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Cover Page Footnote
Professor of Law, Fordham University School of Law. I would like to thank Amy Mikolajczyk for excellent research assistance.
JUSTICE STEVENS AND MARKET RELATIONSHIPS IN ANTITRUST

Mark R. Patterson*

INTRODUCTION

Justice John Paul Stevens practiced antitrust law before his appointment to the Supreme Court of the United States. He also taught antitrust and served on commissions studying the antitrust laws. He therefore had experience in both the practicalities and the problems of antitrust law. This experience has served him well on the Court, where Justice Stevens has written majority opinions in numerous important cases and dissented in others.

This Article argues that in these opinions Justice Stevens can be read to have developed a distinctive approach to antitrust analysis. His approach focuses particularly on the relationships between the several markets involved in most antitrust cases, maintaining this focus even in cases involving monopolization and horizontal restraints, which are often viewed as involving only single markets. Thus, at least as read here, Justice Stevens adopts a consistent approach in a variety of cases, and his approach emphasizes an aspect of anticompetitive conduct common to all those cases.

The specific issue with which Justice Stevens appears to be concerned is conduct in one market that does not make economic sense in that market but instead is aimed at gaining power in a second market. Although Justice Stevens does not explicitly present this issue as occupying the central role given it by this Article, his opinions consistently emphasize market relationships of that kind. This Article goes beyond Justice Stevens's opinions, however, in advocating that this emphasis on market relationships serve as a general test for antitrust legality.

The first section of the Article discusses briefly the development of antitrust's current focus on market relationships, both in law and economics. The subsequent portion of the Article discusses Justice

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3. Those cases generally do involve two markets, as is discussed below. See infra Part IIA, C.
Stevens’s emphasis on market relationships and the particular inquiries he has applied in evaluating anticompetitive conduct. The final section of the Article compares a test for antitrust legality based on market relationships with three other approaches to providing structure to antitrust analysis: the per se rule/rule of reason dichotomy, the ancillary-restraint test, and the use of a market-power screen.

I. ANTITRUST, SINGLE MARKETS, AND MARKET RELATIONSHIPS

In its early years, antitrust law focused on single markets, for single products, rather than on relationships between markets. The "trusts" that prompted the Sherman Act were contractual arrangements between sellers of the same products, and § 1 of the Sherman Act was originally directed at such horizontal arrangements. Even § 2's prohibition on monopolization was once viewed, notably in the Standard Oil case of 1911, as a "supplement" that enabled challenges to combinations of firms that were not reached by § 1.

Although the early years of antitrust also included cases that we would now describe as "vertical" cases involving two markets, the opinions in those cases often did not focus on the market relationships at issue. In Dr. Miles Medical Co. v. John D. Park & Sons Co., for example, where the challenge was to resale price maintenance, the Supreme Court approached the problem as one involving the manufacturer's attempts to impose restraints on alienation on the distribution of its product, rather than as one arising from the different functions of manufacturer and dealer.

Economic assessments of antitrust issues also focused initially on single markets. Alan Meese has shown how early antitrust theorists adopted a price-theoretic model of competition that assumes that a firm interacts with a monolithic and exogenous market. Meese points out that this model caused economists to neglect the costs of transacting, which led them to ignore the possible benefits of contractual restraints. Another way to put it might be that the price-theoretic model led antitrust economists to neglect the development of criteria for evaluating inter-market relationships.

More recently, however, cases challenging various sorts of inter-market relationships have become central to antitrust. Particularly in the middle part of the twentieth century, the Supreme Court adopted strict approaches to a number of inter-market contractual arrangements. Focusing on

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5. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
6. Id. at 60-61.
7. 220 U.S. 373 (1911).
8. See id. at 404-05.
10. See Meese, Monopolization, supra note 9, at 785-93.
leverage and exclusion, the Court adopted per se or near-per se rules against tying, exclusive dealing, and vertical distribution restraints. These cases relied, sometimes incorrectly, on arguments that a seller can gain power either by leveraging power in one market to another or by denying its competitors in one market access to important inputs from another.

Subsequently, and probably to some extent in response to the Supreme Court’s leverage and exclusion cases, economists both within the Chicago School and more generally began to focus on the use of contracts to reduce transaction costs. This transaction cost economics (“TCE”) approach was founded by Ronald Coase, and in the antitrust area has been advanced most prominently by Oliver Williamson. As Professor Meese has described, TCE has been applied in antitrust to explain many contractual restraints. Unfortunately, these explanatory efforts have sometimes been devoted more to justifying restraints than to developing a means for determining when they are in fact procompetitive. As Williamson has said, “[i]f the affirmative case for vertical restrictions become the new orthodoxy, ... it should not be concluded that such restrictions are unproblematic.”

An analytical approach to market relationships is therefore important to antitrust. Indeed, now that antitrust scholars of all stripes emphasize market relationships, but differ on the purposes that such relationships most often serve, one could argue that market relationships are the central issue in antitrust. Some believe that inter-market restraints are presumptively procompetitive; others believe that they are presumptively anticompetitive. The problem is that there is no accepted analytical apparatus for determining when the transaction-cost explanation is the correct one and when the restraint at issue is an effort to gain a strategic advantage.

Although it might go too far to say that Justice Stevens’s strategy has been to develop such an analytical approach, he has repeatedly focused on this problem. This Article argues, in fact, that one can derive from his opinions an inquiry that serves well in evaluating a wide variety of inter-market relationships. This inquiry asks whether a seller operates in each of its markets in a way that makes economic sense in that market, rather than using one market to benefit another. Although this inquiry is not an explicit

16. See Meese, Monopolization, supra note 9, at 822-31.
17. See Williamson, Institutions of Capitalism, supra note 15, at 372. In making this statement, Williamson was referring primarily to the ambiguous welfare effects of restraints that both mitigate free riding and enable price discrimination, id. at 373, but he also acknowledges concerns about strategic behavior, id. at 25-26.
part of current antitrust doctrine, except perhaps in tying cases, it is in some respects a more helpful test for anticompetitive effect than current approaches.

