra note 13, at 279.

87. This Article's preference for legislative, rather than judicial, action is not simply standard conservative dogma. Even if courts properly moderate majoritarian excesses and preserve the individual rights of the disenfranchised and powerless, that function has no application in the present context. The parties who are objecting to the legislature's judgment are not powerless individuals, but collective actors exerting economic power.

88. Cf. Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & ECON. 23, 38, 49 (1983) (proposing immunization of regulatory restraints that do not have consequences outside state boundaries because states will balance all harms and benefits and can "act if the results are unsatisfactory").

89. Elhauge, supra note 63, at 712.

90. For similar reasons, courts do not consider post-decision legislative oversight as sufficient "active supervision" to satisfy the state action exemption. See Elhauge, supra note 63, at 715. For a discussion of the state action doctrine, see infra Subsection II.A.2.
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useful to examine three factors: (1) the harm that would occur prior to legislative action; (2) the relative ease of access to the legislative process; and (3) the process costs resulting from the placement of the burden. Although the first factor may be inconclusive, the second and third factors strongly support placing the burden of petitioning the legislature on competing businesses rather than on the persons allegedly injured by the competitors' conduct. The following diagram helps illustrate factor (1), the interim harm resulting from the placement of the burden of seeking legislative action.

**DIAGRAM I. INTERIM HARM**

(Scenario A) **COURTS MAY CONSIDER NONECONOMIC JUSTIFICATIONS AND VICTIMS OF COMPETITORS' CONDUCT BEAR BURDEN OF SEEKING LEGISLATIVE ACTION**

Decision Whether to Enter Agreement ———> Judicial Review ———> Legislative Review

- Harmful Agreement
- Practice Improperly Adopted

(Scenario B) **COURTS CANNOT CONSIDER NONECONOMIC JUSTIFICATIONS AND COMPETITORS BEAR BURDEN OF SEEKING LEGISLATIVE ACTION BEFORE ADOPTING PRACTICE**

Decision Whether to Enter Agreement ———> Legislative Review

- Beneficial Practice Not Adopted

Businesses may argue that courts should consider noneconomic justifications, thereby forcing consumers to seek corrective action from the legislature because the relative interim harm is small. Given the courts' traditional suspicion of noneconomic defenses, few competitors will rely on thesejustifications in adopting harmful practices unless the competitors clearly lack a financial interest and have a widely accepted public justification for their conduct. Even fewer courts will inappropriately approve the competitors' balance. By contrast, it would seem that no competitor would be inclined to adopt beneficial practices if it knew that it would not be able to rely on public interest justifications. Thus, the number of harmful practices that competitors adopt and courts improperly approve in scenario (A) appears to be less than the number of beneficial practices competitors forgo in scenario (B).

However, appearances may be deceptive. When the noneconomic public benefits are clear, victims of anticompetitive conduct are less likely to bring
suit, and courts are more likely to manipulate the law to approve challenged conduct. Thus, some competitors will continue to adopt beneficial practices even if the law does not formally recognize noneconomic justifications. More significantly, weighing only the harmful practices that competitors adopt and courts approve underestimates the net interim harm resulting from allowing courts to consider noneconomic justifications. Given the ease with which a business can manufacture a public interest justification, and the difficulty courts face in detecting antitrust violations, the number of anticompetitive practices that competitors improperly adopt would likely increase. Although a court ultimately could reject the manufactured noneconomic justification, interim harm would result. More disturbing, many of those violations may not be detected, and some that are detected may not be prosecuted. Victims of anticompetitive practices may forgo litigation rather than incur the costs that an open-ended inquiry into noneconomic justifications would entail.

In any event, as the diagram suggests, the duration of the harm is longer in case (A) than it is in case (B). Victims of anticompetitive practices typically resort to the judicial process before they pursue legislative action. Moreover, legislative action may require less time when competitors demonstrate clear public benefits than when losing plaintiffs seek to overturn judicial decisions. The latter is likely to involve greater controversy and engender more spirited debate. Thus, the net interim harm from allowing courts to consider noneconomic justifications and forcing victims to seek corrective legislation could be greater than if the law required competitors to seek prior legislative approval for their actions.

The second factor, the ease of access to the legislative process, unequivocally favors placing the burden of seeking legislative action on competitors. Competitors generally have a systematic advantage in obtaining legislative relief. First, many victims of anticompetitive practices may be unaware of their injuries and do not realize that they need to institute legislative action. Second, the victims of anticompetitive conduct generally are more susceptible to “collective action/free rider” problems than competitors. Often the net benefits from legislative action will exceed its costs, but no single party will seek action because the collective public would share the benefits while the individual party would bear the entire cost of petitioning. Although both competitors and their victims are susceptible to this phenomenon, it is more likely to occur when the group is larger and has more diffuse interests. The disadvantage of large diffuse groups is two-fold. First, they are more susceptible to free rider problems because any benefits from a particular law must be spread out over a larger number of beneficiaries. Second, they are less able to avoid free riding because their size makes

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91. For example, a court may classify a social welfare justification as procompetitive and therefore allow it to offset anticompetitive harm. See Seib, supra note 13, at 735.
92. See supra note 56 and accompanying text.
93. Elhauge, supra note 63, at 717.
94. Id. As Professor Elhauge explains, the disadvantage of large diffuse groups is two-fold. First, they are more susceptible to free rider problems because any benefits from a particular law must be spread out over a larger number of beneficiaries. Second, they are less able to avoid free riding because their size makes
victims of anticompetitive conduct, often consumers, are more likely than competitors to be part of such a group. The existence of trade associations that organize and monitor industry members and that help ensure that the industry speaks with a single, well-funded voice exacerbates this difference.

