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Competitor Collaboration after California Dental,

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I. INTRODUCTION

Under the antitrust laws certain agreements among competitors are considered to be so clearly anticompetitive that they are unlawful "per se."[1] Judicial experience is said to be sufficient to convince courts that such practices are unreasonable as a class.[2] This means that a more inquiring examination into such things as market power or specific anticompetitive effects is so unlikely to produce a different result that it is not worth the significant additional costs.

Other agreements, which typically involve joint production or distribution, are thought to have significant potential to reduce costs, increase output, improve the product or service, or otherwise please customers. While these arrangements might also be anticompetitive, this can be shown only by a full rule-of-reason inquiry into market power, and anticompetitive effects must be proven.[3]

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[1] Herbert Hovenkamp, 11 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1910 at 252–65 (Aspen 1998). See also *Arizona v Maricopa County Medical Society*, 457 US 332, 348 (1982) (applying the per se rule of invalidity to a prepaid medical plan involving maximum price fixing among 1750 physicians acting in a nonexclusive arrangement); *United States v Topco Associates, Inc*, 405 US 596, 608 (1972) (applying per se rule to a purchasing and retail branding joint venture among grocers lacking market power in their assigned territories).

[2] See *Broadcast Music, Inc v Columbia Broadcasting System, Inc*, 441 US 1, 2 (1979) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."), quoting *Topco Associates*, 405 US at 607–08. See also *FTC v Superior Court Trial Lawyers Association*, 493 US 411, 433 (1990) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."), quoting *Maricopa County*, 457 US at 344; *NCAA v Board of Regents of University of Oklahoma*, 468 US 85, 100–01 (1984) (stating that "judicial experience" determines when per se rule should be applied).

[3] Hovenkamp, 11 *Antitrust Law* ¶ 1912 at 282–303 (cited in note 1). See also *Board of Trade of City of Chicago v United States*, 246 US 231 (1918) (holding that not all horizontal agreements between competitors are anticompetitive).

In between these two extremes lies a range of conduct and structural possibilities that may require something more than per se disposal, but something less than a full blown rule-of-reason inquiry.[4] This class of conduct might be defined as highly suspicious but not unambiguously anticompetitive, perhaps because courts lack sufficient experience with it. Depending on the circumstances, a court might be justified in condemning such conduct without a market power inquiry, or with an attenuated inquiry; or it might require relatively less proof of anticompetitive effects. Not all of these "quick look" inquiries are alike, and the inquiry varies with the structure of the market and the nature of the threat.

The Supreme Court has acknowledged that some restraints can be condemned without "a detailed market analysis," or that certain restraints are sufficiently suspicious to "requir[e] some competitive justification" even when specific anticompetitive effects have not been proven.[5] Nevertheless, as the Court noted in *California Dental Association v FTC*,[6] "our categories of analysis of anticompetitive effects are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear," and no "bright line" separates them.[7] Some restraints create an "intuitively obvious inference of anticompetitive effect," while others "call for more detailed" market analysis.[8] In all cases,

> [t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.[9]

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[4] Hovenkamp, 11 *Antitrust Law* ¶ 1911 at 267 (cited in note 1). See also *Orson v Miramax Film Corp*, 79 F3d 1358, 1367 (3d Cir 1996) (stating that an "abbreviated rule-of-reason" applies "where per se condemnation is inappropriate, but where a full-blown industry analysis is not required to demonstrate the anticompetitive character of an inherently suspect restraint").

[5] *California Dental Association v FTC*, 526 US 756, 779 (1999) (holding that a "quick look" analysis was not appropriate for analyzing the association's advertising restrictions).

[6] 526 US 756 (1999).

[7] Id at 779.

[8] Id at 781.

[9] Id.

The Supreme Court then held that dentists' horizontal agreements restricting advertising of price and quality should be addressed under a complete rule of reason, rather than the more truncated inquiries that the Federal Trade Commission and the Ninth Circuit below had employed.[10]

This Article examines the implications of the *California Dental Association* decision for future antitrust analysis of collaborations among competitors. First, Part I briefly summarizes the majority's approach to the competitor collaboration at issue and the contrasting approach taken by Justice Breyer and three other dissenters. Part II then considers the respective duties of the Federal Trade Commission ("FTC")[11] and the Circuit Court of Appeals to (1) identify the proper rule of antitrust to be applied, whether per se, rule of reason, or some intermediate form of analysis; and (2) marshal the facts justifying the decision under the rule being applied. Part III then examines some of peculiarities in the rule-of-reason inquiry developed by the *California Dental Association* majority, particularly its definition of "output" in the affected market. It also considers whether the Court meant to revive a regime that gave greater antitrust deference to restraints in the learned professions, considers whether the restraint in *California Dental Association* is best defined as "naked" or "ancillary," and evaluates the role of justifications and less restrictive alternatives in antitrust analysis of competitor collaboration. Finally, Part IV argues that *California Dental Association* gives Supreme Court antitrust jurisprudence an indefensible juxtaposition of concerns. The Court's recent monopolization decisions indicate extreme concern about the anticompetitive potential of strategic behavior by single firms. In contrast, the *California Dental Association* majority seems excessively sanguine about the threats posed by collusive conduct, particularly when unaccompanied by any significant joint productive activity. This juxtaposition of concerns should be reversed.

In *California Dental Association*, the dentists were not engaged in significant joint productive activity. Rather, they were organized into a professional association collectively making ethical rules. On their face, the challenged rules were designed to control false and misleading advertising, but they had been applied in an unusually aggressive manner. According to the FTC,

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[10] *California Dental Association*, 526 US at 759.

[11] Or the district court, in a lawsuit brought by the Justice Department or a private plaintiff.

they had been used to condemn many instances of truthful, nondeceptive advertising.[12] Justice Breyer's dissent, with no disagreement from the majority, characterized the facts this way:

> [T]he Dental Association's "advisory opinions and guidelines indicate that . . . descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule . . . . [I]n "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth" . . . . [O]ne advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false."[13]
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> The Commission . . . referred to instances in which the Association, without regard for the truthfulness of the statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive."[14]

The California Dental Association's rules on discount advertising required a dentist wishing to advertise a discount to make elaborate disclosure of her entire fee schedule, such that "across-the-board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book.'"[15] For example, if a dentist performed one hundred different services and advertised a "fifteen percent discount to senior citizens," the guidelines apparently required the dentist to list both the full price and the discounted price of each individual service. The California Dental Association often condemned advertising claims such as "we guarantee all dental work for 1

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[12] *In re California Dental Association*, 121 FTC 190, 270 (1996), affd as *FTC v California Dental Association*, 128 F3d 720, 729 (9th Cir 1997), affirmance revd and remanded, *California Dental Association*, 526 US at 779, vacated, 2000 WL 1239199, *18 (9th Cir) (remanding the dispute to the FTC with instructions to dismiss its case against the California Dental Association).

[13] *California Dental Association*, 526 US at 783 (Breyer dissenting), quoting *California Dental Association*, 128 F3d at 729.

[14] *California Dental Association*, 526 US at 783–4, quoting *In re California Dental Association*, 121 FTC at 301.

[15] *California Dental Association*, 526 US at 784, quoting *In re California Dental Association*, 121 FTC at 302.

year," or the "latest in cosmetic dentistry," and "gentle dentistry in a caring environment."[16]

On these facts, the Ninth Circuit held that the FTC properly condemned the California Dental Association's restraints on price advertising using a "quick look," rather than a "full-blown" rule-of-reason inquiry.[17] The Supreme Court majority disagreed, and remanded for just such a full-blown inquiry.[18]

Speaking of earlier decisions in which a "quick look" had been applied,[19] the Supreme Court observed that:

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets.[20]

By contrast, the case before the Court "fail[ed] to present a situation in which the likelihood of anticompetitive effects is comparably obvious"[21]:

> In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients.[22]

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[16] *California Dental Association*, 526 US at 784, quoting *In re California Dental Association*, 121 FTC at 308–10.

[17] *California Dental Association*, 128 F3d at 727.

[18] See *California Dental Association*, 526 US at 781.

[19] *California Dental Association*, 526 US at 780. The Court cited *FTC v Indiana Federation of Dentists*, 476 US 447, 465–66 (1986) (upholding, as supported by substantial evidence, the FTC's ruling that an organization's requirement that members withhold x-rays from insurers was a violation of § 1 of the Sherman Act); *NCAA*, 468 US at 113 (invalidating League's television regulations that expressly limited output and fixed minimum price); and *National Society of Professional Engineers v United States*, 435 US 679, 692–93 (1978) (holding a society's absolute ban on competitive bidding invalid under § 1 of the Sherman Act).

[20] *California Dental Association*, 526 US at 770.

[21] Id.

[22] Id at 772, citing Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J Pol Econ 1328, 1330 (1979) (arguing that setting minimum

The Court postulated that:

> The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.[23]

Rather,

> the [California Dental Association's] advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient.[24]

The Court emphasized the degree of information failure in the market for professional services such as dentistry, and regarded this as requiring at least a receptive hearing for advertising restrictions whose stated purpose was to limit deceptive advertising.[25]

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quality standards in some markets with information asymmetries will increase social welfare); Barry R. Furrow, et al, 1 *Health Law* § 3-1 at 86 (West 1995) ("In economic terms, the market for professional health care services is characterized by market failure: consumers are incapable of assessing quality due to imperfect information and there is a high risk of negative externalities or danger to the consumer or third parties.").

[23] *California Dental Association*, 526 US at 773.

[24] Id, citing Jack Carr & Frank Mathewson, *The Economics of Law Firms: A Study in the Legal Organization of the Firm*, 33 J L & Econ 307, 309 (1990) ("One feature common to the markets for complex services is an inherent asymmetry of knowledge about the product: professionals supplying the good are knowledgeable; consumers demanding the good are uninformed."); George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q J Econ 488 (1970) (illustrating the effects of "quality uncertainty" in markets characterized by asymmetrical information).

