
Populist and Economic v. Feudal: Approaches to Industry Self-Regulation in the United States and England

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English and American courts treat industry self-regulation very differently. American courts have been generally slow to acknowledge the legitimacy of self-regulation. Once they accept the need for some degree of self-regulation, however, the American courts, under the growing influence of the Chicago school, have become increasingly willing to uphold the regulation on the grounds of economic efficiency. The English courts have had less difficulty recognizing the legitimate role industry self-regulation plays. In determining the reasonableness of the regulatory scheme, however, the English courts adopt a protectionist approach which favours the *status quo* within the industry. These distinctions, the author argues, reflect fundamentally different attitudes towards both the concept of private rule and the role of the courts in the economic affairs of the country.

Le traitement réservé à l'auto-réglementation de l'industrie par les tribunaux diffère d'un pays à l'autre. Les cours américaines se sont généralement montrées réticentes à reconnaître la légitimité de l'auto-réglementation. Une fois cela accompli, par contre, les cours américaines, sous l'influence grandissante de l'école de Chicago, ont de plus en plus soutenu la validité de l'auto-réglementation pour des motifs d'ordre économique. Les tribunaux anglais ont plus rapidement reconnu le rôle légitime de l'auto-réglementation. Pour déterminer si les règlements étaient raisonnables, cependant, ils ont adopté une vision protectionniste qui joue en faveur du *status quo*. Ces distinctions, selon l'auteur, dénotent des attitudes fondamentalement différentes face à la notion de règle privée et aussi face au rôle des tribunaux dans les questions économiques.

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"Such words as [rights] are a constant solicitation to fallacy." *Jackman v. Rosenbaum Co.*, 260 U.S. 22 at 31 (1922) *per* Holmes, J.

"[P]ublic interests within [the] doctrine [of restraint of trade] are not concerned with ... considerations [of economic policy throughout an industry]. The doctrine grew in earlier years in comparatively simple economic and social conditions. They raised no such abstruse economic considerations ..." *Texaco Ltd. v. Mulbery Filling Station Ltd.*, [1972] 1 W.L.R. 814 at 827, [1972] 1 All E.R. 513, (1971) 116 S.J. 119 (Ch.D) *per* Ungood-Thomas, J.

I. Introduction

This article compares the response of courts in the United States and England to actions by business groups, undertaken without statutory authority, that disadvantage other businesses, especially business rivals. For convenience, such extra-governmental activities are referred to as industry self-regulation. More specifically, the article leaves aside informal self-regulation such as that routinely practiced in the English banking and se-

curities industries, and focuses instead on formal self-regulation, such as a jockey club's refusal to licence a horse trainer¹ or a fashion guild's refusal to sell to designated retailers.²

The activities under focus here — concerted action by businesses that puts another business, often a rival, at a significant competitive disadvantage — fall into a conceptual category that U.S. lawyers will recognize, but that others may find most peculiar: a group boycott. Following American group boycott analysis, these activities may constitute an unreasonable restraint of trade in violation of s. 1 of the *Sherman Antitrust Act*, although other elements, such as an effect on interstate commerce, must also be present.³ This article deals with a sub-category of group boycotts, a highly general category, by ignoring purely vertical dealings between franchisers and franchisees, manufacturers and dealers, and sellers and buyers, and by avoiding the well-worn subject of vertical restraints. Instead, it deals with group activity that is at least partly horizontal in that it directly affects a rival of at least one of the group members who, in turn, often compete amongst themselves. Examples of such activities include attempts by standard-setting and product-testing organizations to certify products, by sporting associations to regulate their sport, by trade associations to discipline non-conforming members, and by businesses who have jointly formed important support facilities, like a trade fair or a real estate multiple listing service, to control access to those facilities.⁴ Perhaps because U.S. courts today, under the growing influence of the Chicago School of Economics, generally tolerate vertical restraints, cases challenging horizontal group activities constitute an increasing share of the U.S. antitrust docket.

Those injured by group activities such as these operate at a competitive disadvantage which can range from mere disapproval by partisan rivals whose judgment customers discount, to denial of access to essential facilities, to *de facto* exclusion from a profession or industry. Injury to the private

¹*Nagle v. Feilden*, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.) [hereinafter *Nagle*].

²*Fashion "Originators" Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457 (1941) [hereinafter *FOGA*].

³*Silver v. New York Stock Exchange*, 337 U.S. 341 (1963) at 347 [hereinafter *Silver*]. A collective action that puts a rival at a significant competitive disadvantage constitutes a *per se* violation of s. 1 of the *Sherman Antitrust Act*, c. 647, 26 Stat. 209 (1890) as amended by 15 U.S.C. s. 1 unless the action occurs in the context of government regulations. But see *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985) [hereinafter *Pacific Stationery*]. This decision limits *Silver* by requiring that the defendants possess market power or unique access to a business element necessary for effective competition.

⁴For a more comprehensive definition of the industry self-regulation discussed here, see R. Heidt, "Industry Self-Regulation and the Useless Concept 'Group Boycott'" (1986) 39 Vand. L. Rev. 1507 at 1507-15 [hereinafter *Heidt*].

firm may also threaten the interests of the consuming public by retarding the entry of new firms into the industry, thus reducing both the diversity of products and services offered the public and the intensity of the rivalry those in the group face. On the other hand, provided the extra-governmental group does not fix prices or destroy rivalry between its members,⁵ its efforts can often be conceptualized in economic terms as an efficiency enhancing integration. For instance, certification efforts may reduce consumers' search costs by grading and ranking sellers and identifying non-conforming sellers and products. Similarly, standardization efforts may widen the market of a conforming seller by assuring a great many purchasers that standard products will suit their specifications. Denying a rival real estate agent access to a multiple listing service may improve efficiency by maintaining the ideal number of agents for the smooth operation of the service, by eliminating agents whose poor reputation would lower the economic value of the service, and by preserving optimal incentives for those who undertook the risks and efforts of creating the service in the first place.⁶

Faced then with group behaviour that, like normal rivalry, may enhance efficiency even as it injures rivals, what suits may an injured rival bring and how will the courts react?