II. JUSTICE STEVENS AND MARKET RELATIONSHIPS

Not surprisingly, given that tying violations are explicitly defined by the relationship between two markets, it is in a tying case that Justice Stevens has been most explicit about the anticompetitive effect of using one market to benefit another:

[T]he law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller’s power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.

It is important to note that Justice Stevens here recognizes the limitations on a leverage theory. He does not suggest that a seller that possesses market power in one market can both use it in that market and use it to gain an advantage in another market. The seller must choose. But antitrust can nevertheless disallow the inter-market transfer of market power. Or, to put it another way, antitrust need not allow sellers to allocate market power from one market among multiple markets. To do so would allow sellers both to exert their power wherever they can best exploit consumers and to exercise the power in a way that was least likely to allow it to be eroded, and thus, to echo the law of monopolization, would allow “the willful . . . maintenance of that power.”

Justice Stevens has emphasized this general principle not just in tying cases, but in cases alleging a variety of antitrust violations, as will be discussed below. First, though, it is worth noting that Justice Stevens’s focus on market relationships began with his first antitrust opinion for the Court, in Cantor v. Detroit Edison Co. In Cantor, the plaintiff challenged

18. One can view tying law’s prohibited conduct, the use of power in a tying market to force purchases in a second, tied market, as not making sense in the tying market. Power can only be used once, so the use of tying-market power to force purchases in the tied market makes that power unavailable in the tying market. See infra text accompanying notes 20-21.

19. For a comparison of the approach presented here with current rules, see infra Part III.A-B.

20. A tying arrangement is a requirement by seller that a buyer, in order to get one product—the tying product—must agree also to buy a second product—the tied product. See generally Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

21. Id. at 14.


a Detroit Edison program under which the company distributed "free" light bulbs to its customers as part of its main business of providing electricity. The Michigan Public Service Commission regulated the supply of electricity in the state, and Detroit Edison had filed rate tariffs with the commission that included the light bulb program. Detroit Edison therefore argued that the program was exempt from antitrust scrutiny under the state action doctrine.\textsuperscript{24}

Despite the state's approval of the tariff, Justice Stevens pointed out that there was no evidence that the state had given the regulation of light bulbs any consideration.\textsuperscript{25} More to the point in the present context, he focused on the fact that there was no necessary relationship between the markets at issue, at least from the perspective of state regulation: "Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards."\textsuperscript{26}

Because the decision involved only the exemption issue, there was no occasion to determine whether there was a substantive violation. The parties, however, expressed divergent views on the propriety of using one market to affect another. Detroit Edison argued that "[t]he purpose of the program . . . [was] to increase the consumption of electricity,"\textsuperscript{27} thus claiming that the light bulb market was used to benefit the electricity market. The plaintiff, on the other hand, argued that "[t]he effect of the program . . . [was] to foreclose competition in a substantial segment of the light-bulb market,"\textsuperscript{28} thus claiming that the electricity market was used to harm the light bulb market.

Although Justice Stevens did not address these arguments on the merits, he did make a point that became important in his subsequent antitrust opinions: "[Detroit Edison's] accounting records reflect no direct profit as a result of the distribution of bulbs."\textsuperscript{29} That is, in evaluating conduct in a market, it is important to ask whether it is profitable on its own terms, in that market. Although this criterion is not often explicitly part of the doctrinal rules at issue in Justice Stevens's opinions, he nevertheless has used it to answer subsidiary questions that the doctrine presents. By doing so, he has given content to antitrust rules that are often quite vague.

\textsuperscript{24} See id. at 592. Under the state action doctrine, conduct directed by state and local governments can be exempt from antitrust scrutiny. See generally Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 20.2 (1994).
\textsuperscript{25} Cantor, 428 U.S. at 584-85.
\textsuperscript{26} Id. at 596.
\textsuperscript{27} Id. at 584.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 583-84.
A. Monopolization Cases

The law of monopolization is one area in which one can say that Justice Stevens has introduced clarity, though not all commentators agree.30 Prior to his opinion in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,31 the conduct aspect of a violation of § 2 was established by proof of the defendant’s “willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”32 Although this test was supplemented with additional inquiries asking whether the defendant’s conduct was, on the one hand, “exclusionary”33 or, on the other, “honestly industrial,”34 these inquiries added little legal certainty.

The case involved the elimination of “destination” skiing packages in Aspen, Colorado. The defendant, Ski Co., controlled three of the mountains at Aspen, and the plaintiff, Highlands, only one. Together the parties had previously offered a one-week destination package under which skiers could ski at any of the four mountains, but Ski Co. decided to terminate that arrangement and instead offer its own three-mountain destination package. Highlands tried to find substitute arrangements to provide a satisfactory destination package, but Ski Co. resisted those efforts at every turn, and Highlands sued.

Justice Stevens, following earlier cases, relied in part on conclusions that Ski Co.’s conduct was “exclusionary” and “anticompetitive.” He pointed out the harm that Highlands suffered as a result of Ski Co.’s actions and the harm to consumers who preferred the four-mountain ticket. The latter harm was apparently “anticompetitive,”35 and the combination of the two was apparently “exclusionary.”36 Neither of these conclusions was self-evident, however. Surely it cannot be that conduct of a seller, or even a monopolist, is exclusionary and anticompetitive whenever it ceases a form of

30. See, e.g., Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 Cornell L. Rev. 1177, 1196 (2002) (“Aspen Skiing offered no guidance on which justifications for refusing to deal might be legitimate. This vague approach comports with the indeterminacy of the rule of reason generally, except that here the cost of that indeterminacy falls squarely on the defendant because of the reversed burden of proof.”).
34. See United States v. Aluminum Co. of Am., 148 F.2d 416, 431 (2d Cir. 1945).
35. See *Aspen Skiing*, 472 U.S. at 606 (stating that “the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket”).
36. Justice Stevens said that “[t]he question whether Ski Co.’s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.” Id. at 605. On this point, he quoted the Areeda treatise: “Thus, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” Id. at 605 n.32 (quoting 3 P. Areeda & D. Turner, Antitrust Law 78 (1978)).
cooperation with its rivals, even if consumers desire the product of that cooperation.\textsuperscript{37}