Correspondingly, legislators often are less responsive to larger groups with diverse interests. Although legislators are accountable for all of their votes, no single vote is likely to cause a large diffuse group to organize and oppose a candidate. The same cannot be said when a legislator votes against the interests of a small concentrated group. For example, if a senator votes to make tobacco illegal, she will likely face well-organized and heavily financed opposition in her next election.

Finally, process costs are lower if competitors bear the burden of seeking legislative action. By requiring competitors to petition the legislature before they engage in public-spirited but potentially anticompetitive activity, the legislative workload invariably will increase. Some of the additional demands may not seem justified if the requests focus on the narrow interests of small specialized industries. Nonetheless, these costs should not be prohibitive. Many requests could be summarily rejected or approved. The more controversial proposals, on the other hand, deserve a hearing in a public forum with accountable decision makers and would appropriately take place before the legislature.

By contrast, a system whereby courts consider noneconomic justifications and losing plaintiffs must petition the legislature for relief imposes substantial costs. Given the ease with which competitors (or their attorneys) can manufacture noneconomic justifications for their actions, permitting consideration of those justifications would undermine the per se rule. Every case would involve intense litigation in which the courts and the parties struggle with a Rule of Reason analysis. In those cases where the defendants present legitimate public benefits allegedly offsetting anticompetitive harm, courts would have to make unguided decisions that balance conflicting interests. Many would view those decisions as arbitrary. Indeed, given the absence of guidelines, the decisions could not be anything but arbitrary. The reputation of and respect for the judicial system necessarily would suffer. The exclusion of interested parties from the judicial decision making process would further increase the perception of unfairness. Finally, the reduced predictability of the decision making process also would escalate the costs of business planning.

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95. Id.; see also Wiley, supra note 80, at 724-25.
96. Elhauge, supra note 63, at 724-27.
97. See supra note 56 and accompanying text.
In any event, the argument that the law should permit courts to balance noneconomic interests because there is always legislative recourse is simplistic. As the Supreme Court has stated, "[m]ulticed consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition . . . . It did not leave this fundamental national policy to the vagaries of the political process."98

In sum, despite the appeal of encouraging businesses to engage in public-spirited conduct, noneconomic justifications should not be part of a Rule of Reason analysis or even be permitted to justify avoidance of the per se rule. Private parties often are governed by self-interest, frequently have idiosyncratic or antimajoritarian views, and are not accountable for their actions. Elected, accountable legislators should make public policy decisions in the first instance. As discussed below, the Supreme Court, although not directly deciding the issue, appears to agree that courts should not permit private parties to offset anticompetitive harm with noneconomic benefits.

II. THE RELEVANT SUPREME COURT CASE LAW

A. Case Law Supporting the Rejection of Noneconomic Justifications

1. National Society of Professional Engineers v. United States and its Progeny

The most compelling case rejecting social welfare justifications is National Society of Professional Engineers v. United States.99 In Professional Engineers, the defendants argued that an interest in protecting public health, safety, and welfare justified an ethical rule prohibiting competitive bidding.100 The defendants reasoned that price competition for projects would induce engineers to offer their services at reduced prices, forcing them to compensate by compromising the quality and safety of their work.101 The Supreme Court flatly rejected the defendants' "public safety" justification.102 The Court stated that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."103 The Court explained that the Sherman Act reflected a legislative belief that competition ultimately

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98. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 (1978). For similar reasons, the Supreme Court repeatedly has expressed an unwillingness to imply exemptions to the antitrust laws. See infra note 180 and accompanying text.
100. Id. at 685.
101. Id. at 684-85.
102. Id. at 696.
103. Id.
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would produce lower prices as well as better, safer goods and services. Accordingly, the Court held that the antitrust inquiry under the Rule of Reason "is confined to a consideration of impact on competitive conditions," and that any argument based on noneconomic justifications should be addressed to Congress.

Following Professional Engineers, the Supreme Court has consistently rejected noneconomic justifications for anticompetitive conduct. In FTC v. Indiana Federation of Dentists, a dentists' association claimed that its agreement to withhold x-rays from patients' insurers was necessary to maintain quality dental care. It argued that x-rays, standing alone, were inadequate for diagnosis, and that the insurers' exclusive reliance on x-rays in making decisions concerning coverage might deprive patients of necessary care. The Court found the defendants' assertion to be untenable. It stated that "[p]recisely such a justification for withholding information from customers was rejected as illegitimate in [Professional Engineers]." The Sherman Act, the Court once again explained, foreclosed consideration of whether competition was beneficial to society.