[25] *California Dental Association*, 526 US at 774:

> Assuming that the record in fact supports the conclusion that the California Dental Association disclosure rules essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts . . . would be less effective at conveying information relevant to competition if they listed the original and discounted prices for [services], than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to

The majority apparently found it quite easy to distinguish between limitations on advertising and limitations on the output of dental services, and of course there is no necessary connection between them; a bona fide limitation on deceptive advertising could expand the output of dental services by increasing consumer confidence in dentistry.[26] Thus the real issue was whether a horizontal restraint limiting the type of advertising at issue tended to reduce or to enlarge output. The majority was unpersuaded that the issue was sufficiently clear that it could be satisfied on a "quick look."[27]

The Court conceded that the FTC opinion itself may have been sufficient to support condemnation of the advertising restrictions under the rule of reason. The fault was with the Ninth Circuit's opinion, which had been too hasty in applying a "quick look" without a full analysis of the market.[28] It then remanded to

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empirical but not a priori analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping.

[26] Nevertheless, the Court refused a similar defense in *Indiana Federation of Dentists*, rejecting the dentists' claim that an agreement to withhold x-rays from insurers was not a restriction in the output of dental services. 476 US at 455–56. The Court later classified the restraint as a "naked restriction on price or output." Id at 460, citing *NCAA*, 468 US at 109–10. It then found the requisite impact on competition in the fact that in two locales the insurers had actually been unable to obtain compliance with their requests for x-rays. See *Indiana Federation of Dentists*, 476 US at 457. Looking at these effects, the Court concluded that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" Id at 460–61, quoting Phillip E. Areeda, 7 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1511 at 429 (Little, Brown 1986). In sum, *Indiana Federation of Dentists* identified the restriction on release of x-rays as a "reduction of output." 476 US at 460 (citation omitted).

[27] *California Dental Association*, 526 US at 779. Significantly, the Court concluded:

> [it was] possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

Id at 778.

[28] Id at 779. The Court stated:

> In light of our focus on the adequacy of the Court of Appeals's analysis, Justice Breyer's thorough-going, *de novo* antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the

the Ninth Circuit for fuller consideration under the rule of reason.[29]

Justice Breyer dissented.[30] While he also was dissatisfied with the Ninth Circuit's opinion, he nonetheless found the record adequate to support its judgment. He found the case to involve a "traditional application of the rule of reason to the facts as found by the Commission."[31] He then would have proceeded by considering four questions:

(1) What is the specific restraint at issue?
(2) What are its likely anticompetitive effects?
(3) Are there offsetting procompetitive justifications?
(4) Do the parties have sufficient market power to make a difference?[32]

On the first question, what is the restraint, Justice Breyer faulted the majority for accepting the California Dental Association's statement of its advertising policy at face value as expressing the "content" of the restraint.[33] The restraint consisted in what the California Dental Association actually did, rather than in what it said. While the challenged restraint was nominally "a promise to refrain from advertising that is 'false or misleading in any material respect,'"[34] in practice this "innocent-sounding ethical rule" had been implemented in a series of "opinions, guidelines, enforcement policies, and review of membership applica-

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> comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly Justice Breyer's treatment of the antitrust issues here is no 'quick look.' Lingering is more like it, and indeed Justice Breyer, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

Id (emphasis in original).

29 The Court also noted that the FTC had relied entirely on Sherman Act decisions in its opinion and had given no consideration to the possibility that a more aggressive liability standard might obtain under the Federal Trade Commission Act. *California Dental Association*, 526 US at 759 n 3, citing the Federal Trade Commission Act, codified at 15 USC § 45(a)(1) (1994). On this question, see Phillip E. Areeda and Herbert Hovenkamp, 2 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 307 at 21 (Little, Brown rev ed 1995). See also id at ¶ 302h (Aspen 2d ed 2000).

30 Joined by Justices Stevens, Kennedy, and Ginsburg.

31 *California Dental Association*, 526 US at 781 (Breyer dissenting).

32 Id at 782.

33 Id at 781.

34 Id at 782, quoting *California Dental Association Code of Ethics*, § 10 (1993), <http://www.cda.org/public/coe98.html> (visited May 7, 2000).

tions" in a manner that "reached beyond its nominal target."[35] In practice, the cited rule:

(1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable;"
(2) "precluded advertising . . . of across the board discounts;" and
(3) "prohibit[ed] all quality claims."[36]

Justice Breyer noted that the Commission record was far larger than the very small number of instances cited by the Ninth Circuit, and showed that the California Dental Association had disciplined dentists or recommended denial of membership when they simply advertised such things as "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive," or offered one-year guarantees of work done.[37] Justice Breyer summarized these various fact findings of the FTC at considerably greater length than had the Ninth Circuit.[38]

On the issue of likely anticompetitive effects, Justice Breyer thought that the "anticompetitive tendencies" of the restraints on price were "obvious"[39]:

> An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by

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[35] *California Dental Association*, 526 US at 782 (Breyer dissenting), quoting *In re California Dental Association*, 121 FTC at 190.

[36] *California Dental Association*, 526 US at 783, quoting *In re California Dental Association*, 121 FTC at 301, 308 (alterations in original).

[37] *California Dental Association*, 526 US at 783, citing *In re California Dental Association*, 121 FTC at 301. The California Dental Association seemed to view a guarantee as "deceptive" because no one can know for sure how long a particular piece of dental work will last. But guarantees should be viewed as risk-sharing devices, not as promises that work will last for a year. A guarantee is simply a promise that if something breaks it will be replaced or repaired without additional charge. Surely a dentist could make such a promise just as easily as a toaster manufacturer. Deception might exist, but only if the dentist makes the promise without intending to honor it.

[38] Compare *California Dental Association*, 526 US at 781–94 (Breyer dissenting), with *California Dental Association*, 128 F3d at 723–24.

[39] *California Dental Association*, 526 US at 784.

> offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices.[40]

Justice Breyer also found "serious anticompetitive tendencies" in the restrictions on quality advertising.[41] Patients or their parents may still want to know whether a dentist makes a point of "gentle care" or is willing to guarantee work for one year.[42] Justice Breyer stated that the record showed anticompetitive effects from these restraints that were more than hypothetical:

> [T]he Commission pointed to record evidence affirmatively establishing that quality-based competition is important to dental consumers in California. Unsurprisingly, these consumers choose dental services based at least in part on "information about the type and quality of service." Similarly, as the Commission noted, the ALJ credited testimony to the effect that "advertising the comfort of services will 'absolutely bring in more patients,'" and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients that a dentist could attract.[43]

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[40] Id at 784 (Breyer dissenting), citing *Bates v State Bar of Arizona*, 433 US 350, 364 (1977) (stating commercial speech plays an "indispensable role in the allocation of resources in a free enterprise system"); *Virginia Board of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748, 765 (1976) (invalidating Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs).

[41] *California Dental Association*, 526 US at 785 (Breyer dissenting).

[42] Justice Breyer stated:

> To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition in any legitimate respect, let alone one that inhibits customers from learning about the quality of a dentist's service.

Id at 785–86, citing *Paramount-Famous Lasky Corp v United States*, 282 US 30, 43 (1930) (stating that agreement among film suppliers to negotiate with distributors according to a standard form of contract "necessarily and directly tends to destroy" competition); *United States v First National Pictures, Inc*, 282 US 44, 54–55 (1930) (invalidating, on the same principle, an agreement among distributors with respect to exhibitors).

[43] *California Dental Association*, 526 US at 786 (Breyer dissenting), citing *In re California Dental Association*, 121 FTC at 249, 309–11. Justice Breyer also pointed out that "the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of

On the question of possible justifications, Justice Breyer noted that the problem is essentially an "empirical" one of examining not only whether justifications have been proffered, but also whether the record supported them.[44] The California Dental Association had argued that its severe specific restrictions were "inextricably tied to a legitimate Association effort to restrict false or misleading advertising."[45] In sum, California Dental Association's apparent defense was that the only practicable way to reach false and deceptive advertising was with a broad rule that without individualized analysis condemned many instances of nondeceptive advertising as well. Justice Breyer admitted to the "theoretical plausibility" of this claim but found it unsupported by the record.[46] As for the restraint on quality advertising, the FTC had noted that the California Dental Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts."[47] The Ninth Circuit had also concluded that "the Association's unsubstantiated contention that 'claims about quality are inherently unverifiable and therefore misleading' could 'justify banning all quality claims without regard to whether they are, in fact, false or misleading.'"[48]

On this issue, Justice Breyer concluded that:

> With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift

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care." *California Dental Association*, 526 US at 786 (Breyer dissenting), citing *In re California Dental Association*, 121 FTC at 310–11.

[44] *California Dental Association*, 526 US at 787 (Breyer dissenting).

[45] *California Dental Association*, 526 US at 787 ("The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, non-deceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.").

[46] Id.

[47] Id, quoting *In re California Dental Association,* 121 FTC at 319–20.

[48] *California Dental Association*, 526 US at 787 (Breyer dissenting), citing *California Dental Association*, 128 F3d at 728.

> the false from the true, that fact does not make out a valid antitrust defense.[49]

Justice Breyer also found sufficient evidence of market power in the high percentage of California dentists who were members of the Association and in the difficulty of entry into dental practice.[50]

Justice Breyer seemed mystified about why the majority thought the Ninth Circuit's analysis had failed.[51] First, he found statements in the Ninth Circuit's opinion that appeared to address and resolve most of the things that the majority believed were absent from that opinion.[52] While the majority found that the lower court had failed to consider how "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition," Justice Breyer concluded that the Ninth Circuit had done precisely that.[53] Ordinarily, horizontal restraints on price advertising unaccompanied by any integration of production, are unlawful per se.[54] But the market complexities of this particular case had led the Ninth Circuit to apply a "quick look" rule-of-reason analysis, noting that the "value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly."[55] Justice Breyer concluded that "the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion."[56] Breyer compared the case at bar with *FTC v Indiana Federation of Dentists*,[57] in which the Court had reached the same "legal conclusion" as the Ninth Circuit did in *California Dental Associa-*

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[49] *California Dental Association*, 526 US at 787–88 (Breyer dissenting), citing *In re California Dental Association*, 121 FTC at 316–17; *NCAA*, 468 US at 119; and Areeda, 7 *Antitrust Law* ¶ 1505 at 383–84 (cited in note 26).