More compelling was the discussion of the market relationships at issue in the case. Although the opinion did not emphasize the existence of two adjacent markets, it did touch on it. The Court observed that Ski Co.'s practices caused Highlands to "become\["] a day ski area in a destination resort."\textsuperscript{38} Although this statement does not specifically refer to day skiing and destination skiing as separate markets, they do not appear to be in the same market, as it is unlikely that skiers would view a one-day, one-mountain ticket—a day-skiing ticket—as interchangeable with a six-day, four-mountain one—a destination package. In addition, the Court referred to Highlands's "attempt to develop a substitute [destination] product . . . by buying Ski Co.'s daily tickets in bulk,"\textsuperscript{39} indicating that day tickets are inputs to destination tickets, not competing products.

Justice Stevens then pointed out that Ski Co.'s conduct did not make business sense from the perspective of the day skiing market:

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.\textsuperscript{40}

This inquiry, at least as compared to the questions of whether Ski Co.'s conduct was "exclusionary" or "anticompetitive," is straightforward. It is reasonably clear that declining to sell day-skiing tickets to Highlands did not make sense for Ski Co., considering, again, only the day-skiing market. Although evaluating whether conduct makes business sense might sometimes be more difficult, as when a seller participates in initially unprofitable promotional activities, even there the inquiry is more focused and decisive than asking whether conduct is exclusionary.

Moreover, a focus on the market relationships in \textit{Aspen Skiing} provides even more reason to view Ski Co.'s conduct as anticompetitive than the quotation above suggests. Although Justice Stevens describes Ski Co. as sacrificing profits in the short term for long-term benefits, it is likely that its conduct was profitable overall even in the short term. Its sacrifice of profits

\textsuperscript{37} See Robinson, \textit{supra} note 30, at 1194-1204.
\textsuperscript{38} \textit{Aspen Skiing}, 472 U.S. at 594.
\textsuperscript{39} Id. at 607.
\textsuperscript{40} Id. at 608. This Article argues that Ski Co.'s conduct was not so much a sacrifice of short-run benefits for long-run power as it was a sacrifice of benefits in the day-skiing market for power in the destination-skiing market. It is quite possible that the conduct was profitable overall even in the short run, because Ski Co. reaped the profits in the destination market immediately.
in the day-skiing market was likely made up by increased profits in the destination-skiing market, where its three-mountain package became the only destination package available.41

One might ask what this sort of unprofitable behavior has to do with willful acquisition and maintenance of monopoly power. But that question is no more difficult for the market-relationship test than for an inquiry into whether the defendant’s conduct is “exclusionary.” In fact, conduct can be exclusionary, in that it can hurt competitors, without holding out the prospect of acquiring or maintaining monopoly power. That could be the case, for example, if one seller acted to exclude another in a market where there were many other competitors, so that monopoly power was unlikely. When, on the other hand, a seller engages in unprofitable conduct in one market to benefit a second market, the seller presumably expects to recoup its losses in the second market, which would require some degree of market or monopoly power.42

B. Vertical Agreements

In some respects, monopolization cases like Aspen Skiing are similar to cases involving vertical distribution restraints. In each type of case, the issue generally is whether a party is excluded from competing at one market level by being denied access to an important input at another market level. In monopolization cases, the monopolist typically operates at both levels, as in Aspen Skiing, where Ski Co. sold both day-skiing tickets and destination-skiing packages. In vertical distribution cases, the restraint typically involves an agreement between parties at the two levels, usually a manufacturer and a downstream dealer.

If the approach of Aspen Skiing were to be adopted in a vertical distribution case, the question asked would be whether a party at one level—a manufacturer, say—acted against its own interest at the behest of a party at another level—a dealer—in order to disadvantage a competitor. Indeed, in his dissent in Business Electronics Corp. v. Sharp Electronics Corp.,43 Justice Stevens quotes William Baxter’s description of just this possibility:

Scenarios that involve a firm or firms at one level of activity using vertical restraints deliberately to confer market power on firms at an adjacent level are inherently suspect. To do so is, typically, to inflict self-

41. The Court pointed out that Ski Co.’s share of the Aspen market increased during this period. Id. at 594-95. It is possible, though, that the size of the Aspen market as a whole declined.

42. Note that the use of a market-relationship test for the second, conduct prong of a monopolization violation would not eliminate the need for the first prong of the test, an assessment of the seller’s monopoly power.

injury, just as it would be for consumers to confer market power on the retailers from whom they buy.\textsuperscript{44}

Justice Stevens argued that it was exactly this scenario that described \textit{Business Electronics}, where a manufacturer had terminated one dealer at the request of another. Although the majority, through Justice Scalia, argued that the termination of a dealer that apparently had charged lower prices would allow the remaining dealer to provide more promotional services,\textsuperscript{45} Justice Stevens pointed out that there was no arrangement between the manufacturer and the remaining dealer to provide such services:

[T]he “quite plausible purpose” the majority hypothesizes as salvation for the otherwise anticompetitive elimination of price competition—“to enable Hartwell to provide better services under the sales franchise agreement”—is simply not the type of concern we sought to protect in [\textit{Sylvania}]. I have emphasized in this dissent the difference between restrictions imposed in pursuit of a manufacturer’s structuring of its product distribution, and those imposed at the behest of retailers who care less about the general efficiency of a product’s promotion than their own profit margins. \textit{Sylvania} stressed the importance of the former, not the latter; we referred to the use that manufacturers can make of vertical nonprice restraints, and nowhere did we discuss the benefits of permitting dealers to structure intrabrand competition at the retail level by coercing manufacturers into essentially anticompetitive agreements.\textsuperscript{46}

Thus, Justice Stevens’s emphasis in \textit{Business Electronics}, as in \textit{Aspen Skiing}, was on whether the denial of a product in one market to a seller in another made sense from the perspective of the producer of the denied product. In \textit{Business Electronics}, the terminated dealer was denied access to the manufacturer’s products, and there was no evidence that the manufacturer did this to advance its own interests: “[I]f it were clear that [the manufacturer] had acted independently and decided to terminate [the dealer] because [the manufacturer], for reasons of its own, objected to petitioner’s pricing policies, the termination would be lawful.”\textsuperscript{47}


\textsuperscript{45} \textit{Bus. Elecs. Corp.}, 485 U.S. at 739-40 (Scalia, J.).