A comparison of the judicial reaction in the two countries is complicated by at least two factors. The first is the large number of more or less equally promising theories upon which an injured business (hereinafter the plaintiff) can base its legal arguments in England. In the U.S., in contrast,

⁵I use the words "output" and "rivalry" rather than "competition" because the word "competition" is so often understood to refer both to the output that results from rivalry between firms (in contrast to the reduced output that results from a price-fixing cartel, a monopoly, a successfully coordinated oligopoly, or an industry protected by restrictive occupational licensing) and to the process of rivalry (the process by which more efficient firms take business from less efficient firms). This article does not emphasize price-fixing cases even though price-fixing can certainly be seen to regulate industry, in the sense of the everyday usage of that term. But unlike most self-regulation, price-fixing helps rather than hurts outside rivals by creating a price umbrella under which they can sell. Of course, a price-fixing case can turn into a self-regulation case when and if the colluding companies exclude or handicap a rival in order to keep the rival from disrupting their price-fixing agreement.

Others have compared the U.S. and English approaches to price-fixing. See R. Whish, *Competition Law* (London: Butterworths, 1985). Although the English, like the Americans, formally condemn price-fixing, the English have not removed procedural obstacles that disable effective enforcement of its formal policy. Moreover, the English do not devote significant resources to ferret out covert price-fixing, and do not impose significant penalties. In effect, the English accept covert price-fixing as standard business practice. See R. Whish, "The Impact of EEC Competition Law in the U.K.", in M.P. Furmston, R. Kerridge & B.E. Sufin, eds., *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (The Hague: Martinus Nijhoff, 1983) at 117-18.

⁶For other benefits and dangers of industry self-regulation, see Heidt, *supra*, note 4 at 1551-82.

the plaintiff is almost sure to proceed under s. 1 of the *Sherman Antitrust Act* and its prohibition of concerted behaviour in unreasonable restraint of trade.⁷ The advantages of using this federal antitrust law rather than state common law include access to the federal courts and, should the plaintiff prevail, treble damages plus his attorney's fees.⁸ But in England no legal theory offers such decisive practical advantages; no legal theory, for example, offers more than single damages. Thus injured plaintiffs or, in an appropriate case, the Office of Fair Trading may attack industry self-regulation in England through a network of possible legal theories including: (1) acting in unreasonable restraint of trade;⁹ (2) willfully injuring another without justification;¹⁰ (3) interfering with the business of another by unlawful means;¹¹ (4) interfering with another's contract;¹² (5) injurious falsehood;¹³ (6) intimidation;¹⁴ (7) interfering with another's right to work;¹⁵ (8) acting outside

⁷*Supra*, note 3. This Act condemns every contract combination or conspiracy in restraint of trade.

⁸In the U.S., the prevailing party does not normally recover his attorney fees. S. 4 of the *Sherman Act*, *supra*, note 3, expressly provides, however, that prevailing plaintiffs shall recover these fees.

⁹*Eastham v. Newcastle United Football Club Ltd*, [1964] Ch. 413, [1963] 3 W.L.R. 574, [1963] 3 All E.R. 139; *Blackler v. New Zealand Rugby Football League, Inc.*, [1968] N.Z.L.R. 547.

¹⁰*Stratford J.T. & Son Ltd v. Lindley*, [1965] A.C. 307, [1964] W.L.R. 541, [1964] 3 All E.R. 102 (H.L.); *Lumley v. Gye* [1853] 118 All E.R. 749, 2 E & B 216, 22 L.J.Q.B. 463 (Q.B.); *Acrow (Automation) Ltd v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 at 1682, [1971] 3 All E.R. 1175, S. J. 642 (C.A.). This sweeping tort is not universally accepted. See *Allen v. Flood*, [1898] A.C. 1 at 138, [1895-9] All E.R. 52, 67 L.J.Q.B. 119 (H.L.) which argues against a general tort for unjustifiably causing economic loss.

¹¹*Emms v. Brad Lovett Ltd*, [1973] 1 N.Z.L.R. 282; *Torquay Hotel Co. v. Cousins*, [1969] 2 Ch. 106 at 139-40, [1969] 2 W.L.R. 289, [1969] 1 All E.R. 522 (C.A.); *Allen v. Flood*, *supra*, note 10 at 138. But see, *Crofter Hand-Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435 at 442, [1942] 1 All E.R. 142, 111 L.J.P.C. 17 (H.L.). Unlike the action for unreasonable restraint of trade, this action does not require privity of contract. Thus an injured third party, like a consumer, can sue. Nor is privity required for the actions of interfering with another's contract or intimidation. See W.L.H. Rogers, ed., *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 1984), c. 18; W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 1981) at 34-37.

¹²*Lumley v. Gye*, *supra*, note 10; *Southern Foundries (1926) Ltd and Federated Foundries Ltd v. Shirlaw*, [1940] A.C. 701, [1940] 2 All E.R. 445, 109 L.J.K.B. 461 (H.L.); *Temperton v. Russell*, [1839] 1 Q.B. 715, [1891-4] All E.R. Rep. 724, 62 L.J.Q.B. 412 (C.A.); *Statnigros v. Storhang & Partners*, [1953] C.L.Y. 3556.