[50] *California Dental Association*, 526 US at 788–89 (Breyer dissenting).

[51] See id at 789 ("But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory.").

[52] See id at 790–91.

[53] See id at 790.

[54] See Herbert Hovenkamp, 12 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2023b3 at 147–48 (Aspen 1999). See also *United States v Gasoline Retailers Association*, 285 F2d 688, 691 (7th Cir 1961) (holding gasoline retailers' limiting price advertising to the only posting on pump illegal per se); *In re Massachusetts Board of Registration in Optometry*, 110 FTC 549, 605 (1988) (holding it unlawful for optometrists' association to prohibit truthful advertising of pricing or discounts).

[55] *California Dental Association*, 526 US at 790 (Breyer dissenting) (alteration in original), quoting *California Dental Association*, 128 F3d at 726–27.

[56] *California Dental Association*, 526 US at 793 (Breyer dissenting).

[57] 476 US 447, 459 (1986).

tion.[58] In *Indiana Federation of Dentists*, the Court held that an agreement among dentists to refuse to give insurers access to certain medical records violated the rule of reason. Justice Breyer compared the facts of the two cases, finding no significant differences between the cases to justify the divergent outcomes.

Finally, as Justice Breyer developed the parties' burden of persuasion, the government first needed to show what the restraint was and that it had the feared potential for adverse effects on competition. At that point, the burden shifted to the defendant to show a procompetitive justification.[59] He added that the "allocation" of burdens

> reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, and the latter called forth the criticism that the "Government always wins." I hope that this case does not represent an abandonment of that basic, and important, form of analysis.[60]

II. INFERIOR TRIBUNALS AND THE DUTY TO ELABORATE

The hallmark of good antitrust analysis is reasoned elaboration. First, the antitrust tribunal must explain why a particular mode of analysis, whether per se or rule of reason, is appropriate to a certain set of facts. Second, especially in rule-of-reason cases, the tribunal must also lay out the structural and behavioral factors upon which its decision is based. Such elaboration is critical if antitrust decisions are to be useful guides to the future conduct of others facing similar circumstances. Decisions that are inadequately explained provide little guidance and thus have to be made over and over again.

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[58] *California Dental Association*, 526 US at 793, citing *California Dental Association*, 128 F3d at 727.

[59] See *California Dental Association*, 526 US at 788 (Breyer dissenting), citing Areeda, 7 *Antitrust Law* ¶ 1507b at 397 (cited in note 26); Hovenkamp, 11 *Antitrust Law* ¶ 1914c at 313–15 (cited in note 1).

[60] *California Dental Association*, 526 US at 794 (Breyer dissenting) (citations omitted).

This Part examines two different problems related to the duty to elaborate. The first is distinguishing among facial and "as applied" challenges to a private rule-making association's published standards. The second is identifying the tribunal that has the duty to elaborate.

A. Facial versus "As Applied" Challenges

To a limited extent the majority and dissenting opinions in *California Dental Association* appear to rest on different views of the facts. The majority believed "that the restrictions at issue here are very far from a total ban on price or discount advertising."[61] Further, the majority seemed to be swayed by the fact that the restrictions, "at least on their face" were "designed" to prohibit "false or deceptive advertising."[62] Indeed, on their face the restrictions were broad but certainly could have been interpreted in a competitive manner. The restrictions defined "false or misleading" claims as

i. ones that are "likely to mislead" because they made only "partial disclosure of relevant facts;"

ii. those "intended or likely to create false or unjustified expectations of favorable results and/or costs;" or

iii. those that failed to disclose "all variables and other relevant factors" that might affect a dentist's fee, or that contained "representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived."[63]

It is hard to see anything inherently anticompetitive in such statements. However, other guidelines were more aggressive, stating that:

> [a]ny communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.
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> Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, "low fees"—must be based on verifiable data substantiating the comparison or statement of relativity.

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[61] *California Dental Association*, 526 US at 773.

[62] Id at 771.

[63] Id at 760–61 n 1.

> The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity.[64]

Perhaps the most troublesome was:

> Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.[65]

While these guidelines were quite restrictive, on their face they nevertheless suggested that many instances of price or discount advertising would in fact be permitted.

But Justice Breyer looked beyond the facial expression of these "innocent-sounding" rules.[66] For him, the "restraint" was not the text of the rules, but rather the way that they had been implemented, effectively making discount and quality advertising of any kind almost impossible.[67] This served to distinguish *California Dental Association* from decisions such as *National Society of Professional Engineers v United States*,[68] where the ethical rule on its face forbade engineers from engaging in competitive bidding against one another; or from the price-fixing agreement in *Goldfarb v Virginia State Bar*,[69] where the ethical rule in question effectively forbade lawyers from deviating from bar-established legal fees.[70]

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64 Id at 761.

65 *California Dental Association*, 526 US at 761 n 1.

66 Id at 782 (Breyer dissenting).

67 See id (citations omitted):

> [The] restraints do *not* include merely the agreement to which [California Dental Association's] ethical rule literally refers, namely, a promise to refrain from advertising that is 'false or misleading in any material respect.'. . . Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications.

68 *National Society of Professional Engineers v United States*, 435 US 679 (1978). The challenged ethical provision provided that an "[e]ngineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding." 435 US at 683 n 3. See also Hovenkamp, 12 *Antitrust Law* ¶ 2003h at 56–59 (cited in note 54).

69 *Goldfarb v Virginia State Bar*, 421 US 773, 774 (1975) (holding that state and county bar associations' minimum-fee schedules violated § 1 of the Sherman Act). See Hovenkamp, 12 *Antitrust Law* ¶ 2003g at 54–56 (cited in note 54).

70 *Goldfarb*, 421 US at 774.

The biggest difference between a facial and an as-applied challenge to a professional rule is in the nature of the factual record. The explicit ban on competitive bidding in *Professional Engineers* presumably could be struck down without any serious inquiry into implementation. Indeed, even if the ban were rarely enforced by disciplinary actions, it could still have an *in terrorem* effect that would dissuade most engineers from bidding competitively. By contrast, the competitive effects of most of the advertising restrictions in *California Dental Association* could not be assessed at all without examining how the restrictions were applied. On their face most of them appeared quite harmless and even procompetitive.[71]

Notwithstanding a detailed FTC record establishing how the California Dental Association's rules had been enforced in specific cases, the Ninth Circuit said almost nothing about the issue. Rather, it simply quoted the rules at length and gave a very brief summary of how they were enforced.[72] The court acknowledged that

> [U]nlike the situation in [other cases], the California Dental Association's policies do not, on their face, ban truthful, nondeceptive ads. The allegation instead is that the rules have been enforced in a way that restricts truthful advertising.[73]

Nevertheless, the Ninth Circuit's analysis reads much more like a facial challenge.[74] In sum, while the Ninth Circuit's treat-

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[71] For a description of the California Dental Association's restrictions, see note 67 and accompanying text.

[72] See *FTC v California Dental Association*, 128 F3d 720, 724–25, 729 (9th Cir 1997).

[73] Id at 727 (citations omitted).

[74] The Ninth Circuit's only discussion of the issue was this:

> The Commission found that through its pattern of enforcement, the California Dental Association went beyond the literal language of its rules to prohibit ads that were in fact true and nondeceptive. The California Dental Association's advisory opinions and guidelines indicate that across-the-board discounts and descriptions of prices as "reasonable" or "low" do not comply with the Code. Although these guidelines are not directly binding on member dentists, the Commission staff presented evidence that the California Dental Association has relied on them in making decisions about members' advertising on appeals from disciplinary decisions by component societies and on review of membership applications referred by components. In numerous cases, the California Dental Association advised components that advertising did not comply because it included "reasonable" or "affordable" language. . . .
>
> The Commission's opinion cites numerous cases in which the California Dental Association advised members of objections to special offers, senior

ment was not purely facial, it did not offer the kind of analysis of any particular case sufficient to enable the reader to grasp the entire story. Justice Breyer's summary of the FTC's findings did that, but according to the Supreme Court majority this was too late; that duty devolved on the Ninth Circuit itself.[75]

Suppose (as it actually did occur) a particular dentist had been expelled from California Dental Association for advertising "reasonable fees quoted in advance," with no inquiry into whether the fee quotations themselves or the promise to quote them in advance had been misleading.[76] Or suppose he had been dismissed for advertising a one-year guarantee on his work, with no inquiry into whether he made good on such promises when the work failed. If such a dentist then challenged that expulsion as a concerted refusal to deal, a court might readily agree that this particular instance of rule enforcement was unlawful—not because the association lacked the authority to make rules forbidding deceptive advertising, but because it applied the rules so as to condemn something that seems quite clearly in consumers' best interest, and without searching for actual deception. In such a case any injunction would presumably run, not against a general ethical rule prohibiting "deceptive" price advertising, but rather against a particular application to conduct not shown to be deceptive. The FTC record had developed numerous examples of such overreaching, but the Ninth Circuit ignored them except for a brief and rather generic mention of all of them together.[77]

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citizen discounts, and new patient discounts, apparently without regard to their truth. It may be that there is some confusion even within the California Dental Association about the extent to which truthful price advertising is restricted. But there are enough examples of California Dental Association objections to truthful ads to find that substantial evidence supports the FTC's conclusion.

In terms of the non-price advertising, advisory opinion eight expressly states that claims as to the quality of services are inherently likely to be false or misleading. The evidence before the ALJ demonstrates that the California Dental Association, following this guideline, has often advised components that the Code of Ethics bars such claims, without any inquiry into whether or not, in a particular case, they were true. On numerous occasions, California Dental Association also informed its components that guarantees were barred by state law.

Id at 729 (citations omitted).

[75] See *California Dental Association*, 526 US at 779 (assigning to the court of appeals the "obligation to give a more deliberate look").

[76] See id at 783 (Breyer dissenting), quoting *In re California Dental Association*, 121 FTC at 301.

[77] See *California Dental Association*, 128 F3d at 729.