\textsuperscript{46} \textit{Id.} at 755-56 (Stevens, J., dissenting) (citing \textit{Cont'l T.V., Inc. v. GTE Sylvania Inc.}, 433 U.S. 36 (1977)).

\textsuperscript{47} \textit{Id.} at 742 (citing United States v. Parke, Davis & Co., 362 U.S. 29, 43-45 (1960)).
C. Horizontal Cases

Although application of a market-relationship approach seems more obvious in vertical cases,\textsuperscript{48} which present the relationship between markets directly, Justice Stevens has also suggested a similar approach to horizontal relationships. Vertical market relationships are important in horizontal cases as well, because when the defendants in such cases defend their conduct, they generally do so by arguing that the conduct is procompetitive because it provides some new good or service that requires their collective efforts to produce. In such cases, the key factor is the relationship between the original market, in which the agreeing sellers operate, and the joint-venture market, in which they argue that they have created something new.

This reliance on the creation of a new market is most apparent in \textit{Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.},\textsuperscript{49} a case in which Justice Stevens dissented. \textit{Broadcast Music} presented a challenge by CBS to the business practices of two ventures, ASCAP and BMI, that were the product of agreements among music composers. The two organizations were created to provide central clearinghouses for the licensing of music, since it was costly for composers to negotiate individually with potential licensees. Each of the organizations operated primarily through blanket licenses, under which licensees received the rights to perform all of the organization’s available compositions. CBS challenged the organizations’ unwillingness to license under any arrangement other than the blanket license, which CBS argued eliminated competition among composers.

ASCAP and BMI defended by arguing that the blanket licenses did not constitute price-fixing among composers, but instead offered licensees a new option that was previously unavailable to them, and the Court’s majority opinion accepted that argument, emphasizing the cost savings made possible by ASCAP and BMI. The Court did not make clear, though, how one determines whether a new product that literally fixes prices is sufficiently new to take it out of the price-fixing category.\textsuperscript{50} Not every cooperative venture results in a new complementary product, and \textit{Broadcast Music} makes the determination of whether such a product is created a critical one.

Here, Justice Stevens again offered an analytical approach. In \textit{Arizona v. Maricopa County Medical Society},\textsuperscript{51} the Court was presented with a factual situation similar in some respects to that of \textit{Broadcast Music}. The challenged agreements in \textit{Maricopa} were agreements by doctors to accept agreed-upon maximum fees for their services. In \textit{Maricopa}, as in

\textsuperscript{48} Monopolization cases can be included in this “vertical” category, because the exclusionary aspect of such cases generally involves the denial to the seller in one market of an input from another market.

\textsuperscript{49} 441 U.S. 1 (1979).

\textsuperscript{50} The Court referred to the “substantial lowering of costs” made possible by the blanket licenses, \textit{id.} at 21, but also said that the blanket licenses had “certain unique characteristics,” \textit{id.} at 22, and did not establish clear criteria for making the determination.

\textsuperscript{51} 457 U.S. 332 (1982).
Broadcast Music, the defendants argued that they had created a new product, which the doctors in Maricopa said was "a uniquely desirable form of insurance coverage that could not otherwise exist." 52 The doctors relied explicitly on Broadcast Music, and argued that their agreement, though literally price-fixing, made a procompetitive addition to the market.

Justice Stevens disagreed, distinguishing the doctors' activities from those of ASCAP and BMI:

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold. 53

Thus, a key factor in Justice Stevens's view was whether the new venture created by the horizontal agreement was independent of the agreeing parties, in that it stood or fell on its own performance. The parallel with Justice Stevens's approach to market relationships in cases like Aspen Skiing is clear: Once again, the question turned on whether the sellers' operations in one market—the joint-venture market—made economic sense in that market, considered alone, or whether they were instead conducted to benefit another market—the agreeing sellers' original market.

A question not really answered in Maricopa, though, is why the physicians were not viewed as bearing the risk of the failure of their ventures, given that insurers need not have contracted with them and could instead have negotiated with the physicians directly, just as CBS could have negotiated with composers. The dissent in Maricopa apparently viewed the possibility of individual negotiation as more real there than in Broadcast Music: "That competition yet persists among physicians is not a sensible reason to invalidate their agreement while refusing similarly to condemn the Broadcast Music agreements that were completely effective in eliminating competition." 54

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52. Id. at 351.
53. Id. at 356-57.
54. Id. at 365 n.12 (Powell, J., dissenting). It is actually not clear here whether the dissent is referring to competition by physicians for business within the maximum-fee arrangements or to competition among them outside those arrangements.
Still, it might be that even if the chance of failure was as great for the physicians, they did not have much at risk even in the case of failure. The process of gathering prices that the individual physicians would accept was probably not a costly one. In contrast, ASCAP and BMI had established not just a licensing function, but also means of monitoring and enforcing composers' copyrights. The provision of those services presumably required a much greater investment than the physicians made in Maricopa, and that could have justified excluding ASCAP and BMI, but not the physicians' groups, from per se illegality.