¹³*Hall-Gibbs Mercantile Agency Ltd v. Dun* (1910), 12 C.L.R. 84, [1910] S.R. Qd. 333 (Aust. H.C.); *Sungravure Pty Ltd v. Middle East Airlines Airliban SAL* (1975), 49 A.L.J.R. 117 at 125; *Debeers Abrasive Products Ltd v. International General Electric Co. of New York*, [1975] 1 W.L.R. 972 at 978, [1975] 2 All E.R. 599, 119 S.J. 439 (Ch.); *Halsbury's Laws of England*, vol. 45, 4th ed. (London: Butterworths, 1985) para., 1531.

¹⁴*Rookes v. Barnard*, [1964] A.C. 1129, [1964] 2 W.L.R. 269, 108 S.J. 93 (H.L.); *Midland Cold Storage Ltd v. Turner*, [1972] I.C.R. 230, 116 S.J. 783, [1972] 3 All E.R. 773 (N.I.R.C.). But see, *Morgan v. Fry*, [1968] 2 Q.B. 710, [1968] 3 W.L.R. 506, (1968) 112 S.J. 671 (C.A.);

the defendant group's charter;¹⁶ (9) acting contrary to natural justice;¹⁷ (10) breaching the implied contractual obligations owed by an association to treat each member in accordance with the association's rules;¹⁸ or (11) entering a contract which was registrable and unlawful under the *Restrictive Trade Practices Act*.¹⁹ This last claim would typically be brought by the Office of Fair Trading rather than by an injured individual.²⁰ Although the *Restrictive Trade Practices Act* gives a private claim to an individual injured by an unregistered but registrable agreement, no private action for failure to register has yet been brought.²¹ An injured business in the United Kingdom can also sue in the U.K. courts for a violation of the *Treaty of Rome*,²²

Hadmor Productions Ltd v. Hamilton (1981), [1983] 1 A.C. 191, [1982] 2 W.L.R. 322, [1982] 1 All E.R. 1042 (H.L.).

¹⁶*Edwards v. Society of Graphical and Allied Trades* (1970), [1971] Ch. 354 at 376, 377, 383, [1970] 3 W.L.R. 713, 114 S.J. 618 (C.A.).

¹⁶*Dickson v. Pharmaceutical Society of Great Britain*, [1967] 2 W.L.R. 718, [1967] 2 All E.R. 558, 111 S.J. 116 (C.A.), aff'd [1970] A.C. 403, [1968] 3 W.L.R. 286, [1968] 2 All E.R. 686 (H.L.).

¹⁷*Cinnamond v. British Airports Authority*, [1980] 1 W.L.R. 582, [1980] 2 All E.R. 368, 124 S.J. 221 (C.A.); *Posluns v. Toronto Stock Exchange* (1964), [1965] 1 O.R. 428, 46 D.L.R. (2d) 210 (O.H.C.).

¹⁸*Davis v. Carew-Pole*, [1956] 1 W.L.R. 833 at 842, [1956] 2 All E.R. 524; *Abbott v. Sullivan*, [1952] 1 K.B. 195, [1952] 1 All E.R. 226, [1952] T.L.R. 133 (C.A.); *Halsbury's Laws of England*, vol. 47, 4th ed. (London: Butterworths, 1984) paras 116, 251. A court may also deem the defendant association's actions *ultra vires* or outside the association's jurisdiction; e.g. *Abbott v. Sullivan*, *ibid*. Although recognized as distinct doctrines, the doctrine condemning the association's breach of the implied contractual obligations owed to its members may overlap with the doctrine condemning an association from acting outside its group charter; e.g. *Dickson v. Pharmaceutical Society of Great Britain*, *supra*, note 16.

¹⁹*Re Newspaper Proprietor's Agreement* (1963), [1964] 1 W.L.R. 31, [1964] 1 All E.R. 55, 108 S.J. 13 (H.L.); *Daily Mirror Newspapers Ltd v. Gardner*, [1968] 2 Q.B. 762 at 768, [1968] 2 W.L.R. 1239, [1968] 2 All E.R. 163 (C.A.); *Brekkes Ltd v. Cattell* (1970), [1972] Ch. 105, [1971] 2 W.L.R. 647, [1971] 1 All E.R. 1031; *Restrictive Trade Practices Act* (U.K.), 1976 c. 34, ss 1, 9 & 10.

²⁰It is also possible that the Director General of Fair Trading and the Monopoly Commission will attack instances of industry self-regulation under the *Competition Act 1980* (U.K.), 1980, c. 21, s. 2(1). This possibility seems remote, however. While, in theory, industry self-regulation may fall within the *Competition Act's* condemnation of actions "restricting, distorting, or preventing competition," in practice the Act has been employed elsewhere. Whish, *Competition Law*, *supra*, note 5 at 84-89.

²¹R. Merkins & K. Williams, *Competition Law: Antitrust Policy in the U.K. and the EEC* (London: Sweet & Maxwell, 1984) at 444; Whish, *Competition Law*, *supra*, note 5 at 150-51.

²²*Garden Cottage Foods Ltd v. Milk Marketing Board* (1983), [1984] 1 A.C. 130, [1983] 3 W.L.R. 143, [1983] 2 All E.R. 770. This case holds that an injured private plaintiff may seek equitable relief under the *Treaty of Rome*; it is not clear whether damages may be sought. See also *Bourgoin S.A. v. Ministry of Agriculture, Fisheries and Food* (1985), [1986] 1 Q.B. 716, [1985] 3 W.L.R. 1027, [1985] 3 All E.R. 585. It is unclear whether violation of articles 85 & 86 of the *Treaty of Rome*, 1957 gives rise to an action for damages. See, *Treaty Establishing the European Economic Community and Connected Documents*, 25 March 1957, Publishing Service of the European Economic Communities, Brussels 1962 for an English translation of the *Treaty of Rome*, 1957.

but this article does not discuss the European Economic Community's approach to self-regulation.