B. Who Has the Obligation to Elaborate?

The *California Dental Association* decision is narrow in two different senses. First, it divided the Court five to four. Second, even the majority conceded that further elaboration of the existing record by the Court of Appeals might be sufficient to support that court's judgment, given the exhaustive review in the FTC's decision.[78] However, if the FTC's review of the allegations was adequate, but the Ninth Circuit's review was not, why did not the Supreme Court simply query whether the agency's own opinion was sufficient to support its judgment?

A final order from the FTC is reviewed by a federal circuit court of appeals under two standards. First, findings of fact, including "economic" conclusions, are generally reviewed under a "substantial evidence" standard. The question is whether a reasonable person would accept the record as adequate to support the stated conclusions of fact.[79] By contrast, questions of law are reviewed de novo, although some deference is given to the FTC's expertise.[80] The decision whether the rule of reason, the per se rule, or an intermediate "quick look" is to be applied is a question of law.[81] The reviewing court should thus review that decision de novo.

One of Justice Breyer's objections to the majority was that the Supreme Court had previously held that the FTC's decision is to be enforced if the *Commission's* "factual findings" as supported by "substantial evidence" are sufficient to "make out a violation of Sherman Act § 1."[82] In that case it would seem that the relevant question for Supreme Court review was not whether the Ninth

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[78] See *California Dental Association*, 526 US at 779.

[79] See *Indiana Federation of Dentists*, 476 US at 454 (stating that a reviewing court must accept the Commission's findings of fact if such findings are supported by evidence that a reasonable mind would find sufficient to support the conclusion); *FTC v California Dental Association*, 128 F3d 720, 725 (9th Cir 1997) (same).

[80] *Indiana Federation of Dentists*, 476 US at 454; *California Dental Association*, 128 F3d at 725.

[81] See *Arizona v Maricopa County Medical Society*, 457 US 332, 337 n 3 (1982) (noting trial court's decision to apply a rule of reason and certify that decision as a question for interlocutory appeal); *FTC v Superior Court Trial Lawyers Association*, 493 US 411, 433 (1990) (noting that once courts have enough experience with a particular kind of restraint, they apply a conclusive presumption of per se illegality) (citing *Maricopa County*, 457 US at 344). See also Hovenkamp, 11 *Antitrust Law* ¶ 1909b at 251–52 (cited in note 1).

[82] *California Dental Association*, 526 US at 783 (Breyer dissenting), quoting *Indiana Federation of Dentists*, 476 US at 454–55. See Administrative Procedure Act, Pub L No 89-554, 80 Stat 393 (1966), codified at 5 USC § 706 (1994) ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (E) unsupported by substantial evidence.").

Circuit had listed sufficient facts in its appellate opinion to support the FTC's judgment, but whether the FTC itself had listed them. This was apparently Justice Breyer's premise when he summarized the FTC's evidence, virtually all of which came from the FTC's own written opinion. He noted that the FTC had before it "far more" evidence than the Ninth Circuit had actually mentioned.[83]

One wonders what the result would have been if the Ninth Circuit had simply issued a summary opinion to the effect that the FTC's fact findings were amply supported by the record and its legal conclusions consistent with the law; or had simply said "review denied." Such opinions are not rarities in appeals from the final decisions of federal agencies, although they are more common for some agencies than for others.[84] The majority's analysis in *California Dental Association* suggests the following.

First, *California Dental Association* should *not* be read for the general proposition that the circuit court has a duty to write a full opinion justifying its own decision where no opinion is necessary. Suppose, for example, that the agency has described the facts and law correctly and reached its conclusion in a well-reasoned opinion that the circuit court concludes cannot be improved. Nothing is to be gained by requiring the circuit court to state any more than its own decision that the facts are amply supported in the record and the treatment of the law is correct. If the Supreme Court grants review in such a case, then the substance of the challenged holding must be gleaned from the agency's opinion rather than that of the appellate court. Otherwise, Supreme Court review would consist of nothing more than an attack on the circuit court's opinion-writing practices, because nothing of substance is contained in the circuit court opinion. In sum, the circuit court should be entitled to adopt fully the FTC's opinion as its own in cases where it has no disagreement. The

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[83] *California Dental Association*, 526 US at 783 (Breyer dissenting).

[84] Cursory opinions are not common in substantive appeals from final FTC decisions. But see *FTC v Superior Court Trial Lawyers*, 897 F2d 1168, 1990 WL 27380 (DC Cir) (resolving, in single paragraph, issue left undecided by Supreme Court); *Figgie Intl v FTC*, 817 F2d 102, 1987 WL 37227 (4th Cir) (briefly affirming FTC in false advertising case); *Capax v FTC*, 607 F2d 493 (DC Cir 1979) (affirming, with one word, FTC false advertising decision). Abbreviated opinions are much more common in appeals from the final decisions of other regulatory agencies, particularly the National Labor Relations Board. See, for example, *General Security Services Corp v NLRB*, 1999 WL 555301 (8th Cir) (summarizing the holding in one paragraph and stating that "substantial evidence in the record as a whole" supported the Board's findings and "nothing is to be gained by rehashing the facts"); *Skills Group v NLRB*, 185 F3d 862 (3d Cir 1999) ("review denied"). See also *Floyd v FCC*, 1999 WL 236879 (DC Cir) (briefly affirming FCC order per curiam).

Supreme Court always looks at the FTC record for itself when the circuit court *reverses* the FTC and the question is whether the circuit court erred and the FTC record was in fact sufficient to support its conclusions of law.[85]

Second, in *California Dental Association* the Ninth Circuit did not simply affirm the FTC. Rather, it substituted its own judgment about which rule ought to be applied to the price restraints, indicating a "quick look" rule of reason rather than the per se rule that the FTC had employed.[86] On the nonprice advertising, it agreed with the FTC and applied an abbreviated rule of reason.[87] Further, the Supreme Court disagreed with both lower tribunals, and insisted not only on a rule-of-reason inquiry for both price- and nonprice-related advertising, but also on a more elaborate rule-of-reason inquiry than at least the Ninth Circuit had performed.[88] The Supreme Court then held, in essence, that where the rule it insisted upon involved a broader inquiry than the rule that *either* of the lower tribunals had articulated, it was not the Supreme Court's job to search the FTC's record or opinion to see if the evidence supported illegality under this broader inquiry as well as the disapproved narrower one.[89] Once the Supreme Court decides that both the agency and the circuit court articulated the wrong rule, the highest Court will not review the agency's decision simply to see whether the recited facts are also sufficient to support the outcome under the correct rule.

Congress vested the review of final decisions of administrative agencies in the courts of appeals.[90] While the standard gives a large amount of control to these intermediate courts, the Supreme Court made clear in 1951 that Supreme Court review was appropriate in the "rare instance when the standard appears to

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[85] See, for example, *In re Superior Court Trial Lawyers Association*, 107 FTC 562 (1986), vacated in relevant part, 856 F2d 226 (DC Cir 1988), revd in relevant part and remanded, 493 US 411, 422–23 n 9, 424–28, 431 (1990) (quoting extensively from FTC findings of fact and disagreeing with Ninth Circuit's factual characterization of respondent's boycott); *Indiana Federation of Dentists*, 101 FTC 57 (1983), vacated, 745 F2d 1124 (7th Cir 1984), vacatur revd and remanded, 476 US 447, 455–57 (1986) (analyzing in detail the evidentiary basis for contested FTC findings of fact), affd on remand, 804 F2d 144 (7th Cir 1986).

[86] See *California Dental Association*, 128 F3d at 726–27.

[87] See id.

[88] *California Dental Association*, 526 US at 779.

[89] Id.

[90] See *Universal Camera Corp v NLRB*, 340 US 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.").

have been misapprehended or grossly misapplied."[91] In such cases the Court sometimes reinstates the judgment of the agency, as it did in *Indiana Federation of Dentists*, after the Seventh Circuit applied the wrong substantive legal standard.[92] In that case, however, the Court did not simply conclude that the circuit court erred; it also went back to the FTC opinion and found sufficient facts to support the FTC's conclusions.[93]

The unique attribute of *California Dental* is that the Supreme Court concluded that both the FTC and the Ninth Circuit had applied the wrong legal standard. Under the more elaborate rule-of-reason inquiry that the Supreme Court demanded, the Ninth Circuit's summary of the facts was insufficient to sustain the judgment; the FTC's more elaborate compilation of the facts may have been sufficient, but the Supreme Court would leave it to the Circuit Courts of Appeals to make that determination. Thus the Supreme Court's obligation was to correct the errors of the Ninth Circuit. Once corrected, the Ninth Circuit then applied the correct standard and analyzed whether the FTC had done its job properly.[94]

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[91] *Universal Camera*, 340 US at 491. However, application of the standard is dividing the Supreme Court. See *Allentown Mack Sales and Service v NLRB*, 522 US 359 (1998), in which the majority found that one conclusion of the NLRB was not supported by substantial evidence, notwithstanding appellate court approval. Id at 829. However, Justice Breyer and three other dissenters (Justices Stevens, Souter and Ginsburg) objected that the majority should have examined the NLRB's decision itself to determine whether the inadequacies existed, rather than simply looking at the decision of the circuit court:

> [I]f the majority is to overturn a Court of Appeals' "substantial evidence" decision, it must identify the agency's conclusion, examine the evidence, and then determine whether the evidence is so *obviously* inadequate to support the conclusion that the reviewing court must have seriously misunderstood the nature of its legal duty.

Allentown Mack, 522 US at 385. Note that Justice Souter dissented with Justice Breyer in *Allentown Mack* but wrote for the majority in *California Dental Association*. The issue is sufficiently similar to the one in *California Dental Association* that one wonders whether Justice Souter has changed his position.

[92] *Indiana Federation of Dentists*, 476 US at 466 (reversing the judgment of the Court of Appeals).

[93] Id.

[94] *California Dental Association*, 121 FTC 190, 307–22 (1996), affd, 128 F3d 720 (9th Cir 1997), affd in part and remanded in part, 526 US at 781 (1999), vacated, 2000 WL 1239199, *18 (9th Cir) (remanding the dispute to the FTC with instructions to dismiss its case against the California Dental Association).