When one comes to the rule of reason, though, one might reasonably doubt whether at least the decision to offer only blanket licenses was truly procompetitive, and this was in fact the focus of Justice Stevens's dissent in Broadcast Music. He emphasized the sizes of ASCAP and BMI and the fact that they could have operated differently. Translating this market-dominance concern into the market relationship framework, one can ask whether sellers in the position of the copyright owners would, if acting in their own interests, choose to create a downstream duopoly that could serve as a bottleneck between them and their customers.

It is difficult to answer this question when, as in Broadcast Music and Maricopa, there is no clear distinction between the agreeing sellers' interests in their original market and their interests in the new, joint-venture market. But in National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma (NCAA), Justice Stevens wrote the majority opinion in a horizontal case in which interests in the two markets diverged. In NCAA, several large universities challenged an NCAA plan governing the televising of college football games. The plan limited the total number of games televised and the number of games that any one college could televise. The NCAA enacted the rule through a vote, and a majority of its voting members were small schools. Consequently, the small schools were able to enact the rule, despite opposition to it by large football-playing schools, which then brought the court challenge.

56. That interpretation is consistent with Justice Stevens's refusal to apply the per se rule in National Collegiate Athletic Ass'n v. Board of Regents of the University of Okla. (NCAA), 468 U.S. 85 (1984). There too he relied on functions that were performed by the defendants but were not specifically at issue in the case. See id. at 100-02 (describing how there must be agreement on the rules of intercollegiate sports competition, though the restraint at issue, which involved limitations on the number of football games broadcast, was not among those rules). The NCAA decision is discussed further below. See infra text accompanying notes 59-63.
57. Justice Stevens also focused on the block-booking aspect of the case and on the lack of competition among individual compositions. Broad. Music, 441 U.S. at 28-29, 32-33.
58. Each composer's works were available only through either ASCAP or BMI, but a composer concerned about a bottleneck might have relied upon competition between ASCAP and BMI to prevent anticompetitive terms.
59. 468 U.S. 85.
60. Id. at 118 n.63.
61. Id.
Justice Stevens determined that the per se rule should not apply, relying on considerations similar to those that were present in *Broadcast Music* and that he concluded were not present in *Maricopa*: the need for a joint entity to create the product.62 As a result, evaluation under the rule of reason was required. As suggested above, if the market relationship test were applied to make the rule-of-reason determination, the question would be whether the colleges would choose to create the new joint entity—or, in this context, the NCAA’s television plan—when it could inhibit their ability to serve their customers. It was clear from the suit that at least some of the colleges would not have chosen to do so.63

Returning again, then, to Justice Stevens’s dissent in *Broadcast Music*, one might ask whether some of the composers would have preferred that ASCAP and BMI offer some alternative to blanket licenses. Indeed, Justice Stevens referred to that possibility: “Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price.”64 That is, although individual negotiation was possible, it would have been pointless if potential licensees needed access to many compositions, in which case they would have needed blanket licenses anyway.

Thus, a horizontal agreement, even where it is not formally exclusive, can “impose[] the [agreeing parties’] views of the costs and benefits of competition on the entire marketplace.”65 Indeed, that may be the purpose of the agreement, even if there are differences among the sellers in the agreeing market. That is, it is possible that if a majority of sellers prefer one mode of competition, they would create a product like the NCAA rule or the ASCAP and BMI blanket licenses specifically to make it difficult or prohibitively expensive for others to compete in other ways. Although there appears to be no evidence that such was the case in *Broadcast Music*, in contrast to *NCAA*,66 it nevertheless seems that Justice Stevens’s greater scrutiny of the restraint in that case was appropriate.

62. *See supra* note 56.
63. This in fact was the issue on which Justice Stevens’s opinion focused. He relied on the fact that in the absence of the television plan, the major colleges would have televised more games, so that the plan restricted their output. The approval of the plan therefore did not make sense from their perspectives, in the market in which they sold television rights to their games. *See NCAA*, 468 U.S. at 106-07 (“The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete.”). It made sense only from the collective perspective of all the NCAA schools, which really meant it made sense only from the perspective of the voting majority of smaller NCAA schools. *Id.* at 118. By enacting the plan with their voting power, the small colleges were able to commandeer the large colleges’ market power in the individual-game market and use it to impose the television plan on the major television networks. *Id.* at 118 n.63.
III. The Centrality of Market Relationships in Antitrust

Justice Stevens can thus be seen as having applied a consistent approach in a variety of cases. In all of the cases discussed above, he focused on the implications of the sellers' conduct for the relationship between markets. Those implications indicated, at least in Justice Stevens's view, that sellers had linked the markets in illegitimate ways. His emphasis in some of the cases, as described above particularly with regard to Aspen Skiing, was on conduct that did not make economic sense in one market and caused an anticompetitive effect in another. In the horizontal cases, his focus was again on anticompetitive harm in one market—the sellers' original market—caused by actions in another—the joint-venture market.

Although Justice Stevens has not explicitly put these two inquiries together as a single two-part test, it is appropriate to do so. That conduct does not make economic sense does not by itself indicate that it is anticompetitive. By asking not just whether the conduct at issue lacks a legitimate business purpose in one market, but also whether that conduct can be explained by the gains it produces in another market, the inquiry can identify conduct that is likely to be anticompetitive.

This Article, focused as it is on the work of Justice Stevens, is not the place to set out the arguments for and implications of this approach in further detail. But it can be illustrated by reference to one of the more common explanations offered to justify antitrust restraints: the reduction of transaction costs. In many cases, an effort to reduce transaction costs is in fact an effort to improve—make less costly—the relationship between two markets. When sellers create a joint venture, for example, the purpose of the venture may be to make the relationship between the sellers and their customers more efficient, as in Broadcast Music. This is also the nature of the free-riding justification for vertical restraints, where manufacturers seek to reduce the costs of coordinating the production of promotional and repair services for their products, and for many exclusivity arrangements.