The comparison is complicated further because U.S. antitrust law is currently caught in the middle of an unfinished revolution, and I'm not sure whether to use for this comparison the populist law before the revolution — which was hostile to any private regulation — or the liberal, economic law after it. Put briefly, the Chicago School of antitrust analysis has revolutionized U.S. antitrust law since 1978. It has introduced a simplified and unified economic approach that focuses solely on maximizing economic efficiency by balancing allocative and productive efficiency. The Chicago School approach tolerates almost all industry self-regulation unless it serves to enforce an agreement to fix prices or to fix other terms or conditions of sale or purchase.²³ In effect the Chicago School would condemn only collusion — agreements between rivals to limit rivalry between themselves — and would tolerate exclusion — concerted action injuring non-agreeing rivals. But unreconstructed pockets of the populist American antitrust law remain, a fortuity that may be due only to the inevitable delay before a case dealing with that part of the law presents itself.

This unfinished revolution has left current antitrust law unsettled, unpredictable, and difficult to state. The Supreme Court's most recent statement, *Pacific Stationery*, again embraced the Chicago School's view that efficiency alone drives the *Sherman Act*, and that the mere injury to a rival business does not implicate the Act as long as sufficient rivals remain to assure consumers a competitive output.²⁴ But the only two rulings that the Court was asked to make involved very modest reforms to the edifice of populist law that had governed. The plaintiff in *Pacific Stationery* was a retail stationery store that had been expelled from a joint venture of rivals whose purpose was to buy stationery supplies in volume to obtain discounts. The Supreme Court granted the two modest reforms to the existing law requested by the defendants; namely, that the joint venture must be shown to possess market power for a violation to be found and that the mere failure of the defendants to grant the plaintiff a hearing does not warrant the venture's condemnation *per se*. Without any further change to existing law, the case was then remanded for evaluation under the Rule of Reason. This case by case approach promises to keep the Chicago School's revolution unfinished for some years, and bars a confident statement of the steps U.S. courts are to follow in deciding these cases.

²³R.A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: U. of Chicago Press, 1976) at 210. *National Soc'y of Prof'l Eng'rs v. United States* 435 U.S. 679 (1978) [hereinafter *NSPE*]; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

²⁴*Supra*, note 3.

Despite these complications, some comparisons of the two countries' approaches may yet be advanced. For some time, U.S. courts initially approached industry self-regulation with notable hostility, a hostility based on populist rather than economic grounds. The hostility sprang primarily from what I call the jealousy impulse of the U.S. courts — their disapproval of private firms usurping regulatory power that the courts insisted on reserving for the government. This traditional hostility still manifests itself in several aspects of the U.S. approach. It partly explains the continued practice of requiring the defendants, once a plaintiff has shown that their concerted action has put him at a significant competitive disadvantage, to satisfy the court that *any* self-regulation is justified. The defendant usually tries to discharge this burden on the ground that the nature of the particular industry requires self-regulation. Failure to meet this burden probably means immediate condemnation as a "group boycott". Immediate condemnation also results, according to some lower courts, where the defendants fail to show that their action against the plaintiff accomplishes "an end consistent with the policy justifying self-regulation, is reasonably related to that end, and is no more extensive than necessary."²⁵

Once the defendants satisfy this burden — and thereby avoid condemnation *per se* — the courts will adopt the Rule of Reason approach. Since 1978, that approach amounts to an economic analysis which purports to balance the loss to allocative efficiency from the defendants' action against the possible gains to productive efficiency, and to uphold or condemn the defendant's action based on the net result for efficiency.²⁶

The English courts do not share their American counterparts' hostility towards the concept of industry self-regulation. To the English courts, an industry self-regulation case is just another type of administrative law case, to be governed by the same principles that govern judicial review of administrative action generally. These principles attempt to define the rights and obligations of individuals and of individual firms in relation to the groups whose actions affect them. They seek to protect what the courts see

²⁵*Denver Rockets v. All-Pro Management Inc.*, 325 F. Supp. 1049 (D.C. Cal. 1971).

²⁶*NSPE*, *supra*, note 23. The courts should merely balance anti-competitive aspects of a defendant's action against its pro-competitive aspects and should disregard other factors, such as public safety, that might support actions that carry a net anti-competitive effect. To be sure, an attorney could strive to distinguish *NSPE* on the ground that it involved collusion while most industry self-regulation cases involve exclusion. By collusion, I mean agreements among rivals to refrain from competition on some dimensions of trade or purchase, such as the price or the nature of the product. Exclusion, by contrast, involves concerted conduct to exclude or handicap a rival. Exclusion cases are governed, so the argument might go, not by *NSPE* but by *Pacific Stationery*, *supra*, note 3. I believe, however, that *Pacific Stationery*, properly read, calls for the same economic approach explicitly demanded in *NSPE*. The discussion in the text assumes that this reading will prevail.

as the legitimate expectations and rights of particular businesses against unnecessary or abusive treatment at the hands of any group, public or private. Thus the English administrative law cares much less about whether the actions of an extra-governmental group reduce industry output or otherwise impair economic efficiency, than it does about the fairness of those actions in relation to the rival businesses most immediately affected. These inquiries, in the hands of the English courts, give a distinct advantage to marginal groups who can make a plausible claim that some "legitimate interest" of theirs, such as their wish to survive, justifies their actions, and to the marginal victim who can realistically claim that the self-regulation threatens its "legitimate interest" in its continued existence. In contrast, the U.S. courts, once they overcome their threshold hostility towards any industry self-regulation, seek the best advantage for consumers and tolerate the destruction of particular firms or groups through industry self-regulation, fair or not, as part of the competitive maelstrom.