III. THE RULE OF REASON IN *CALIFORNIA DENTAL ASSOCIATION*

A. Introduction

The *California Dental Association* majority's opinion says little about how a judge should decide which antitrust rule to apply to a particular horizontal restraint. Rather, the Court indicates very generally that the rule to be applied must be "meet for the case," and that the standard for when to invoke a full blown rule-of-reason inquiry is the "plausibility of competing claims"[95] about competitive effects.[96] These phrases leave several questions open, such as (1) plausible about what? (2) how plausible? (3) what kinds of evidence must support a "plausibility" finding at the initial stage when a court must determine what rule to apply? and (4) when does a judge engage in this "plausibility" inquiry—is it the initial inquiry, a later inquiry, or the only inquiry?

While quite unstructured itself, the Supreme Court's opinion certainly cannot be read as a repudiation of a more structured approach to antitrust decision making. It simply fails to develop the logic of such approaches. The Court probably did not mean that any time a defendant could offer a plausible-sounding argument that its restraint was "procompetitive" it was entitled to a full rule-of-reason inquiry examining every possible "competitive" or "anticompetitive" effect. First, the Supreme Court made clear that the term "procompetitive" refers to practices that tend to increase output.[97] Second, speaking of the plausibility of "competing" claims implies that the plaintiff must make an opening plausible claim that the practice is anticompetitive. If the plaintiff cannot do that, then no offsetting plausible claim is needed. Those observations are at least the beginning of a road map for the rule of reason: first, the plaintiff has the initial burden of alleging an anticompetitive restraint—that is, one that tends to reduce market output. Second, the defendant will then be permitted to offer evidence that the restraint in fact tends to increase rather than decrease market output, or at least that there is no significant possibility of an output reduction.

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[95] *California Dental Association*, 526 US at 778.

[96] Id at 781.

[97] See id at 777.

B. Output Impact of Challenged Restraints

The *California Dental Association* majority and the dissenters did not wholly agree about the content of the challenged dental association restraints. The majority believed that the "output" of dentists was dental services, not the package of dental-services-plus-distribution-information that sellers ordinarily provide. The majority thus rejected as "puzzling" the view adopted in the Ninth Circuit that the restraints on advertising were a form of output limitation.[98] The Supreme Court majority concluded that:

> If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining whether a . . . limitation has the anticompetitive effect of artificially raising prices.[99]

Justice Breyer had a different view:

> [I]f the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. . . . There is adequate reason to believe that tendency present in this case.[100]

Consider an agreement among automobile manufacturers to install cheaper carburetors as fuel distributors rather than more expensive fuel injection systems, while making no provision to reduce the number of cars. The majority's reasoning requires the conclusion that such an agreement would not be an output reduc-

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98 Id at 776.

99 *California Dental Association*, 526 US at 776–77.

100 Id at 791 (Breyer dissenting), citing Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1505' at 404 (Aspen Supp 1998).

tion, for it would reduce the demand for cars (to the extent purchasers preferred fuel injectors) without affecting the supply. The Court evidently presumed a static market in which the automobile manufacturers would respond to the reduced demand by lowering their prices.

But the more likely explanation of such an agreement is that the automobile manufacturers wish to reduce innovation-based competition with one another. The majority apparently had in mind a form of quality advertising whose purpose was to inform (or misinform) patients about the high quality of dental services generally. For example, dental association advertising about the high quality of dental care in California might serve to give California residents more confidence about going to the dentist, thus increasing the demand for dental services. By contrast, a restriction on such information would reduce the demand for such services, and thus serve to lower prices.

In contrast, Justice Breyer described the use of quality advertising as a competitive device for distinguishing one dentist from another. That is, Dr. Brown might advertise "gentle care" in order to induce more customers to visit her rather than a different dentist.[101] Competitive advertising of quality in this fashion might serve to increase the demand for dental services generally, but as Justice Breyer noted, it would also serve to steer patients desiring gentle care to Dr. Brown and thus away from other dentists.[102] As a result, the latter would have to communicate their own offering of gentle care (or some other attribute that customers might desire).

The record in the case indicated that the advertising at which the California Dental Association restrictions were directed was of the competitive type that served to distinguish one dentist from another, not the more general advertising that might be promulgated by the Association itself to increase consumer confidence in dentistry. Indeed, if the anticipated impact of quality advertising was to give customers more confidence in dentists generally rather than more trade to the advertising dentist, then dentists acting alone would have little incentive to provide quality advertising.[103]

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101 Id.

102 Id.

103 That is, there would be a significant free rider problem. For example, farmer Brown is not likely to advertise the healthful effects of potatoes if the anticipated result is that customers will buy potatoes generally—from Brown's many thousand competitors as well as Brown herself. She would endure all of the expense but obtain only a small portion of

To be sure, the majority was correct that restraints on one part of a price-service package might serve to increase the number of units sold in another part of the package, at least in the short run. For example, if all the breakfast cereal manufacturers agreed to stop advertising they might be able to reduce their costs by as much as 20 percent. If these cost reductions were passed on, the result might be greater cereal sales. Or if a group of automobile dealers agree to close their showrooms on evenings and Sundays the result might be lower overhead costs, lower car prices and conceivably increased car sales.[104] But should a court apply the rule of reason because of such possibilities?[105] *Any* agreement eliminating or reducing a significant input can lessen production costs, whether the input be a physical component,[106] advertising, or research and development. For example, rivals facing heavy innovation budgets might agree with each other to cease innovating and thus to reduce their costs, resulting in lower prices. Indeed, even a naked bid-rigging agreement can reduce the substantial cost of computing competitive bids.[107]

Ordinarily a naked horizontal restraint is not saved from per se condemnation simply because it offers the possibility of higher output of the narrowly defined product itself.[108] The "output" of

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the benefit. Such advertising would ordinarily be promulgated by a potato growers' association and the expenses divided via association dues. Brown herself would advertise only in a way that distinguished her potatoes from those of rivals.

[104] See, for example, *In re Detroit Auto Dealers Association, Inc*, 111 FTC 417, 499 n 24 (1989) ("We observe . . . that prices may effectively have risen above competitive levels if they simply remained the same after agreement. Holding all other factors constant, we would expect car prices to have gone down in response to dealers' overhead costs."), affd 955 F2d 457 (6th Cir 1991). Compare *NCAA v Board of Regents of University of Oklahoma*, 468 US 85, 116–17 (1984) (correctly, in this author's opinion, rejecting the proposition that restrictions on the number of televised football games served to increase the demand for gate attendance). Of course, *any* successful cartel serves to increase the demand for substitute products not covered by the cartel agreement.

[105] The Sixth Circuit thought so. See *Detroit Auto Dealers Association*, 955 F2d at 472 ("We do not equate limitation of hours with price-fixing, but we do not find error in the Commission's conclusion that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade."). See Areeda, 7 *Antitrust Law* ¶ 1511 (cited in note 26).

[106] *National Macaroni Manufacturers Association*, 65 FTC 583, 584 (1964), affd 345 F2d 421, 422 (7th Cir 1965) (condemning agreement among pasta makers to reduce the quality of macaroni by substituting 50 percent inferior farina wheat instead of following the higher quality standard of 100 percent durum semolina). See Herbert Hovenkamp, 13 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2136 at 193–94 (Aspen 1999).

[107] Compare *FTC v Alliant Techsystems*, 808 F Supp 9, 21 (D DC 1992) (rejecting argument that eliminating the cost of competitive bidding is an efficiency justifying the merger of two defense contractors). See also Hovenkamp, 11 *Antitrust Law* ¶ 1907c at 221–25 (cited in note 1).

[108] See, for example, *National Macaroni*, 345 F2d at 421.

any firm is the combination of product-plus-other-services that the market produces.[109] Thus the output of the car dealer is car transactions, its desirable showroom and hours of operation, and its advertising. An agreement among dealers not to have showrooms reduces costs and may or may not result in greater cars sales. But we attach significance to the fact that consumers value the showroom; otherwise a well-functioning competitive market would not have produced it.

By contrast, a properly restricted agreement not to engage in fraudulent behavior is not conducive to reduced output in either the short or the long run.[110] In a well-functioning market, competition tends to reduce the instances of fraud, but in a poorly functioning one, those tendencies may be suppressed. In sum, there is a consumer interest in suppressing misleading or false information, but hardly in suppressing all information without regard to deception or falsity.

C. Which Markets? Greater Deference to the Learned Professions?

The *California Dental Association* majority opinion narrows the range of horizontal actions that can be subjected to a "quick look." It may even signal a return to an era in which the so-called "learned professions"[111] were given deference that has been denied to them in recent years. In *Goldfarb,* the Supreme Court stated:

> 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

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[109] See Hovenkamp, 11 *Antitrust Law* ¶ 1901d at 186–89 (cited in note 1); Hovenkamp, 12 *Antitrust Law* ¶ 2023b at 144–45 (cited in note 54).

[110] However, the Supreme Court briefly suggested the possibility that deceptive advertising might indefinitely attract additional customers, precisely because they were misled. *California Dental Association*, 526 US at 775.

[111] Basically, doctors, dentists, engineers, lawyers, and optometrists comprise the learned professions. See Hovenkamp, 11 *Antitrust Law* ¶ 1911e at 280–82 (cited in note 1).

> viewed as a violation of the Sherman Act in another context, be treated differently.[112]

And in *Engineers* the Supreme Court acknowledged that:

> by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[113]

Significantly, these decisions ended up condemning the restraint, notwithstanding the deferential language. Later decisions appear to abandon deferential treatment altogether.[114]

While the *California Dental Association* opinion quoted the entire *Goldfarb* passage stated above,[115] the context was not a discussion of special treatment for the learned professions as such, but rather of restraints in markets that are "characterized by striking disparities between the information available" to the seller and the buyer.[116] However, the Court then added the previously quoted statement to the effect that advertising in professional markets is rare, and comparing services is very difficult, and that "the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising."[117] Further, the quality of professional services resists "calibration," in part "because of the specialized knowledge required to evaluate the services," and in part "because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services . . . or to something else."[118]

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112 *Goldfarb*, 421 US at 788 n 17.