The Court reached a similar conclusion in FTC v. Superior Court Trial Lawyers Ass'n. In Trial Lawyers, attorneys who regularly accepted court appointments to represent indigent defendants agreed that they would not accept new cases unless the District of Columbia increased the statutorily fixed fees for such work. The defendants argued, in part, that the public's interest "in obtaining better legal representation for indigent defendants" justified the agreement. Evidence in the record supported the defendants' claims. Many District of Columbia officials agreed that the statutory fee was too low and viewed the boycott as necessary to generate public support for the political decision to raise the statutory rates. Additionally, a report by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar concluded "that the prevailing rates 'drove talented attorneys out of CJA practice, and encouraged those who remained to do a less than adequate job on their cases.'" Still, the Court rejected the

104. Id. at 695.
105. Id. at 690.
106. See id. at 689.
108. Id. at 462-63.
109. Id.
110. Id. at 463.
111. Id.
113. Id. at 416.
114. Id. at 419.
115. Id. at 421.
116. Id. at 444-46.
117. Id. at 444 (citing court of appeals opinion below, 856 F.2d 226, 229 (D.C. Cir. 1988)). The Report explained that a rate increase was absolutely "necessary to attract and hold good criminal lawyers
defendants' social welfare justification. As in Professional Engineers, the Court was unwilling "to pass [judgment] upon the social utility or political wisdom" of the defendants' agreement. Citing Professional Engineers, the Court remarked upon Congress' embrace of competition, stating: "the 'Sherman Act reflects a legislative judgment ... 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.'

In Professional Engineers, Indiana Dentists, and Trial Lawyers, the defendants directly benefited from their agreements. Indeed, the obvious benefits to the defendants cast doubt upon the sincerity of their proffered social welfare justifications. Accordingly, one may construe the Court's opinions in these cases as reaching only conspiracies by self-interested, profit-motivated competitors. If such a characterization is accurate, these cases provide little guidance concerning the proper treatment of agreements by public-spirited competitors that either objectively appear to be disinterested or even may be harmed by their agreed-upon restraints.

Nevertheless, this Article maintains that Professional Engineers and its progeny cannot be so easily dismissed. Although the holdings of Professional Engineers, Indiana Dentists, and Trial Lawyers can be distinguished, the Court's reasoning cannot. In all three decisions, the Court interprets the legislative judgment reflected in the Sherman Act and professes its view regarding the proper functions of the judicial and legislative branches.

and assure their ability to render effective representation to their clients." Id.

118. Id. at 424.
119. Id. at 422.
120. Id. at 423 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978)).
122. See Trial Lawyers, 493 U.S. at 423-24; FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 463 (1986); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689 (1978); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). In Philadelphia National Bank, the defendants argued that the need to stimulate economic development by attracting businesses to the area justified the merger of two large banks. Id. at 334. The Court summarily rejected the defendants' noneconomic argument, stating:

[A] merger the effect of which "may be substantially [sic] to lessen competition" is not saved 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 when it enacted the amended § 7.

Id. at 371.

Of course, courts routinely balance the public interest against anticompetitive effects in preliminary injunction actions. See 7(2) JAMES MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 65.04[1], at 65-81 (2d ed. 1995). The relief in such cases, however, is only temporary. The legislature is not the proper forum for such interim relief. Courts may also engage in broad interest balancing in other areas of the law. See Bird, supra note 13, at 280; Nonprofit Entities, supra note 13, at 813. In such cases, however, there generally is no statute with a legislative intent expressed as unambiguously as in the Sherman Act. Although there is dispute about the underlying purpose of the Sherman Act's mandate for competition,
Competition is the talisman, and the Court will not countenance any argument premised on the undesirability of competition in a particular market. Yet, any argument relying upon social welfare justifications to offset net harm to competition logically rests on the assumption that competition does not work well in the defendants' market. Otherwise, a free market could provide the same benefits that the defendants assert. To the extent that there are market failures, the Court adamantly maintains that the legislature is the proper forum for considering possible remedies.

Furthermore, as previously discussed, even if the defendants do not directly benefit from their agreement, they still may be motivated by self-interest. Public-relations benefits and forestalled government intervention may be as profitable in the long run as an increase in price. Thus, any attempt to limit Professional Engineers, Indiana Dentists, and Trial Lawyers to their facts may be disingenuous. Any commercial enterprise, whatever its primary motive, may be influenced by self-interest. Distinguishing these cases on the basis of the defendants' motive also ignores concerns that unaccountable decision makers are more likely to make arbitrary or antimatioritarian judgments.

2. State Action Precedent

The Court's application of the state action doctrine to private parties and municipalities provides additional, albeit less direct, support for the view that courts should not accept social welfare justifications for anticompetitive conduct. In California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., the Court held that private parties' anticompetitive agreements are exempt from the antitrust laws if: (1) a "clearly articulated" state policy authorizes the challenged restraint; and (2) the state "actively supervise[s]" the private conduct.

The Court subsequently has explained that "the active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." In FTC v. Ticor Title Insurance Co., the Court further held that the active supervision requirement demanded more than simply having a

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124. See Professional Eng'rs, 435 U.S. at 692, 695.
125. See supra notes 64-65 and accompanying text.
126. See supra notes 66-67 and accompanying text.
128. Id. at 105 (quoting Lafayette, 435 U.S. at 110); see also FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).
supervisory apparatus in place; the state agency must review the private parties' decision making to ensure that state officials control the terms of the challenged restraint. These decisions reveal the Court's strong fear of unsupervised exercises of private power. It follows that if the Court does not trust private parties to balance public and private interests when the state has clearly articulated the public interests, it should be especially unwilling to defer to private decision making when the private parties have defined the public benefit that allegedly offsets the harm to competition.