Thus, while the English law does not show the presumptive hostility towards industry self-regulation of the populist U.S. antitrust law, neither does it show the tolerance of industry self-regulation that follows from the commitment to economic efficiency of the post-1978 U.S. antitrust law. Rather, the English courts are quick to approve attempts at industry self-regulation, but then review the actual enforcement of self-regulation by asking such feudal²⁷ or protectionist questions as whether the self-regulation

²⁷"Feudal" here is used in contrast with "liberal" to characterize two contrasting regimes for allocating authority. As opposed to the "liberal" regime, the "feudal" regime features a relatively decentralized allocation of authority between the state and private associations, especially guilds; a relatively greater role for the private administration of justice and a larger sphere of private jurisdiction; an unwillingness to determine a person's status and entitlement solely through the play of market forces; a judicial preference in favour of preserving existing institutions threatened by market forces; and the development of an inclusive web of ties of obedience, protection and maintenance which bind together persons of unequal status. "Feudal" here does not necessarily refer to a system characterized by homage, feudal incidents, honors and feudal courts, knightly service connected with fiefs, the widespread use of service tenements instead of a salary, or the use of military tenures for military purposes. Plainly, only my highly vestigial version of "feudal", a version far removed from the core concept historians use, could plausibly characterize a tendency in the judicial approach of the United Kingdom of 1988.

As used in this descriptive article, "feudal" is not a pejorative. In particular it does not connote the arbitrary exercise of power. On the contrary, this article contends that the English approach fixes more attention on checking the arbitrary use of private power than does the economic approach of the Chicago School, for the latter opposes any judicial interference with powerful private associations except when overall economic efficiency is threatened.

Admittedly, such generalized concepts as "feudal" and "liberal" may not serve the historian's goal of understanding the workings of medieval and modern society. For a discussion of feudalism see E. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe" (1974) 79 *American Historical Review* 1063. As the historian Michael Postan has written, such generalized concepts may, nevertheless, "help us to distinguish one historical situation from another, and to align similar situations in different countries and even in different

“unfairly” or “unnecessarily” threatens the status or “legitimate interests” of the victim or, on the other hand, protects the status and “legitimate interest” of the regulators.

The response of courts when industry self-regulation is challenged is worthy of study as a branch of trade regulation law in its own right. Beyond that, I suggest that these sharply different approaches to industry self-regulation reflect fundamental differences in judicial attitudes about the legitimacy of private rule, the proper role of the courts in the economic affairs of the country, the extent to which trade regulation law ought to be devoted to economic efficiency, and the extent to which courts should consider the utilitarian consequences of their rules or, alternatively, limit themselves to adjusting the rights and obligations of the immediate parties towards one another. In Part II, I will compare in greater detail the initial approaches of the English and U.S. Courts upon encountering examples of self-regulation. Part III will analyze, from both a comparative and economic perspective, the approaches adopted by the courts in determining the legal status of the self-regulation that survives initial scrutiny.

II. The Initial Approach of Courts Upon Encountering an Instance of Industry Self-Regulation

A. *The American Approach*

One of the unreconstructed pockets of the populist antitrust law in the U.S. concerns the courts' initial approach towards extra-governmental regulation. This approach, with its presumptive hostility towards any extra-governmental rule, is articulated most clearly in Justice Hugo Black's opinions for the Supreme Court between 1939 and 1971. In *Fashion "Originators" Guild of Am. v. Fed. Trade Comm'n*,²⁸ for example, Justice Black, writing for a unanimous court, condemned a guild of fashion designers that was attempting to stop style piracy by refusing to deal with both the style pirates and with the manufacturers and retailers who dealt with them. Justice Black was willing to assume that style piracy was tortious and that the sole purpose of the guild's action was to control this tortious behaviour. However laudable its goal, he considered the guild's attempt at industry self-regulation fundamentally illegitimate:

periods." M.M. Postan, foreword to M.L.B. Bloch, *Feudal Society*, xiv (Chicago: U. of Chicago Press, 1961).

²⁸*FOGA*, *supra*, note 2.

[It] is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus “trenches upon the power of the national legislature and violates the statute.”²⁹

This concern that a private group was usurping the role of the government has doomed other attempts at self-regulation. In *American Medical Ass’n v. United States*,³⁰ the AMA’s effort to regulate pre-paid group health plans triggered treble damage liability on this ground:

Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the *Sherman Act*.

Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. ... Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands. Although extreme situations may seem sometimes to have required vigilante action ... and although persons who reason superficially concerning such matters may find justification for extra-legal action to secure what seems to them desirable ends, this is not the American way of life.³¹

Similarly, in *Federal Trade Comm’n v. Wallace*, a trade association of coal retailers was condemned for taking concerted action against coal dealers who sold at short weight, or who misrepresented their coal. Again the court deemed any attempt at industry self-regulation illegitimate in principle:

It is not a prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic and restrictive measures their conceptions thus formed.³²

In effect, the courts limited the methods by which business groups could legitimately control the behaviour of a rival to suing under existing law and to lobbying the legislature for new and more favourable laws.

I have called the populist notion that only the legislature and the courts can attempt to control the business conduct of others the “jealousy” impulse of the U.S. antitrust law.³³ It echoes an underlying theme of Roman law whose concept of *merum imperium* centered all rule-making, save for that

²⁹*Ibid.* at 465.

³⁰130 F.2d 233 (D.C. Cir. 1942) aff’d 317 U.S. 519 (1943) [hereinafter *AMA*].