The analyses of most of the cases above were in effect evaluations of transaction-cost justifications. The key point is that where an arrangement reduces transaction costs between markets, one would expect both markets to share the benefits. That is, there is no reason why, when conduct reduces transaction costs, the conduct cannot make sense in both markets. If instead one seller loses by the arrangement, or a single seller

68. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); see also supra Part II.A.
69. I am working on a larger project on this issue.
70. That was most obviously true of Broadcast Music, Maricopa, and Business Electronics. The defendants in NCAA and Aspen Skiing also made arguments of this nature, but the Court rejected them out of hand. See Aspen Skiing, 472 U.S. at 608-10; Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (NCAA), 468 U.S. 85, 113-15 (1984).
loses in one of two markets in which it operates, it is reasonable to conclude that it is not cost reduction, but the exercise, acquisition, or maintenance of market power that is occurring.

As an additional illustration of this issue, consider a currently controversial topic: volume discounts and bundled rebates. In a recent case, *LePage’s Inc. v. 3M*, the plaintiff challenged 3M’s bundled rebate policies, which gave higher rebates to those distributors that met sales targets with respect to several lines of 3M products. As a result, those distributors that wanted to receive the best rebates on 3M’s brand-name tape—a product in which 3M was dominant—needed also to purchase 3M’s private-label tape—a product in which 3M faced competition from others, like LePage’s. The court found 3M liable for monopolization, but said that volume discounts “are concededly legal and often reflect cost savings.” Some commentators have found this distinction between bundled rebates and volume discounts inexplicable.

Although 3M did not make much of an attempt to show that its conduct had procompetitive benefits, suppose it had been able to show cost savings, perhaps from joint shipping of the various products included in the bundles. There would still be no reason for 3M, looking at each of its markets individually, to use the rebate structure that it did. Under the bundled-rebate structure, 3M gave greater total rebates, which included rebates on brand-name tape, to those whose purchases of private-label tape from 3M enabled them to meet sales targets than to those whose greater purchases of brand-name tape from 3M did not contribute to the meeting of sales targets. This could not make sense from the brand-name tape market alone, unless it were true that shipping economies were greater for purchases of two kinds of tape than for purchases of brand-name tape alone.

72. *Id.* at 154.
74. It relied instead on an argument that its prices were not predatory. *LePage’s*, 324 F.3d at 147 (“Instead, 3M argues that its conduct was legal as a matter of law because it never priced its transparent tape below its cost.”). The court said that “[a]lthough 3M allude[d] to its customers’ desire to have single invoices and single shipments in defense of its bundled rebates, 3M cite[d] to no testimony or evidence in the 55 volume appendix that would support any actual economic efficiencies in having single invoices and/or single shipments.” *Id.* at 164.
75. In fact, the products in the bundled rebates were quite different, so the court said that such savings were unlikely. *Id.* (“It is highly unlikely that 3M shipped transparent tape along with retail auto products or home improvement products to customers such as Staples . . . “). 76. The rebate structures were customized for each customer and apparently were designed in such a way as to force the customers to buy 3M private-label tape. See *LePage’s Inc. v. 3M*, No. CIV. A. 97-3983, 2000 WL 280350, at *5 (E.D. Pa. Mar. 14, 2000), aff’d, *324 F.3d 141* (3d Cir. 2003).
77. Although “the parties agreed that the relevant product market [was] transparent tape,” *id.* at 146, that was presumably because 3M’s share even in that broad market was very high, *see id.* at 144 (stating that the 3M share was above ninety percent), so that the plaintiff did not need to argue for a narrower market. The facts of the case indicate that brand-name and private-label tape were not viewed as interchangeable by consumers.
Instead, it seems likely that 3M was willing to take losses (give greater rebates) in the brand-name market in order to make gains in the private-label market.

In contrast, straightforward volume discounts on a particular product can often make economic sense. That is certainly true when the discounts reflect cost savings. Even where they do not, the test suggested here would not condemn them, so long as the discounts were confined to a single market. In that case, they would be akin to limit pricing. Antitrust does not generally condemn limit pricing, despite its possible anticompetitive effect, primarily because it would involve antitrust courts in difficult assessments of what conduct is sufficiently profitable. In effect, the rule described here takes advantage of the fact that the involvement of two markets makes it practicable to determine that conduct is not legitimate competition.

The following paragraphs provide some more context for the rule described here by comparing it with three other approaches that are part of antitrust. The first of these, the dichotomy between the per se rule and the rule of reason in the law of horizontal restraints, is part of current law. The second, the ancillary-restraint doctrine, is not so clearly part of current law, but does reflect an approach often adopted, even if not under that label, in joint-venture cases. The third, the use of a market-power screen, has been vigorously advocated by some as a means of providing structure to the rule of reason, but it has not been widely adopted, at least in its strictest form.

A. The Per Se Rule and the Rule of Reason

Generally speaking, antitrust has two modes of analysis. Most restraints are analyzed under the rule of reason, which asks whether the restraint is on balance anticompetitive, and alleged violations of § 2 are evaluated under a similar test. Some restraints, however, are judged under a per se rule, which turns not on a showing of actual anticompetitive effect but on a showing that the restraint at issue is in fact in one of the per se categories. The reading of Justice Stevens's opinions described here,
though based on the single overriding inquiry of whether conduct makes sense in individual markets, nevertheless fits well in this framework.

The initial inquiry in evaluating market relationships is to identify the two markets at issue. This inquiry was decisive in *Maricopa*, where Justice Stevens concluded that the agreement at issue created a second market only in a formal sense, and that the "market" was little more than a vehicle for price-fixing. Consequently, he found the agreement illegal per se. This general approach is consistent with the "new product" test in *Broadcast Music*, where it was the creation of the new product that the Court viewed as making the per se rule inappropriate.