Under current state action doctrine, antitrust laws do not exempt municipalities from liability unless they act pursuant to a clearly articulated state policy. Courts, however, do not require active state supervision. This is, in part, because municipal decision makers are less self-interested than private parties, and they are accountable to the public through their own electorates and state legislatures. This is another indication of the Court's mistrust of unaccountable private decision making. However, the Court does require a municipality to demonstrate clear state authorization. This requirement guards against the danger that a municipality will further purely local interests at the expense of more pressing state goals. At a minimum, this suggests that the Court understands that something less than the immediate financial returns of direct price fixing can influence decision making. In particular, if the Court fears that benefits to constituents will influence local legislators’ balancing processes, it should be equally suspicious that the possible long-term benefits from public-spirited conduct will bias private parties' decision making.

Admittedly, the state action decisions do not hold that noneconomic justifications cannot be recognized under the Sherman Act. To the contrary, the Supreme Court has intimated that the rejection of a complete exemption for municipalities from the antitrust laws does not preclude consideration of noneconomic or social welfare justifications under the Rule of Reason.

131. Id. at 633-35; see also Bienstock, supra note 79, at 1832; Elhauge, supra note 63, at 695. The Court also stated that the availability of state judicial review could not satisfy the active supervision requirement. Ticor Title, 504 U.S. at 633-35.

132. A state statute granting municipalities the full right of self-government concerning all local matters and the authority to supersede state laws as to such matters (a "home rule" statute) does not satisfy the "clear articulation" requirement. Community Communications Co. v. City of Boulder, 455 U.S. 40, 54 (1982).

133. See Hallie, 471 U.S. at 47.


135. See Hallie, 471 U.S. at 47.

136. See supra notes 64-65 and accompanying text.

137. See Boulder, 455 U.S. at 56 n.20; Hertz Corp. v. New York, 1 F.3d 121, 130-31 (2d Cir. 1993), cert. denied, 114 S. Ct. 1054 (1994) (directing district court to consider the municipality's noneconomic justifications). The judiciary's apparent acceptance of social welfare defenses when municipalities enact anticompetitive restraints, however, should have no implications for restraints imposed by business combinations. Municipal decisionmakers are accountable to the public and are not directly financially self-interested. An antitrust problem arises only when the municipal action furthers
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Nevertheless, the state action doctrine as applied to private parties and municipalities reveals the same fears expressed by the Court in Professional Engineers and its progeny—presumptively self-interested and unaccountable decision makers cannot be trusted to balance public and private interests. Those same fears support the rejection of social welfare defenses to anticompetitive restraints.

To summarize, Professional Engineers and its progeny provide direct support for limiting the Rule of Reason to effects on competition. Attempts to distinguish those cases based on the extent of the defendants' self-interest are only superficially appealing. Moreover, the language and reasoning in those cases, as well as in the Courts' state action decisions, reinforce this Article's policy arguments for rejecting social welfare defenses to anticompetitive conduct.

B. Case Law Supporting Consideration of Noneconomic Justifications Under the Rule of Reason

Three Supreme Court cases, Goldfarb v. Virginia State Bar, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., and NAACP v. Claiborne Hardware Co., are cited most often to support consideration of noneconomic justifications under the antitrust laws. Although far from frivolous, arguments based on those cases may be easily distinguished.

1. Goldfarb v. Virginia State Bar

In Goldfarb, the plaintiffs challenged a minimum-fee schedule for legal services relating to residential real estate transactions. The County Bar Association published the schedule and the State Bar provided enforcement. The defendants argued that the learned professions were not "trade or commerce," and hence were beyond the scope of the antitrust laws. Although it rejected this argument, the Court stated:

parochial interests at the expense of persons outside of the municipality's jurisdiction. See Hallie, 471 U.S. at 47. Thus, unlike challenges to private restraints, antitrust review of municipal restraints may not require courts to balance disparate interests or engage in constant supervision. Instead, the inquiry under the Rule of Reason more appropriately may focus on whether all interested or affected parties were represented in the legislative process, that is, whether the municipality harmed persons beyond its borders. See Bienstock, supra note 79, at 1851.

142. See United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993); Coons, supra note 13, at 749-50; Elhauge, supra note 63, at 741-42.
143. Goldfarb, 421 U.S. at 776.
144. Id. at 776.
145. Id. at 786 (quoting Section 1 of the Sherman Act).
146. Id. at 786-87.
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 professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.47

This language suggests that courts may factor noneconomic considerations into a substantive antitrust analysis. How else could a court allow public service aspects to justify a restraint viewed as a violation in another context? Nevertheless, in the twenty years since Goldfarb, the Court's language remains mere dictum. The Court has never allowed noneconomic concerns to offset anticompetitive harm. In fact, on more than one occasion, the Court has applied a per se rule to invalidate restraints adopted by a professional association.48 The Court has explained that its extended footnote in Goldfarb envisions ethical norms that “serve to regulate and promote” competition and thus fall within the Rule of Reason.49 In effect, professionals' good motives cannot justify anticompetitive harm, but they may be evidence of procompetitive benefits.50 Effects on competition, however, remain the yardstick by which courts determine violations of the antitrust laws.