³¹*Ibid.* at 249.

³²75 F.2d 733 (8th Cir. 1935) at 737.

³³Heidt, *supra*, note 4 at 1587.

exercised by the *paterfamilias*, in the government.³⁴ But while institutions intermediate between the family and the government, such as trade associations, certification boards, joint ventures, unions, universities and even single corporations, may have played little role in the Roman world, they abound today. Private groups routinely judge rivals and act in ways that put rivals at a competitive disadvantage. Implicit in any joint activity from a merger, partnership or joint venture to a less complete integration like a trade association, standard-setting body or multiple listing service is a judgment about rivals which may put some, especially those not included in the organization, at a competitive disadvantage.³⁵ Moreover, rivals often make the best judges of each other, thanks to their expertise and interest, and to the efficiency with which they can reach and implement their judgments. Thus the "jealousy" impulse seems at war with modern industrial society.

Fortunately, lower courts have often resisted the "jealousy" impulse and the presumption against self-regulation in ways that are a tribute to judicial ingenuity.³⁶ Except for the esteem accorded Justice Black and the belated judicial awareness of the conflict between the "jealousy" impulse and the Chicago School's antitrust analysis, I would see no chance of this impulse surviving the Chicago School's revolution. All the same, it may continue to fall between the cracks of that revolution and to affect U.S. antitrust law for many years.

B. *The English Approach*

In England there is no similar presumption against industry self-regulation. The key word here is presumption. While the English courts may ultimately review the defendants' action to determine whether it conflicts with the right to work, offends natural justice or invades another of the plaintiff's legally protected interests, they acknowledge a legitimate role in society for such "domestic" or "semi-public tribunals". They respond to such tribunals with deference, tolerance and gratitude for the important and necessary work these organizations perform. They do not insist that only

³⁴M.P. Gilmore, *Argument from Roman Law in Political Thought, 1200-1600* (New York: Russell & Russell, 1941) at 37-44.

³⁵Heidt, *supra*, note 4 at 1531.

³⁶*Gunter Harz Sports Inc. v. United States Tennis Ass'n Inc.*, 665 F.2d 222 (8th Cir. 1981); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966) cert. denied 385 U.S. 846 (1966); *Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975) cert. denied 423 U.S. 1053 (1976); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Bartholomew v. Virginia Chiropractors Ass'n*, 612 F.2d 812 (4th Cir. 1979) cert. denied 446 U.S. 938 (1980); *E.A. McQuade Tours Inc. v. Consolidated Air Tour Manual Comm'n* 467 F.2d 178 (5th Cir. 1972) cert. denied 409 U.S. 1109 (1973); *Brown v. Indianapolis Board of Realtors*, 1977-1 Trade Cas. s. 61, 435 (S.D. Ind.).

public bodies may attempt to licence or regulate. In general, they distinguish less sharply, and much less passionately, between the functions considered appropriate for public and private bodies. Whether a regulatory body acts under statutory authority, on the one hand, or merely under industry custom, on the other, matters fundamentally in the U.S.. but hardly matters at all in England.

Indeed perhaps an easier way to compare the different approaches is to note the effect in the two countries of legislation authorizing the private group to regulate. The existence of legislation giving a private group authority to regulate changes the courts' approach drastically in the U.S.. Neither antitrust law,³⁷ nor the common law, can be used to challenge such authorized regulation. American courts will only review that regulation to the extent they review any governmental action. In other words, the injured rival must look to U.S. administrative law, *e.g.*, "the regulator misinterpreted the statute" or U.S. constitutional law, *e.g.*, "the statute as implemented by the regulator violates the equal protection clause."

In contrast, when the English government authorizes regulation, either through a statute or the granting of a royal charter specifying the authority, many of the legal theories on which a plaintiff may challenge the regulation remain available. For example, the plaintiff can still prevail by establishing that the governmentally authorized regulation infringes his right to work, offends natural justice, or operates as an unreasonable restraint of trade.³⁸

³⁷*Parker v. Brown*, 317 U.S. 341 (1943). A state law may displace competition with some other economic regimen, thereby exempting those who comply with the state law from antitrust scrutiny.

³⁸In deciding whether defendants have violated natural justice, English courts treat public and private defendants the same. U.S. courts, in contrast, treat them differently in deciding the similar question of whether defendants have violated due process. The following cases illustrate the English treatment first of public and then of private defendants. See *Ridge v. Baldwin* (1963), [1964] A.C. 40, [1963] 2 W.L.R. 935, [1963] 2 All E.R. 66 (H.L.), where it was held that the dismissal of a public servant violated natural justice because the servant received no notice of the charges against him and no hearing was held. *Metropolitan Properties Co. (F.G.C.) v. Lannon* (1968), [1969] 1 Q.B. 577, [1968] 3 W.L.R. 694, [1968] 3 All E.R. 304 (C.A.) held that natural justice is violated when a member of a Rent Assessment Committee passes judgment on an appeal in which he has a conflict of interest. *Abouna v. Foothills Provincial General Hospital Board*, (1978), 83 D.L.R. (3d) 333; [1978] 2 W.W.R. 130, reversing in part [1977] 5 W.W.R. 75, 77 D.L.R. (3d) 220 (Alta. C.A.), held that a public corporation acting in a quasi-judicial manner has violated the rules of natural justice where a surgeon's appointment to a hospital was revoked by the hospital board without the surgeon having an opportunity to be heard. Cases involving private defendants include: *Faramus v. Film Artistes' Ass'n*, [1963] 2 Q.B. 527, [1963] 2 W.L.R. 504, [1963] 1 All E.R. 636 (A.C.), *aff'd*. [1964] A.C. 925, [1964] 2 W.L.R. 126, [1964] 1 All E.R. 25 (H.L.). *R. v. Gaming Board for Great Britain*, [1970] 2 Q.B. 417, [1970] 2 W.L.R. 1009, 114 S.J. 266 (C.A.) held that the natural justice principle of right to a fair hearing applies to private licensing boards. But see, *Enderby Town Football Club Ltd v. Football Ass'n* (1970), [1971] Ch. 591, [1970] 3 W.L.R. 1021, [1971] 1 All E.R. 215 (C.A.)