113 *National Society of Professional Engineers*, 435 US at 696. See also *Indiana Federation of Dentists*, 476 US at 458 (perhaps conduct in question would be evaluated under per se rule in ordinary market, but Court traditionally reluctant to apply per se rule to agreements involving the learned professions).

114 See, for example, *FTC v Superior Court Trial Lawyers Association*, 493 US 411, 435–36 (1990) (applying per se rule to naked boycott by lawyers refusing to defend indigent criminals without a pay increase); *Arizona v Maricopa County Medical Society*, 457 US 332, 348 (1982) (applying per se rule to maximum price fixing by physicians).

115 See *California Dental Association*, 526 US at 771–72 n 10.

116 Id at 773.

117 Id.

118 Id at 772 (citations omitted).

Thus the context indicates that the Supreme Court was not intending to defer to the learned professions as such, but rather to distinguish a class of differentiated markets having unusually high information costs from the more general run of markets. This special class of markets could be either broader or narrower than the learned professions. For example, it could be broader if there were other markets, say for particularly complex technology, where the same considerations apply. It also could be narrower in situations that involved the learned professions, but where these considerations were thought not to apply, or to apply only in a more attenuated fashion. For example, the information disparity between medical sellers and buyers is very high when the relevant buyer is the consumer herself, as was assumed in *California Dental Association*. But it is not as high when the relevant buyer is a knowledgeable professional, such as a managed care administrator or insurance company. Thus relatively harsher treatment might be justified in a case like *Indiana Federation of Dentists*,[119] where the relevant purchaser was a health insurer.[120] Under *California Dental Association*, a court facing a horizontal restraint that might seem to be naked in the usual case must therefore ask an additional question—not whether the restraint involves the learned professions but rather whether it involves a situation with an unusually high disparity of information between sellers and buyers, and unusual difficulties in assessing quality or price claims.

Positive answers to this question presumably are uncommon. The *California Dental Association* Supreme Court majority apparently found a plausible claim that imperfections in the dental services market rise nearly to the level of "market failure"—situations where the unrestrained market is simply not doing an adequate job of providing the correct quality or price of the services in question.[121] A conclusion that the *California Dental Association* restraints were procompetitive is tantamount to an inference that the unrestrained market would produce misinformation, in the form of false or misleading advertising,

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[119] *Indiana Federation of Dentists*, 476 US at 447.

[120] Justice Breyer found it very difficult to reconcile *Indiana Federation of Dentists* with *California Dental Association*, see *California Dental Association*, 526 US at 793 (Breyer dissenting), but the fact that in the former case the relevant buyers were insurers may be a significant distinction.

[121] A narrower definition of "market failure" would encompass only those situations where the failure can be corrected by government, as opposed to private, intervention.

that would make consumers worse off, which in turn assumes that the customers are unable to fend for themselves.

Concluding that some markets are prone to produce misinformation too readily undermines the basic economic principle that market competition is a useful way of providing goods to customers. Assuming that the *California Dental Association* restraints effectively eliminated price and quality advertising among California dentists, a rule permitting these restrictions could relegate consumers to highly inferior methods of determining price and quality. They would still have word of mouth, which is likely to be significantly more haphazard and significantly less reliable. They could still try out a dentist and then abandon him if either price or quality seemed unsatisfactory; however, they would be unsure whether a different dentist would be better or worse.

In any event, it would be a serious error to apply the rule of *California Dental Association* in markets where such claims of market complexity are less obvious. For example, if a group of gasoline retailers[122] or automobile dealers[123] makes an agreement eliminating or restricting price advertising or quality claims, the rule of *California Dental Association* would presumably not apply.

One likely and unfortunate effect of *California Dental Association* will be a debate played out through litigation about when horizontal agreements restraining advertising are appropriate in markets exhibiting any degree of information disparity or other complexity. For example, suppose that the members of a hospital[124] or pharmaceutical association[125] agree to refrain from advertising. These markets exhibit at least some of the complexities that the market for dental services exhibits. But in the great majority of cases application of *California Dental Association* would result in expensive and needless inquiries into power and anticompetitive effects. In any event, the decision is properly limited

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122 See, for example, *United States v Gasoline Retailers Association*, 285 F2d 688, 691 (7th Cir 1961) (finding it a per se unlawful and criminal offense for gasoline retailers to agree not to advertise their gasoline prices except by posting them directly on the pump).

123 *In re Arizona Automobile Dealers Association*, 59 Fed Reg 34442 (FTC 1994) (prohibiting, by consent decree, agreements not to advertise).

124 See, for example, *United States v Greater Des Moines Hospital Association*, 1993 WL 113410, *1 (S D Iowa) (consent decree banning restrictions on hospital advertising).

125 *United States v American Pharmaceutical Association*, 1981-2 Trade Cas ¶ 64168 (W D Mich 1981) (approving consent decree forbidding pharmacists from agreeing to restrain price advertising of prescription drugs, "other than false and misleading advertising").

to restraints on advertising, not to price-fixing itself.[126] Further, it can be applied sensibly only to the majority's characterization of the facts, which found the restraints in question to be "very far" from a complete ban on advertising,[127] but perhaps no more than an attempt to control deception.

Nevertheless, a likely consequence of *California Dental Association* is that many defendants in horizontal agreement cases will cite the majority opinion defensively. The courts will then have the expensive job of sorting out those markets in which consumer information costs are sufficiently high to warrant the defense and those in which they are not. For example, is a full rule-of-reason inquiry necessary for equivalent restraints in automobile sales or repair—an area that was the subject of one article that the Court cited?[128] If so, then why not the markets for appliance repair, custom home construction, or plumbing? Each of these plus many others involve significant disparities in the information available to buyers and sellers, price and service combinations that are readily capable of manipulation, and other market failures comparable to those found in the markets for dental or medical services. There is no obvious reason why an agreement among automobile mechanics not to advertise discounts or warranties should be treated any differently than an agreement among dentists to do the same thing.

Further, the Supreme Court may have concluded too readily that someone with "even a rudimentary understanding of economics"[129] could readily distinguish the relatively ambiguous dangers of the dentists' collective refusal to provide x-rays in *Indiana Federation of Dentists* from the restraints on advertising in *California Dental Association*. In the earlier case, the dentists had argued that a far-away claim examiner relying only on x-rays and patient records could not make a fully informed judgment about the proper course of treatment.[130] If that were true, then

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[126] But see *Granite Partners, LP v Bear, Stearns & Co*, 58 F Supp 2d 228, 238 (S D NY 1999) (holding that *California Dental Association* requires a full rule-of-reason treatment for an alleged agreement among brokers to rig bids and engage in sham bidding to keep prices at below-market levels). The market may have been complex, but that in itself is insufficient to justify rule-of-reason treatment for an agreement with the acknowledged purpose of suppressing prices.

[127] *California Dental Association*, 526 US at 773 ("[T]he restrictions at issue here are very far from a total ban on price or discount advertising.").

[128] See Akerlof, 84 Q J Econ at 489–92 (cited in note 24) (analyzing information asymmetries in the used car market).

[129] *California Dental Association*, 526 US at 771.

[130] See *Indiana Federation of Dentists*, 476 US at 464–65.

denial of x-rays might have led to increased payment of claims for proper dental care, and this in turn would amount to an increase in the output of dental services. The more plausible difference between the two cases is that the relevant purchaser in *Indiana Federation of Dentists* was an insurer. In *California Dental Association*, the relevant purchaser was not specified but was presumably the patients themselves.[131]

D. Naked Restraints

Nothing in the *California Dental Association* opinion requires a rule-of-reason analysis for clearly naked restraints. A restraint is naked if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output.[132] By contrast, a restraint is ancillary if its objectively intended purpose or likely effect is lower prices or increased output, measured by quantity or quality.[133] Under this definition a naked restraint is a rational act only if the actors collectively have sufficient power to affect output and price marketwide. By contrast, an ancillary restraint can be profitable, and thus rational, whether or not the participants collectively control the market.

The premise of the *California Dental Association* majority's insistence on a rule of reason was that it was unclear whether the challenged restraints on advertising increased, reduced or had no effect on the output of dental services.[134] The Court took some pains to distinguish cases such as *Professional Engineers*[135] and *NCAA v Board of Regents*,[136] which involved agreements that were rational only on the premise that the defendants collectively had the power to reduce market-wide output. It also distinguished *Indiana Federation of Dentists*, where the agreement to withhold x-rays was rational only on the premise that dental patients and

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131 Neither the Supreme Court's nor the Ninth Circuit's *California Dental Association* opinions ever discussed the role of insurers, and even the FTC's opinion barely mentioned it.

132 See Hovenkamp, 11 *Antitrust Law* ¶ 1906a at 210–12 (cited in note 1).

133 See *Polk Brothers v Forest City Enterprises*, 776 F2d 185, 190 (7th Cir 1985) ("The reason for distinguishing between "ancillary" and "naked" restraints is to determine whether the agreement is part of a cooperative venture with prospects for increasing output. If it is, it should not be condemned *per se*.").

134 *California Dental Association*, 526 US at 771 ("[I]t seems to us that the California Dental Association's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.").

135 *Professional Engineers*, 435 US 679.

136 *NCAA v Board of Regents of University of Oklahoma*, 468 US 85 (1984).

insurers could not find a sufficient supply of compliant dentists.[137] In such cases, the proffered defense attempts to justify a market-wide output decrease rather than show why such a decrease has not or is not likely to occur. In sum, no matter how complex the market, *California Dental Association* does not mandate rule-of-reason treatment for restraints whose logic depends on the exercise of market power.