In Noerr,51 an association of railroad companies engaged in a publicity and petitioning campaign in support of legislation that would have been harmful to truckers. The Court held that the railroads' actions were exempt from the Sherman Act.52 The Court determined that Congress did not intend for the Sherman Act to govern political activity, particularly when the activity implicated First Amendment rights to petition the government.53 Admittedly, the Court's language and reasoning might be interpreted as suggesting that some noneconomic concerns are so important that they supersede Congress's

147. Id. at 788-89 n.17; see also NCAA v. Board of Regents, 468 U.S. 85, 134 (White, J., dissenting).
150. In this respect, professionals are treated no differently from any other business. Trade associations that adopt industry standards in good faith to promote, as opposed to eliminate, competition also may escape antitrust liability. See HOVENKAMP, supra note 34, at 210-11. Courts view such "restraints" as perfecting market defects or being ancillary to legitimate joint ventures.
152. Id. at 127.
153. Id.
interest in preserving competition. This view would undermine the argument that courts do not and should not balance disparate interests. 

An alternative construction of Noerr, however, suggests that the Court did not balance interests. Rather, it merely found that Congress intended the Sherman Act to cover aggregations of economic, but not political, power. Both the language of the Noerr opinion and the result in Trial Lawyers provide support for this interpretation. Furthermore, the ultimate decision makers in Noerr, elected legislators, remained accountable to the public for any anticompetitive effects. Finally, in Noerr, the district court found that the defendants intended to destroy their trucking industry competitors. Still, the Supreme Court determined that no violation had occurred. This hardly represents a ringing endorsement of the relevance of motive. If motive was determinative of legality, a finding of an intent to destroy one's competitors certainly would result in a violation.

3. NAACP v. Claiborne Hardware Co.

By contrast, one can cite Claiborne Hardware to support the relevance of motive to a practice's antitrust consequences. In Claiborne Hardware, white merchants challenged a consumer boycott by African-American citizens. The citizens designed the boycott to pressure the white merchants, in their capacities as business and civic leaders, to adopt a list of particularized demands for racial equality and integration. Persuaded that political

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154. See Coons, supra note 13, at 749 (citing Noerr to illustrate that Rule of Reason "is not niggling or narrow that it must exclude all but economic considerations").
155. See supra notes 83-84 and accompanying text.
156. In Noerr, the defendants used their political clout, not their ability to control prices or output, to pressure or "coerce" the target legislators.
157. The Noerr Court stated that [the railroads' agreement might,] through a process of expansive construction, be brought within the general proscription of "combinations[s] . . . in restraint of trade," [but] they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price fixing agreements, boycotts, market-division agreements, and other similar arrangements.
158. In Trial Lawyers, a case in which the defendants aggregated their economic power to pressure the government, the Court found the intent to achieve legislative action irrelevant and rejected the defendant's claim of First Amendment immunity. 493 U.S. at 424-25. For a discussion of the facts in Trial Lawyers, see supra notes 114-22 and accompanying text.
159. See Noerr, 365 U.S. at 138 n.18. The Supreme Court found little evidence to support the district court's finding that the railroad intended to destroy its competitor, but declined to disturb the finding because "the disposition of [the] case [was] the same regardless of that fact." Id.
161. Professor Elhauge goes so far as to suggest that Claiborne Hardware authoritatively forecloses a bright-line rule that ignores motive and condemns all disinterested restraints that lack a procompetitive virtue to offset their anticompetitive effect. Elhauge, supra note 63, at 742-43.
162. Claiborne Hardware, 458 U.S. at 889.
163. Id. at 889 n.3, 898-99.
concerns motivated the defendants, the Court held that state law could not, under the First Amendment, punish the defendants' nonviolent consumer protest. In *Claiborne Hardware*, however, the boycotters were not competitors that stood to benefit financially from less competition in the boycotted market; they were citizens who wished to voice their views through collective action. The Supreme Court subsequently has held that business competitors cannot take advantage of *Claiborne Hardware*'s First Amendment immunity even if the purest motives inspire them. Accordingly, *Claiborne Hardware* should have significance only for noncommercial entities.

Thus, although commentators cite *Claiborne Hardware*, *Noerr*, and *Goldfarb* to support consideration of social welfare concerns under the antitrust laws, they cannot be construed to mandate such consideration. Instead, the weight of authority, as well as sound policy, counsel against consideration of the noneconomic justifications that business combinations may assert.

III. THE SCOPE OF THE ANTITRUST LAWS AS APPLIED TO NONCOMMERCIALY MOTIVATED RESTRAINTS: THE SPECIAL CASE OF NONCOMMERCIAL ENTITIES

Finally, this Article must discuss the scope of the antitrust laws as applied to noncommercially motivated restraints. Of course, if the Sherman Act does not cover noncommercially motivated restraints, whether such restraints are entitled to special treatment under the Rule of Reason becomes irrelevant.