The tendency of the English courts to blur the public/private distinction, to apply administrative law principles to private groups, and generally to emphasize administrative law concerns highlights their sharply different attitude to self-regulation.

A few cases from English law illustrate this difference. In the famous case *Nagle v. Feilden*,³⁹ a woman sued the stewards of the Jockey Club because they refused to licence her to train race horses on the sole ground that she was a woman. Only horses trained by licenced trainers could participate in races sanctioned by the Jockey Club. And because the Jockey Club held a monopoly over races on the flat in Great Britain, their races were, for all practical purposes, the only races. In exercising its power, the Jockey Club promulgated and enforced the Rules of Racing. Those who did not comply faced a fine or exclusion from the sport. Despite the Jockey Club's freely confessed power to licence trainers and jockeys — a function a U.S. court would consider governmental in character — it operated without statutory authority and without any other authority from the government. Indeed, its only source of authority arose from industry custom.

The English court nevertheless accepted the Jockey Club's extra-governmental regulation of the sport with equanimity, just as it had in previous litigation involving the Club.⁴⁰ Free from any "jealousy" impulse, or at least from any doctrine expressing such an impulse, it did not invoke any presumption against the Jockey Club. While Justice Black decried the fashion guild for "prescribing rules"⁴¹ to regulate commerce, the English court applauded the Jockey Club's promulgation of rules. As the court said, those rules tended to limit the Club's discretion and reduce the chance of caprice, two priorities of administrative law. The contrast should not be overstated. In the end the British court, primarily because of the possible abridgement of the plaintiff's right to work, reached the same outcome an American court probably would have and reversed the dismissal of the

which suggested greater deference would be granted to the regulator when regulation is authorized. See also *Hughes v. Architects' Registration Council of the United Kingdom*, [1957] 2 Q.B. 550 at 557-58, [1957] 3 W.L.R. 119, [1957] 2 All E.R. (D.C.); *Buckoke v. Greater London Council*, [1971] 1 Ch. 655 at 675-77, [1971] 2 W.L.R. 760, [1971] 2 All E.R. 254 (C.A.).

To avoid confusion, this article does not discuss the judicial review in the U.K. of acts by authorized regulators, such as the public tribunals governed by the *Tribunals and Inquiries Act, 1958* (U.K.), 6 & 7 Eliz. 2, c. 66. Commentators on administrative law have dealt at length with the judicial control of such authorized regulation. See B. Schwartz & H.W.R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: Clarendon Press, 1972) at 148.

³⁹*Nagle, supra*, note 1.

⁴⁰E.g., *Russell v. Duke of Norfolk*, (1948) 65 T.L.R. 225, [1949] 1 All E.R. 109, 93 S.J. 132 (C.A.).

⁴¹*FOGA, supra*, note 2 at 465.

plaintiff's suit. But what is being compared here are the courts' initial reactions. Because the British court did not start with any presumption against the Jockey Club's extrajudicial rule, the plaintiff would at least need to shoulder the burden of producing evidence that the reasoning behind the Jockey Club's decision, or the procedures through which they reached that decision, gave her a cause of action. In the U.S., the populist hostility to extra-governmental rule, reflected in the antitrust decisions of Justice Black, shifts this burden to the defendants and, in many cases, goes considerably further.⁴²

Another sporting association case further illustrates the deference shown extra-governmental rule in England. In *McInnes v. Onslow Fane*, the plaintiff sued the British Boxing Board of Control for its refusal to grant him a licence to manage boxers.⁴³ Despite its name, the British Boxing Board of Control was an unincorporated body with no statutory or other governmental authority. It had long controlled professional boxing in England by enforcing an elaborate network of rules and by licensing boxers, managers, promoters, referees, and masters of ceremonies. A licence was essential for those who wished to participate in any of these occupations. The plaintiff in *McInnes* sued on the narrow procedural ground that the Board denied his application without giving him any reasons. The Board's action therefore offended natural justice.

In contrast to the U.S. courts' strident denunciations of extra-governmental rule, the British court began its decision with a straightforward recognition of the role that private groups play:

There are many bodies that, though not established or operating under the authority of statute, exercise control, often on a national scale, over many activities that are important to many people, both in providing a means of livelihood and for other reasons. Sometimes that control is exercised, as by the board, by means of a system of granting or refusing licenses, and sometimes it is operated by means of accepting or rejecting applications for membership.⁴⁴

As in *Nagle*, the British court ultimately reviewed the Board's denial of the plaintiff's application for a licence to see if that denial implicated the right to work and was therefore subject to minimal requirements of natural justice

⁴²*E.g.*, *Denver Rockets v. All-Pro Management Inc.*, *supra*, note 25 at 1064-65. In this case it was held that a professional basketball association is required to show a legislative mandate or justifying policy for any self-regulation before the merits of the self-regulation will be examined; even then, the basketball association, in order to avoid *per se* condemnation of its industry self-regulation, must show that the regulation: 1) accomplishes an end consistent with the policy justifying self-regulation; 2) is reasonably related to that end; and 3) is no more extensive than necessary.