Suppose that California Dental Association were a small and relatively powerless association of California dentists, perhaps equivalent to the National Lawyers Guild rather than the ABA. In that case an advertising restraint designed to limit information that a competitive market would ordinarily provide would not succeed. Dental patients would respond to the restraints by seeking out non-member dentists who did advertise price and quality. By contrast, if the only impact of the restraints were to increase consumer confidence in California Dental Association dentists, then the restrictions would be profitable to member dentists whether or not they had market power. For example, even a tiny group of Chicago pediatricians or auto mechanics could profit by giving truthful quality guarantees or price assurances that other pediatricians or mechanics did not offer. But they could profit by suppressing such information or guarantees only if they controlled the market. Thus the all-important question in *California Dental Association* was "Would the California Dental Association restraints (as applied) have been profitable to its members even if the California Dental Association lacked any market power whatsoever?" For example, suppose that the California Dental Association represented only a small percentage of California dentists, and that its rules effectively forbade members from making any advertising claims about price or quality. By contrast, the majority of dentists faced no such restrictions and advertised both price and quality freely. One suspects that the result would be increased sales by the advertising dentists at the expense of the non-advertising dentists. If that is true, then the *California Dental Association* restraint was naked and should not have been given rule-of-reason treatment.

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[137] *California Dental Association*, 526 US at 770, citing *Indiana Federation of Dentists*, 476 US at 464–65.

E. Justifications

1. The troublesome problem of market imperfections.

Once the plaintiff has shown a restraint with significant anticompetitive potential, the defendant may defend the restraint by showing that it is procompetitive in fact. In *California Dental Association*, the Association argued that significant disparities in information between suppliers and consumers operated to make the advertising restrictions procompetitive, or at least competitively harmless.

One disturbing feature of this argument is that the very information failures that the Supreme Court described as indicating more elaborate examination under the rule of reason also make the market in question more prone to collusion. For this reason, antitrust law has traditionally and properly been hostile toward competitor agreements restraining advertising. The less information a consumer has about *relative* price and quality, the easier it is for the market participants to charge supracompetitive prices, provide inferior quality, or avoid innovation.[138] Indeed, when consumer information is very poor, one can have a "competitively structured" market with numerous service providers but still have noncompetitive pricing.[139] The consumer tends not to know whether the dentist he has selected is offering competitive price and quality, but once the commitment is made, the cost of switching to a different dentist can be high and the consumer cannot readily gauge whether the switch will make him better or worse off. This is the same rationale that justified condemnation of the ban on competitive bidding in *Professional Engineers*.[140] The effect of the ban was to delay the communication of usable price information until after the consumer had selected an engineer, at a time when switching costs would be much higher.[141]

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[138] See Hovenkamp, 12 *Antitrust Law* ¶¶ 2021c at 125–29, 2023b at 144–54 (cited in note 54). See also *Mardirosian v American Institute of Architects*, 474 F Supp 628, 636–37 (D DC 1979) (granting plaintiff partial summary judgment against AIA ethical rule forbidding an architect from trying to compete for the business of another architect who had already been "selected" for the job).

[139] See George Stigler, *The Economics of Information*, 69 J Pol Econ 213, 219 (1961) (demonstrating that "search" or attainment of greater information by buyer is necessary to reduce dispersion in prices).

[140] 435 US at 694–96.

[141] See Hovenkamp, 12 *Antitrust Law* ¶ 2022e at 140–44 (cited in note 54) (arguing that the agreement in *Professional Engineers* eliminating competitive bidding increased consumers' search costs, making comparison shopping more difficult, and potentially leading consumers to pay super-competitive prices).

Such markets are ordinarily improved by more rather than less price and quality information, for the information enables the consumer to make comparisons *before* he or she selects a particular provider.

For that reason, assuming that the rules articulated by the California Dental Association are reasonable on their face, the tribunal must pay close attention to how they are applied. It is one thing to condemn "false and misleading" advertising and have a dispute resolution process devoted to identifying such advertising. It is a very different thing to condemn practically all price and quality advertising under such a rule, with little or no attempt to distinguish that which is false and misleading. The result of such a program largely eliminates the consumer's power to make pre-selection comparisons, except by greatly inferior modes of communication.

2. Less restrictive alternatives: consumer participation.

In a rule-of-reason case, once power and a significant potential for anticompetitive effects are shown, the defendant may answer by showing a significant procompetitive benefit.[142] At that point, the plaintiff can rebut by showing that the same or substantially similar benefits could be achieved in a less restrictive manner—that is, by some means that impose a lesser threat to competition.[143]

The California Dental Association rules were stated in a manner that seemed to make them reasonable. For the most part, their anticompetitive effect lay in the way they were enforced. As Justice Breyer noted, the definition of the restraint must encompass not merely the text of the challenged rules, but also their enforcement history.[144] In that case, one could either say that the

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142 Hovenkamp, 11 *Antitrust Law* ¶ 1914c at 313–15 (cited in note 1). See also *United States v Brown University*, 5 F3d 658, 669 (3d Cir 1993) (holding that the burden shifts to the defendant once the plaintiff meets the "initial burden of adducing adequate evidence of market power or actual anticompetitive effects"); *Law v NCAA*, 902 F Supp 1394, 1404 (D Kan 1995), affd 134 F3d 1010 (10th Cir 1998) (holding that in a rule-of-reason inquiry, the burden shifts to the defendant to prove that the challenged conduct has a procompetitive justification).

143 See Hovenkamp, 11 *Antitrust Law* ¶ 1913 at 303–10 (cited in note 1). See also *Capital Imaging Associates, PC v Mohawk Valley Medical Associates, Inc*, 996 F2d 537, 543 (2d Cir 1993) (stating that once defendant has offered evidence that its combination has procompetitive "redeeming virtues," the burden shifts back to the plaintiff "to demonstrate that any legitimate collaborative objectives proffered by the defendant could have been achieved by less restrictive alternatives").

144 See *California Dental Association*, 526 US at 783 (Breyer dissenting).

restraint, properly defined, was much too broad and thus was facially unreasonable. Or else one might say that there clearly is a less restrictive alternative—namely, application of the rules in such a way as to separate bona fide instances of deceptive advertising from the majority of advertising claims that are competitive.

The dental services market described in *California Dental Association* appropriately suggests two things: first, significant complexities made consumers particularly vulnerable to misleading advertising claims; but second, the same complexities created a significant potential for dentists to mask themselves from competition by restricting the flow of useful consumer information. This in turn suggests, first, that some restrictions on dentists' advertising are in order and second, that the restrictions should not be managed exclusively by the dentists themselves.

Advertising restrictions promulgated as rules of professional ethics are in fact a form of standard setting, and inquiries into the competitiveness of standard-setting programs often involve a structural element. Standard setting is most likely to be anticompetitive when sellers alone set the standards. Conversely, our concerns about anticompetitive standard setting are alleviated considerably when those setting the standards include consumers and other vertically related firms.[145] As the Supreme Court observed, the typical dental patient may be quite uninformed about dental care. But the industry as a whole is full of consumer representatives who are both professional and well-informed.

For example, suppose that a private organization passing judgment on dentists' advertising had equal representation of dentists, insurers and other managers of health plans, and consumer-interest groups. Insurers and consumers have a real interest in ridding a profession of deceptive advertising, but they also have an interest in seeing that procompetitive advertising is unrestrained. Dental work that is of high quality, that is guaranteed, or that is sold at low prices benefits consumers and health care managers alike. In the general area of standard setting, case

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[145] See Hovenkamp, 13 *Antitrust Law* ¶¶ 2232a at 353–54, 2232d at 358–61 (cited in note 106). Compare *Allied Tube and Conduit Corp v Indian Head*, 486 US 492, 509 (1988) (striking down private association's vote to exempt pipe made of alternative materials from its safety standard because the association members had economic incentives that biased the process), with *M & H Tire Co v Hoosier Racing Tire Corp*, 733 F2d 973, 980 (1st Cir 1984) (finding no violation where auto racing association, with no interest in tire production, approved a single tire design and manufacturer for each season and forbade other tires on the association's tracks, reasoning that track owners making up association have no financial interest in tire production).

after case has observed that standard setting is unlikely to have anticompetitive effects when the relevant decision makers are not competitors producing the product or service that was evaluated.[146] Once a significant potential for anticompetitive effects is clear—as it certainly was in this case—an antitrust tribunal could rightfully insist that challenged instances of dental advertising be individually evaluated, and that the tribunal doing the evaluating not be controlled by the dentists themselves.

IV. INDEFENSIBLE JUXTAPOSITION IN LAW OF HORIZONTAL AND VERTICAL RESTRAINTS

Horizontal restraints should and do receive the most severe scrutiny in antitrust analysis.[147] They pose the greatest possibility to threaten competitive harm—threats that are quite apparent in this particular case. Although differences in Court personnel undoubtedly provide the best explanation, the *California Dental Association* decision makes the Supreme Court appear quite sanguine about agreements among competitors with a significant anticompetitive potential, while having exaggerated concerns about unilateral conduct of supposedly dominant firms. In both *Aspen Skiing Co v Aspen Highlands Skiing Corp* [148] and *Eastman*

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[146] See Hovenkamp, 13 *Antitrust Law* ¶ 2232d at 358–61 (cited in note 106). See, for example, *Moore v Boating Industrial Association*, 819 F2d 693, 696 (7th Cir 1987) (approving restriction on submersible tail lights for boat trailers when association was made up largely of trailer manufacturers, who were thus purchasers of the lights rather than plaintiff's competitors in manufacturing them); *ECOS Electronics Corp v Underwriters Laboratories*, 743 F2d 498, 500 (7th Cir 1984) (holding that laboratories' approval of the product of plaintiff's rival constituted an illegal restraint on trade since the laboratory was an independent organization and none of its managers "may be associated with a manufacturer or vendor of products investigated by [the laboratory]"); *United States Trotting Association v Chicago Downs Association, Inc*, 665 F2d 781, 787–90 (7th Cir 1981) (approving restrictive trotting association limitation on race tracks where most of those involved in making the rule were not race track operators); *Jessup v American Kennel Club, Inc*, 61 F Supp 2d 5, 11 (S D NY 1999) (holding that a kennel club did not violate the Sherman Act by adopting a height standard that tended to exclude the plaintiffs' English-bred Labrador Retrievers since the club did not have a financial interest in breeding dogs).