Professor Elhauge, relying on both *Claiborne Hardware* and the legislative history of the Sherman Act, suggests that Congress never intended the Act to cover noncommercially motivated restraints by financially disinterested private parties. Thus, Professor Elhauge might, for example, find that the Sherman Act does not apply to a hypothetical agreement by TV networks to limit violence on television. This Part concludes that the language and legislative history of the Sherman Act provide little support for Professor Elhauge's thesis. There are valid reasons to distinguish *Claiborne Hardware*'s treatment of noncommercially motivated actions by nonbusiness entities from similarly motivated actions by business combinations. In short, only noncommercially motivated restraints by noncommercial entities should be beyond the scope of the Sherman Act.

164. *Id.* at 915.

165. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426-27 (1990). Although *Claiborne Hardware* involved state antitrust law, it suggests that the Sherman Act also may not cover noncommercially motivated boycotts by non-business entities. See infra Section III.B.


167. If the Act excludes noncommercial entities, it also excludes the decisions of those persons that comprise the entity unless the members' independent interests influenced the entity's decision. For example, members of the NAACP that controlled African-American-owned businesses would not be liable to white businesses that the NAACP boycotted unless the members' business interests helped motivate or otherwise furthered the boycott. See Copperweld Corp. v. Independence Tube Corp., 467
A. The Sherman Act Applies to Noncommercially Motivated Restraints by Business Combinations

In analyzing the proper scope of any law, it is necessary to begin with the language of the act. Unfortunately, the language of the Sherman Act provides little direction. Section 1 of the Act makes illegal "[e]very contract ... in restraint of trade."168 By its literal terms, the Act prohibits any agreement restraining trade, regardless of the motive or character of the actors. As previously noted, however, the Court has long recognized that the Act's language should not be taken literally. If it were, every commercial contract would fall within its prohibition.169

The legislative history of the Act provides some indication of the intended scope of the Act, but its guidance is easily overstated. While specific harms motivated this one-hundred-year-old statute, Congress used general language sufficiently broad to cover any commercial contract, making it notoriously malleable.170 With that caveat, some broad statements about legislative intent seem clear. Congress designed the Sherman Act to ensure competition and expressed a preference for the consumer over corporate giants.171 Professor Elhauge undoubtedly would agree with these postulates.172 He suggests, however, that all expressions of concern about business combinations were in the context of financially interested combinations.173 He recounts that all of the legislators voicing an opinion agreed that the Act should not cover the single financially disinterested restraint they discussed, a temperance society boycott of liquor retailers.174 Consequently, Professor Elhauge concludes that courts should exclude all financially disinterested restraints, including those

U.S. 752, 769, 771 (1984) (finding that parent and wholly owned subsidiary are single entity incapable of forming conspiracy for purposes of section 1 of Sherman Act because "agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals"). HOVENKAMP, supra note 34, at 180-83. This postulate mirrors the Courts' treatment of analogous issues in other areas of the law. See, e.g., American Soc'y of Mechanical Eng'rs, Inc. ("ASME") v. Hydrolevel Corp., 456 U.S. 556, 571-74 (1982) (determining that ASME may be liable when "interested" industry members acting as ASME's agent applied industry standards).

168. See Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 59-69 (1911).
172. See Elhauge, supra note 63, at 740. Commentators disagree about the underlying purpose of the statutory mandate for competition. See HOVENKAMP, supra note 34, at 49. Still, all agree that Congress designed the Sherman Act to promote competition. See Srinivasan, supra note 13, at 926.
173. Elhauge, supra note 63, at 740.
174. Id.
imposed by business combinations, from the scope of the Sherman Act.\textsuperscript{175}

The hypothesized temperance society boycott, discussed by the legislators and cited by Professor Elhauge, involved a noncommercial actor motivated by noncommercial concerns. The example provides poor support for the broader exemption of all financially disinterested noncommercial restraints, including those that \textit{business} combinations would impose. To the contrary, there are indications that all conglomerations of economic power troubled the legislators.\textsuperscript{176} A business's intent or motive has little relevance to Congress's chief economic concern: the effect of the combination on commerce.\textsuperscript{177} Congress also feared the social and political consequences of vast combinations of business capital.\textsuperscript{178} As discussed in Part II, there are also several policy reasons why Congress may have been, and courts should continue to be, suspicious of restraints imposed by even financially disinterested business combinations.\textsuperscript{179} Thus, given the Supreme Court's repeated admonition that courts should not readily imply exemptions to the Sherman Act,\textsuperscript{180} there seems to be little support for the exclusion of commercial entities from the Act's coverage, irrespective of whether the actor is financially disinterested or motivated by public interest goals.\textsuperscript{181}