One can also see this approach at work in other decisions of the Court, such as *United States v. Topco Associates, Inc.* decided before Justice Stevens joined the Court. In *Topco*, the Court appeared to rely in large part on a view that the joint venture was not really an independent creation because it was governed by the agreeing parties, which operated in the original market. This sort of structural assessment is not dissimilar to the approach Justice Stevens took in *Maricopa*, but the Court in *Topco* seems to have resolved it incorrectly on the facts. The venture in *Topco* performed clearly independent market functions, just as did the ventures in *Broadcast Music and NCAA*, and therefore should not have been condemned per se.

If the restraint at issue does indeed involve two separate markets, then the rule of reason applies. In Justice Stevens's opinions, this inquiry into

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82. See supra text accompanying notes 51-53.
83. 405 U.S. 596 (1972).
84. In this respect, the Court compared the *Topco* venture to the one in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967):

[Sealy] is, in fact, on all fours with this case. Sealy licensed manufacturers of mattresses and bedding to make and sell products using the Sealy trademark. Like Topco, Sealy was a corporation owned almost entirely by its licensees, who elected the Board of Directors and controlled the business. Just as in this case, Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy-brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy. The Court held that this was a horizontal territorial restraint, which was per se violative of the Sherman Act.

*Topco Assocs., Inc.*, 405 U.S. at 609.
85. See supra text accompanying note 53.
86. *Topco Assocs., Inc.*, 405 U.S. at 598 ("[Topco] procures and distributes to the members more than 1,000 different food and related nonfood items, most of which are distributed under brand names owned by Topco.").
87. See supra text accompanying notes 55-63 (discussing the application of the rule of reason in *Broadcast Music and NCAA*).
88. One can also find in Justice Stevens's opinions a criterion for application of the "quick look" rule of reason. The two cases in which he arguably applied the "quick look," *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1985), and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), both mandated that the agreeing parties deal on its terms. In that case, the new venture is not (just) the creation of a complementary product, but an elimination of competition among sellers of the original product. Where the agreement at issue did not by
conduct appears to be the same under both § 1 and § 2. As described above, one can ask whether the conduct at issue lacks a legitimate purpose in a particular market and, if so, if the conduct provides gains in a second market. A contractual restraint that presents both of these conditions can be condemned under § 1. Under § 2, the presence of both of these conditions establishes the conduct element of a monopolization or attempted monopolization offense, but § 2 requires an additional showing of monopoly power or a threat of such power. The parallelism in the conduct inquiry reflects the fact that the nature of anticompetitive conduct is the same under both § 1 and § 2, but that the condemnation of unilateral behavior under § 2 is only appropriate when the seller has considerable market power.

Thus, the test described here is broadly consistent with current law. Moreover, it focuses conceptually on the same basic issue, market relationships, in deciding both whether the per se rule should apply and whether conduct is illegal under the rule of reason. One would expect both inquiries to turn on similar issues, since both are concerned with determining whether there has been harm to competition. But even if such similarity is present under current law, its presence is not evident because the two inquiries are not clearly defined. The market relationship test described here provides a more structured and transparent version of current law.

B. The Ancillary-Restraint Doctrine

The market-relationship test can also be viewed as a more structured version of the ancillary-restraint doctrine, set out in 1899 in United States v. Addyston Pipe & Steel Co. That doctrine makes a contractual provision permissible if "the [provision] in restraint of trade was ancillary to the main and lawful purpose of the contract." But Addyston Pipe & Steel did not make clear either what purposes are lawful or what exactly it means for a restraint to be ancillary to a lawful purpose, nor have subsequent decisions and commentary resolved these issues.

its terms eliminate competition in the original market, as in Broadcast Music, Justice Stevens applied the full rule of reason.
90. Cf. Thomas A. Piraino, Jr., Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 Vand. L. Rev. 1753, 1771 (1994) ("The federal courts should abandon this false dichotomy between the per se and rule of reason approaches and recognize that the objective of all Section 1 analysis is the same: to determine the substantive economic effect of defendants' conduct.").
91. 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).
92. Id. at 283.
In the horizontal joint-venture context in which the ancillary-restraint doctrine is typically applied,\(^9\) the market-relationship test’s first inquiry, whether the agreement creates a new product in a new market, is a means of answering whether the parties had a lawful purpose. This interpretation of that aspect of the doctrine is not novel, in that it is the same conclusion reached in *Broadcast Music*, as described above, though the Court there did not refer to the ancillary-restraint doctrine by name.

The greater uncertainty in the ancillary-restraint doctrine concerns what it means for a restraint to be “ancillary” to a procompetitive purpose like the creation of a new product. Generally speaking, one could say that a restraint is ancillary to a procompetitive joint venture if it advances the goals of that venture, rather than the (possibly anticompetitive) interests of the parties whose agreement created it.\(^9\) But that is exactly the question asked by the market-relationship test described here: Asking whether conduct makes economic sense looking just at the joint-venture market is equivalent to asking whether it advances the goals of the venture.

In this respect, the market-relationship test provides more specific guidance for the ancillary-restraint doctrine, by identifying the line between “ancillary” restraints and “naked” ones as the line between adjacent markets. Although the evaluation of whether a restraint is ancillary would not necessarily need to focus on the dividing line between markets, as the market-relationship test directs, it seems a logical focus, given antitrust’s concern about the acquisition and exercise of power in particular markets.

C. The Market-Power Screen

Some antitrust commentators have argued that market power be used as an initial screen in antitrust cases.\(^9\) The use of market power as a screen involves an evaluation of market power early in a case, and if the plaintiff fails to establish such power, the case is dismissed, without any inquiry into possible anticompetitive conduct.\(^9\) Despite the vigorous advocacy of such a screen by the Chicago School,\(^9\) it has never been widely adopted outside the Seventh Circuit, and it has been explicitly rejected by the Supreme Court, at least in its strongest form\(^9\).

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94. This approach appeared in fact to be the focus of the court in *Addyston Pipe & Steel*: “[I]f the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly.” 85 F. at 282.