[147] See *NCAA*, 468 US at 99–100 ("A [horizontal] restraint . . . has often been held to be unreasonable as a matter of law . . . . [H]orizontal price fixing [is] perhaps the paradigm of an unreasonable restraint of trade."); Hovenkamp, 11 *Antitrust Law* ¶ 1902 at 190–99 (cited in note 1). See also *Continental TV, Inc v GTE Sylvania, Inc*, 433 US 36, 58 n 28 (1977) ("There is no doubt that [horizontal] restrictions . . . would be illegal *per se*, but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.") (citations omitted).

[148] *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585, 610 (1985) (holding that the unilateral decision by the owner of a skiing facility to terminate an arrangement to offer all-mountain pass in cooperation with owner of competing facility could give rise to antitrust liability).

Kodak Co v Image Technical Services,[149] the Court was quick to find anticompetitive consequences in unilateral refusals to deal—acts that are rarely anticompetitive and where the remedy of forced dealing is usually worse than the problem to be fixed.[150] *Kodak* also permitted a finding of substantial market power on a highly controversial "lock-in" theory[151] that has produced much litigation and forced the lower courts to distinguish *Kodak* at every opportunity.[152] The result is a body of antitrust rules which makes it far too difficult to litigate against collaborative activity where the threat of consumer harm is significant, and far too easy to litigate against manufacturing firms that have significant after-markets,[153] even where competition is almost certain to discipline most significant opportunistic behavior.[154]

But the basic principles should be clear: substantial market power by dominant firms is relatively uncommon and resisted by competitors. Only a few unilateral acts are clearly anticompetitive, and the courts are not good at correcting the problems caused by unilateral refusals to deal. In sharp contrast, competitor collaboration can yield market power quickly, and when most of a market's competitors act in concert they have considerable

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149 *Eastman Kodak Co v Image Technical Services*, 504 US 451, 482–86 (1992) (finding possible anticompetitive consequences resulting from Kodak's decision to tie service for its machines to the sale of its parts).

150 See Phillip E. Areeda and Herbert Hovenkamp, 3A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 765 at 99–104, 771b–c at 174–77 (Little, Brown 1996).

151 Lock-in theory states that once a consumer has invested a considerable amount of money in a piece of hi-tech equipment, the customer will not easily change to a new brand of equipment. Such customers will tolerate substantial increases in service price before switching brands. Lock-in theory therefore allows the court to define the relevant market as a single manufacturer's brand of equipment. See Phillip E. Areeda, Einer Elhauge, and Herbert Hovenkamp, 10 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1740c at 144–45 (Little, Brown 1996).

152 See *America Online, Inc v Great Deals.Net*, 49 F Supp 2d 851, 858 (E D Va 1999) ("[I]t is improper to define a market simply by identifying a group of consumers who have purchased a given product . . . . This is not a case like *Eastman Kodak* where a single brand of product or service constitutes a relevant market because it is unique. In this case, there are other e-mail services that provide the same type of service as AOL. Defendants could have advertised through another e-mail service and still reached the Internet-accessing public."); *Chawla v Shell Oil Co*, 75 F Supp 2d 626, 639 (S D Tex 1999) (holding *Kodak* is not applicable where the "lock-in" effect arises from negotiated contractual obligations). See also Areeda, Elhauge and Hovenkamp, 10 *Antitrust Law* ¶ 1740 at 137–77 (cited in note 151).

153 An after-market is a market for parts, services or supplies for a durable primary product. For example, the purchaser of a Kodak photocopier can ordinarily anticipate that she will have to purchase parts, service or supplies over the life of the machine.

154 See, for example, *Red Lion Medical Safety v Ohmeda*, 63 F Supp 2d 1218, 1230–31 (E D Cal 1999) (extending *Kodak* to a situation where the defendant had not changed its parts policy after a large number of consumers were locked in to its primary equipment).

power to produce noncompetitive results. Further, the courts are much better at administering decrees against competitor collaboration than those against unilateral acts.[155] The law of unilateral refusals to deal, and particularly the Supreme Court's willingness to permit substantial market power to be inferred from the "lock-in" imposed on customers of non-dominant sellers, is thus due for re-examination.

V. POWER

A full rule-of-reason inquiry requires a rather elaborate consideration of market power. While the Supreme Court rejected the Ninth Circuit's application of a "quick look" to the dental association facts, it also made clear that the final inquiry in this particular case need not involve a full inquiry of the kind that might be necessary in, say, a monopolization case. The Court said:

> Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "*requir[e]* some competitive justification," it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule-of-reason" tend to make them appear . . . . "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[156]

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[155] Compare *Image Technical Services v Eastman Kodak*, 125 F3d 1195, 1225–26 (9th Cir 1997) (interpreting injunction against Kodak so injunction would not lead to anticompetitive effects by making Kodak the only parts supplier to its own competitors), with *NCAA*, 468 US at 120 (invalidating organization's restrictions on televised athletic contests). See Hovenkamp, 11 *Antitrust Law* ¶ 1903 at 199–202 (cited in note 1).

[156] *California Dental Association*, 526 US at 779 (citation omitted and alteration in original).

Thus the Court would apparently permit the more truncated power inquiry similar to the one in *NCAA* or *Indiana Federation of Dentists*. Indeed, no power inquiry at all seems to be necessary in a case such as this one where the restraints as applied are prima facie anticompetitive and less restrictive alternatives—in the form of more accurate and individualized determinations of what is false or misleading—seem readily available.

Beyond the highly general quoted statement, the Supreme Court majority never addressed the market power requirement, except to state that the FTC and the Ninth Circuit found it met, and thus apparently agreed with the tribunals below that power was adequate.[157] Justice Breyer's dissent very largely agreed as well.[158] The relevant facts which all tribunals cited were that the California Dental Association had as members about 75 percent of California dentists, with the number reaching as high as 90 percent in some areas; that membership in the California Dental Association was highly valued;[159] and that entry barriers into the practice of dentistry were high.

CONCLUSION

Antitrust decision making and writing over the last twenty-five years have added a great deal of structure to the rule of reason in competitor collaboration cases. Over the years, the case law has largely deserted the unbounded inquiry that Justice Brandeis contemplated in his *Chicago Board of Trade* opinion.[160]

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157 See id at 764, referring to *California Dental Association*, 128 F3d at 728–30; *California Dental Association*, 120 FTC 190, 311–19 (1996).

158 *California Dental Association*, 526 US at 786–90 (Breyer dissenting).

159 On the importance of this criterion to associations having open membership, see Hovenkamp, 13 *Antitrust Law* ¶ 2221a at 306–10 (cited in note 106). See also *SCFC ILC, Inc v Visa USA, Inc*, 819 F Supp 956 (D Utah 1993) (holding that the evidence supported jury conclusion that service association's bylaws, prohibiting issuer of competing card from membership, restrained trade in violation of the Sherman Act), revd, 36 F3d 958 (10th Cir 1994); *Silver v NYSE*, 373 US 341, 347 (1963) (invalidating, despite presence of other federal regulations, actions of New York Stock Exchange as "a group boycott depriving [non-members] of a valuable business service which they needed to compete effectively as broker-dealers in the over-the-counter securities market").

160 See *Board of Trade of City of Chicago v United States*, 246 US 231, 238 (1918):

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

In this sense, the majority opinion in *California Dental Association* is a step back. The majority would like to see a broader inquiry into "reasonableness" than the Ninth Circuit reported, but it provided both unfocused and unrealistic guidance as to the substance of the missing queries. The Court provided nothing resembling a road map or structure for a rule-of-reason examination.

Manageable rule-of-reason inquiries cannot hope to consider all marginally relevant facts. But the majority remanded because "the California Dental Association's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[161]

In explaining why a remand was important, the majority suggested questions that are almost certainly impossible to answer affordably and with acceptable certainty. For example, the Court suggested that an empirical study might determine whether announced discounts for first-time customers "would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, x-rays and fillings, than they would be if they simply specified a percentage discount across the board."[162] It then surmised that in "a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping," and that it was possible that "even if across-the-board discount advertisements were more effective in drawing customers in the short run," repetition of "misstatement due to the breadth of their claims might . . . make potential patients skeptical of any such across-the-board advertising."[163] It also suggested that "across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive."[164]

Such conjectures, if made in almost any market, might turn up at least a small subset of true positives. Any discount advertising might conceivably mislead. Excessive discount advertising, like the clothing store offering endless sales, might jade customers in almost any market. Most markets have less-than-perfect

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161 *California Dental Association*, 526 US at 771.

162 Id at 774.

163 Id at 774-75.

164 Id at 775.

information, and any restraint on advertising might serve to discipline a certain amount of unscrupulous as well as informative advertising. But to launch the federal courts into such queries in all cases involving advertising restraints imposed by self-interested competitors, simply because we lack precise knowledge about the result, will increase the costs of antitrust litigation considerably, without providing comparable improvement in the results.

By contrast to the majority, Justice Breyer's dissent advocated a much more structured inquiry. First, he would have defined the restraints at issue, considering both what the California Dental Association rules said and how they were interpreted.[165] Second, he would have determined the reasonably anticipated competitive consequences of such restraints.[166] Third, assuming significant competitive consequences were apparent, he would have considered whether there were "offsetting procompetitive justifications."[167] Fourth, he would have asked whether the defendants had sufficient market power to "make a difference."[168]

These queries could be worded in different ways or conducted in a different sequence,[169] but the important point is that rule-of-reason cases cannot become unstructured inquiries into thousands of diverse facts which may or may not tell us something about the competitive effects of the challenged practice. That, Justice Breyer warned, would lead us back to the days when the government or plaintiff "had to present and/or refute every possible fact and theory," preventing cases "from ever reaching a conclusion."[170] And it would not be an improvement over the unstructured rule of reason that Justice Brandeis promoted seventy years ago.

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165 See *California Dental Association*, 526 US at 782 (Breyer dissenting).

166 See id.

167 Id.

168 See id.

169 See, for example, Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice* § 5.6c at 256–57 (West 2d ed 1999) (phrasing the queries slightly differently and suggesting that the order may be adjusted for different circumstances).

170 *California Dental Association*, 526 US at 794 (Breyer dissenting) (citation omitted).