\textsuperscript{175} Id. at 740, 742-44.
\textsuperscript{177} See 21 CONG. REC. 2456 (1890) (Remarks of Sen. Sherman), \textit{quoted in KINTNER, supra note 171}, at 115 ("[T]he intention of the combination is immaterial . . . . If the natural effects of its acts are injurious . . . it may be restrained").
\textsuperscript{179} See supra Subsection I.C.1.
\textsuperscript{181} A few lower court cases appear to suggest that the Sherman Act does not cover commercial enterprises under some circumstances. \textit{See, e.g., Council for Employment and Economic Energy Use v. WHDH Corp.}, 580 F.2d 9 (1st Cir. 1978), \textit{cert. denied}, 440 U.S. 945 (1979) (dismissing complaint alleging that broadcasters improperly agreed on amount of free advertising time to be given to opponents of plaintiff's position on public initiative referendum); Donnelly v. Boston College, 558 F.2d 634, 635 (1st Cir. 1977), \textit{cert. denied}, 434 U.S. 987 (1977) (dismissing complaint alleging that conspiracy to deny admission to law school existed); Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650, 655-57 (D.C. Cir.), \textit{cert. denied}, 400 U.S. 965 (1970) (denying relief to proprietary college that challenged accreditation association's rule refusing accreditation to all organization unless they were non-profit); Nara v. American Dental Ass'n, 526 F. Supp. 452, 456-58 (W.D. Mich. 1981) (dismissing suit against dental association that challenged association's restrictions on dentists' advertising); Selman v. Harvard Medical School, 494 F. Supp. 603, 621 (S.D.N.Y.), aff'd, 636 F.2d 1204 (2d Cir. 1980) (dismissing antitrust and other counts challenging rejection of plaintiff's application to medical school); Jones v. NCAA, 392 F. Supp. 295,
B. The Sherman Act Excludes Noncommercially Motivated Restraints by Noncommercial Entities

Different considerations apply to noncommercially motivated restraints by noncommercial entities. The little evidence that exists suggests that Congress did not intend the Act to cover such restraints. For example, Senator Sherman explained why an amendment to exclude temperance societies from the Act was unnecessary:

I do not see any reason for putting in temperance societies [in the amendment] any more than churches or school-houses or any other kind or moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce. 182

Moreover, the Supreme Court has recognized repeatedly that Congress intended the Act to apply primarily to business combinations. 183 Most importantly, there are sound policy reasons to treat noncommercial entities with social welfare justifications differently from similarly motivated businesses.

Noncommercial entities motivated by noneconomic concerns rarely threaten significant harm to competition. Many noncommercial restraints by non-business combinations are ad hoc responses to temporary problems. For example, if Citizens for a Moral Society boycotts supermarkets that sell Playboy magazine, it does not intend to drive the supermarket out of

303-04 (D. Mass. 1975) (denying preliminary injunction against athletic association that declared plaintiff ineligible to play intercollegiate ice hockey). In each of those cases, however, the courts ultimately considered the reasonableness of the challenged restraint or found no adverse economic effect. See WNDHS Corp., 580 F.2d at 656-58; Nara, 526 F. Supp. at 456-58; Selman, 494 F. Supp. at 621; Jones, 392 F. Supp. at 303-04. Thus, although the language suggested exclusion from antitrust liability, the courts relied, at least in part, on the lack of substantive merit of the claims. Some of the cases also are of doubtful validity after Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that learned professions and professional associations are not exempt from Sherman Act).

182. 21 CONG. REC. 2658 (1890) (Remarks of Sen. Sherman), quoted in KINTNER, supra note 171, at 252; see also 21 CONG. REC. 2658 (1890) (Remarks of Sen. Wilson), quoted in KINTNER, supra note 171, at 251.

183. See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37 (1961); Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959) (stating that Sherman Act “is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives”); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (finding that Sherman Act’s purpose is to prevent “restraints to free competition in business and commercial transactions”); cf. FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 427 (1990) (determining that “Claiborne Hardware is not applicable to a boycott conducted by business competitors who ‘stand to profit financially from a lessening of competition in the boycotted market’”). The Supreme Court’s decision in Claiborne Hardware, as well as the lower court decisions in NOW v. Scheidler, 968 F.2d 612, 617-23 (7th Cir. 1992) (dismissing antitrust claim alleging conspiracy by antiabortion group to shut down abortion clinics), rev’d on other grounds, 114 S. Ct. 798 (1994); State of Missouri v. NOW, 620 F.2d 1301 (8th Cir.) (denying relief to state government challenging NOW’s convention boycott of states that had not ratified Equal Rights Amendment), cert. denied, 449 U.S. 842 (1980), directly support an exclusion for noncommercial entities pursuing noncommercial goals.
business. Rather, it will terminate the boycott once the magazine is sold through other “more appropriate” outlets. Such an informal boycott also lacks the ability to sanction non-complying members. Many group members simply will ignore the “boycott” and continue to shop at the supermarket. Thus, the economic strength of the combination is more an expression of consumers’ marketplace votes than a restraint on the freedom of traders. Indeed, the absence of any explicit “agreement” among “combination” members may preclude a finding of illegality. Furthermore, noncommercial entities frequently do not adopt industry-wide restraints. Thus, the restraint may threaten only a competitor rather than competition itself.

This Article does not suggest that noncommercial entities never cause anticompetitive harm. Quite obviously, some do. However, the total potential harm from all conspiracies in which agreement can be proven should be comparatively small. Thus, the excessive costs involved in eliminating that relatively insignificant total harm justify the law’s conclusive presumption against Sherman Act coverage of noncommercially motivated restraints by noncommercial entities. If the Act covered such restraints, court dockets would expand and the law would require judges to undertake detailed and expensive Rule of Reason inquiries. Proof of agreement, of market power, and of effects on competition often involve prolonged discovery and a lengthy trial. Furthermore, the threat of litigation, not to mention liability, might dissuade many groups from undertaking their public-spirited or noneconomically motivated conduct. This deterrent could infringe upon the noncommercial organization’s cherished First Amendment freedoms and may deprive the public of beneficial behavior.