95. This approach was set out most prominently in Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14-23 (1984).

96. See id. at 19-23.


Reliance on a market-power screen has a variety of problems. A primary one is that market power is not mentioned in Sherman Act § 1, and is not even clearly referred to in § 2. Both statutes focus on conduct, and though the Supreme Court requires a showing of power under § 2,\textsuperscript{99} it does not always require such a showing under § 1.\textsuperscript{100} More importantly, perhaps, the evaluation of power is a very difficult task for the fact finder.\textsuperscript{101} Even to the extent that the evidence is accurately assessed, the ultimate determination of the degree of power present is likely to require the fact finder (or judge on summary judgment) simply to select one market-power number, despite the fact that market power is a more complex phenomenon that cannot be accurately captured in that way. Furthermore, the task of showing power is an expensive one, generally requiring expert testimony,\textsuperscript{102} which gives litigation advantages to well-represented and well-funded defendants, so the use of power as a screen is likely to eliminate at least some legitimate cases.\textsuperscript{103}

The use of a market-power screen also has more fundamental economic shortcomings, which have been described by Steven Salop.\textsuperscript{104} He outlines a variety of analytical errors to which a reliance on market power can lead, and he points out that the screen can filter out cases in which anticompetitive harm may be present. Most of the errors that he discusses derive from using an improper baseline for the measurement of power, but some arise even where market power is measured properly. Salop demonstrates that the market-power screen, to be used appropriately, must be much more complex and nuanced than is commonly argued.\textsuperscript{105}

\textsuperscript{99} "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

\textsuperscript{100} See Patterson, supra note 98, at 431-33.

\textsuperscript{101} See Phillip Areeda, The Changing Contours of the Per Se Rule, 54 Antitrust L.J. 27, 28 (1985) ("We have certainly learned from merger, monopoly, and rule of reason cases that proving markets and power is difficult, complex, expensive, and time-consuming.").

\textsuperscript{102} See Richard S. Markovits, The American Antitrust Laws on the Centennial of the Sherman Act: A Critique of the Statutes Themselves, Their Interpretation, and Their Operationalization, 38 Buff. L. Rev. 673, 752 (1990) ("In my opinion, market-oriented approaches are inevitably cost-ineffective. Markets should never be defined because the process of defining markets consumes a substantial amount of resources and because market-definitions do nothing more than put the analyst in a position to calculate market-share and market-concentration (or Herfindahl-Hirschman Index ("HHI")) figures that have less predictive power than the non-aggregated competitive-position data on which the market-definitions were based.").

\textsuperscript{103} See Piraino, supra note 90, at 1761 ("[T]he risk/reward ratio is prohibitive for plaintiffs considering rule of reason cases. First of all, such cases are extremely expensive to pursue. In order to prove a defendant's market power, the plaintiff must introduce lengthy testimony from economists and extensive documentary evidence from other competitors.").


\textsuperscript{105} Professor Steven C. Salop advocates as an alternative that the evaluation of market power be carefully directed by the nature of the anticompetitive conduct alleged. Id. at 191. This approach would effectively result in adoption of a different version of the rule of
result, the danger of errors by the fact finder is increased, and even where no such errors are made, the application of the screen becomes more costly, lessening its value.

Of course, that a market-power screen has weaknesses does not mean that the approach described here would be an improvement. But in fact a market-relationship test as described here satisfies the main goal of the market-power screen without suffering from its weaknesses. The goal of the market-power screen is to eliminate implausible cases, which it is thought to do because a defendant without market power is less likely to be able to impose anticompetitive terms on consumers. But the market-relationship test, which asks whether a seller is acting in a market in a way that does not make economic sense in that market, also provides a plausibility screen. If a seller’s conduct cannot be explained by a legitimate business purpose in a market, it is reasonable to ask whether it is instead motivated by an illegitimate one.

Moreover, the market-relationship test as described here does not ask only whether a seller is acting without a legitimate business purpose in a market, but also asks whether its conduct results in an advantage in a second market. Thus, although commentators have argued that a profit-sacrifice test, like a market-power screen, can produce both false positives and false negatives, the test outlined here, which emphasizes the relationships between two markets, addresses those concerns at least to some extent. In that sense the market-relationship test is not a screen, after which an evaluation of anticompetitive effect is required, but constitutes the evaluation of anticompetitive effect.

It might be argued that a fact-finder could conclude incorrectly that a seller is acting in a way that does not make economic sense. That is, it might be argued that lay fact finders would perform poorly in evaluating whether conduct makes economic sense. But the inquiry into whether business conduct is profitable is surely more straightforward and accessible to lay fact finders than is the inquiry into market power, which will often require complex expert testimony by economists. That is true not least

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108. See supra note 106.

109. Judge, then Professor, Easterbrook has argued that "[e]ven when people know why business practices work—which is not very often—the explanation is hard to convey." Easterbrook, supra note 95, at 8.
because the market-relationship test asks what is actually happening in the market, rather than comparing current conditions with a counterfactual baseline.

CONCLUSION

It is generally recognized that the antitrust rules for the evaluation of conduct, whether under the rule of reason applicable to Sherman Act § 1 claims or under the similar standard of § 2, are exceedingly vague. Consequently, commentators have made occasional attempts, both general and specific, to provide structure to antitrust's conduct tests.

As described in this Article, one can read Justice Stevens's antitrust opinions as an effort of the same kind, though from a more authoritative position. From this perspective, his contribution to the Supreme Court's antitrust jurisprudence has been not only to write many of the Court's leading opinions—Aspen Skiing, Jefferson Parish, Maricopa, NCAA—but also to establish a unifying principle for a variety of doctrinal areas.

110. See, e.g., Piraino, supra note 90, at 1754 ("[T]he modern rule of reason has no substantive content.").
111. Among the more general approaches are Piraino, supra note 90, and Mark R. Patterson, The Sacrifice of Profits in Non-Price Predation, Antitrust, Fall 2003, at 37. Among the more specific are Gavil, supra note 106 and Salop, supra note 105.