184. In some boycotts by noncommercial entities, however, the intent may be to drive the target of the restraint out of the marketplace. For example, if the NAACP organized a boycott against the business of a reputed racist, it may be intended more to punish the “offender” by driving him from the market than to change the racist’s views. See NAACP v. Claiborne Hardware, 458 U.S. 886, 914 (1982).

185. Id. Of course, in some circumstances, informal pressure may be just as effective as formal sanctions. The psychological pressure faced by a non-complying member who is shunned by the rest of the group may be just as coercive as economic sanctions. Id. at 909-10.

186. For many of the same reasons, the Sherman Act should not cover a consumer-imposed restraint, even if it is economically motivated, e.g., a boycott of meat designed to lower the price of beef. Consumer restraints generally are temporary and not enforced by sanctions. “Agreement” is informal at best. Thus, one can consider consumer restraints as properly reflecting the public’s marketplace votes and not antimajoritarian influences. Moreover, it would be anomalous to impose liability on the very group that Congress primarily intended to protect through the Act. See NCAA v. Board of Regents, 468 U.S. 85, 107 (1984); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

187. See Bird, supra note 13, at 288. Of course, to prove a violation of section 1 of the Sherman Act, it is necessary to prove both a restraint on trade and an agreement. 15 U.S.C. §1 (1994). Again, even if an “agreement” were to exist, the noncommercial status of those participating in the agreement would make it unlikely that the agreement would cause economic harm.

188. For example, if the Citizens for a Moral Society’s boycott drives the target supermarket from the market, there may be many other sellers to ensure that the market remains competitive. Consequently, the boycott would injure the supermarket, but not consumers.

189. See Meisel, supra note 178, at 1335-36. For example, in State of Missouri v. NOW, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980), the defendant organization campaigned for a
Finally, an exclusion for noncommercially motivated restraints by noncommercial entities does not invite disingenuous claims of public welfare motives. Non-business entities, by definition, are not commercial competitors guided by profit maximization. They are not likely to manufacture social welfare justifications for economically motivated conduct. Similarly, they are much less likely to have an economic self-interest that may improperly influence their balance of anticompetitive harm and public benefit. Thus, the considerations supporting this Article's rejection of noneconomic justifications by business entities do not lead to a similar conclusion for noncommercially motivated non-business entities. Conversely, the cases and legislative history suggesting an exclusion for noncommercial entities with noneconomic motives do not demand identical treatment for noncommercially motivated business combinations.

IV. CONCLUSION

Are all, or even most, businesspersons untrustworthy, greedy, or despicable persons? Of course not. Nonetheless, it is virtually impossible to eliminate the possibility that business combinations will directly or indirectly benefit from their market restraints. Even private decision makers acting in good faith will tend to overvalue the societal benefits of their conduct. Moreover, private parties are not accountable for their actions and often have views regarding the public interest that do not reflect majority sentiments. Quite simply, private parties are not the proper persons to balance public benefits and anticompetitive harm.

Judicial review or post-decision congressional action are insufficient answers to the problems posed by private decision making. The court system is neither precisely tuned nor properly designed to distinguish between purely altruistic and partially self-interested business behavior. Judges also have no standard by which to decide which public interests are sufficiently important to override Congress's interest in preserving competition. Post-decision congressional action fails to provide adequate relief and places the burden of seeking legislative action on the wrong parties. This is especially true given...
Congress' clear preference for competition. Finally, although noncommercial conduct by noncommercial entities is beyond the scope of the antitrust laws, the Sherman Act does not similarly exclude such conduct by business combinations. Thus, despite the appeal of encouraging public-spirited business conduct, courts should not accept the implicit invitation of the Justice Department and the Third Circuit to weigh defendants' alleged social welfare benefits against anticompetitive harm. The law should recognize only procompetitive\(^{190}\) justifications for anticompetitive restraints imposed by business combinations. Concerned businesspersons who seek to promote the public interest should channel their activity to the legislative arena where all interested parties have an opportunity to voice their opinions and where accountable and disinterested elected officials will make the decisions.

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190. It is possible that some courts will avoid this Article's recommendation by reformulating justifications that are noneconomic as procompetitive. For example, if the NCAA justifies its amateurism restrictions as pursuing the noneconomic Olympic ideal, a court might consider this a procompetitive justification by observing that the NCAA may enhance its image and marketability by pursuing that ideal. There is evidence that some courts already play this game. See Brown Univ., 5 F.3d at 667 (3d Cir. 1993) (suggesting that schools such as MIT benefit from their enhanced reputation); see also Srinivasan, supra note 13, at 942; Seib, supra note 13, at 735.

The willingness of some courts to manipulate the law, however, does not undermine the merits or usefulness of this Article's conclusions. First, many courts will refuse to avoid a clear rule or precedent even if there are means of circumvention. Second, appellate review is available to limit the ability of activist courts to use the "procompetitive reformulation loophole." Furthermore, a distinction might be made between correcting a market imperfection or externality and eliminating competition because of that imperfection. In the latter case, any attempt to reformulate a social welfare justification clearly would be unacceptable. Thus, ethical norms might justify information sharing or creating standards for conduct, but not eliminating competitors or fixing prices. Finally, even if it were impossible to eliminate creative avoidance of the recommended rule, the law should be reluctant to make policy based on assumptions that judges will abuse their power.