⁴³[1978] 1 W.L.R. 1520, [1978] 3 All E.R. 211, 122 S.J. 844 (Ch.) [hereinafter *McInnes*].

⁴⁴*Ibid.* at 1527.

and fairness. Although the court held that the Board's actions were subject to these minimal requirements, it did not think that these requirements extended to giving the plaintiff reasons for the Board's refusal or a hearing.

In justifying this conclusion, the English court indicated the wide discretion legitimately available to the Board and the many goals the Board may pursue:

There are many reasons why a licence might be refused to an applicant of complete integrity, high repute and financial stability. Some may be wholly unconnected with the applicant, as where there are already too many licences for the good of boxing under existing conditions. Others will relate to the applicant. They may be discreditable to him, as where he is dishonest or a drunkard; or they may be free from discredit, as where he suffers from physical or mental ill-health, or is too young, or too inexperienced, or too old, or simply lacks the personality or strength of character required for what no doubt may be an exacting occupation. There may be no 'case against him' at all, in the sense of something warranting forfeiture or expulsion; instead there may simply be the absence of enough in favour of granting the licence.⁴⁵

At least one aspect of this statement would shock an American antitrust lawyer. That is the notion that a private group acting without any statutory authority but with clear monopoly power can legitimately decide, in the classic tradition of a cartel, that "there are already too many licenses for the good of boxing under existing conditions". Apparently the Board is allowed to restrict the number of licences — and thus, in economic terms, output — solely in order to preserve a monopoly output rather than the larger competitive output. This is one reason for denying a licence that an American court would not accept.⁴⁶ Limiting output, and therefore raising the price for goods or services above the price that would prevail under competition, is not considered a legitimate goal for any private group in the U.S.. Indeed such reduced output, not offset by gains to productive efficiency, is the very result the U.S. antitrust laws aim to avoid. In contrast, the English courts casually accept that private groups will try to limit output in order to maximize (or at least artificially maintain) their revenue and profits. The English courts fail to distinguish between the legitimate profits gained by increasing the marketability of the sport, and the illegitimate profits gained by contriving a scarcity which allows the group's products or services to be sold at an artificially increased price.

The *McInnes* court's most telling statement, however, dealt with the deference to be accorded the decisions of these private groups, groups inevitably more knowledgeable than the courts:

⁴⁵*Ibid.* at 1532.

⁴⁶*E.g., Hoover v. Ronwin*, 466 U.S. 558 (1984).

There is a more general consideration. I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over ... activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. ... Bodies such as the board which promote public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause. Such bodies should not be tempted or coerced into granting licenses that otherwise they would refuse by reason of the courts having imposed on them a procedure for refusal which facilitates litigation against them.⁴⁷

However sensible such deference might be, it contrasts sharply with the suspicion, if not cynicism, that greets industry self-regulation in the U.S..

The plaintiff's request in *McInnes* for reasons and a hearing will remind American lawyers of a similar request in the famous case *Silver v. New York Stock Exchange*.⁴⁸ Silver was a broker who was refused wire connections with member brokers by the Exchange. The plaintiff sued the Exchange under the antitrust laws and prevailed on summary judgment. The Supreme Court's opinion differs markedly from *McInnes*. The Supreme Court said first that were it not for the statutory authorization given the Exchange under the *Security and Exchange Commission Act of 1934*,⁴⁹ the Exchange's action against the plaintiff would have constituted a *per se* violation of the antitrust law, with no defense or justification possible.⁵⁰ In the absence of statutory authority, the Exchange would be liable merely because its action (being a concerted action by, among others, the plaintiff's rivals) put the plaintiff at a significant competitive disadvantage. Even with its statutory authority, the Exchange could only take that action that it could show was necessary to make the statute effective, and even then it must give the plaintiff procedural protection.⁵¹ In *McInnes*, as previously stated, the Board had no statutory or other governmental authority; yet it was allowed to control licences in order to achieve a wide variety of ends (including the restriction of output), the choice of which was largely left to its discretion. Furthermore, the Board was held to have no obligation to give the plaintiff reasons or a hearing.

The English courts have also deferred to private groups less ancient and less well-established in British culture than the Jockey Club and the Boxing Board of Control. In *Re Association of British Travel Agents, Ltd*

⁴⁷*McInnes, supra*, note 43 at 1535.

⁴⁸*Silver, supra*, note 3.

⁴⁹*Securities Exchange Act of 1934*, 15 U.S.C. s. 78a (1970).

⁵⁰*Ibid.* at 347.

⁵¹*Ibid.* at 360-61.

Agreement,⁵² a recently created trade association of travel agents promulgated elaborate rules and regulations for each of its members. Moreover, the association enforced the regulations not only by excluding those who did not comply, but by enforcing a "stabilizer" restriction against them. This restriction prohibited members from selling, displaying or booking tours organized or promoted by any non-member, and from selling their own tours through any non-member agencies. Because a large percentage of travel agents and operators were members, membership in the trade association had become a *de facto* licence to trade. Accordingly, the regulations of the association were as mandatory as the regulations of a government licensing authority in the United States. Yet, like the Jockey Club, the trade association operated without any statutory authority.

When the Office of Fair Trading brought the trade association before the Restrictive Trade Practices Court, the court was not troubled in the least by the ABTA's assumption (some might say presumption) that it should attempt to control its industry. Nor was the court troubled by the fact that some of the travel agents affected had never consented to the trade association's authority. Instead, the court directly addressed the merits of the trade association's regulatory regime.

Once again, caution is needed lest the contrast be overstated. After all, trade associations certainly abound in the United States, and they assess dues and impose other requirements for members, which they enforce by excluding those who do not comply. To some extent, the judicial acceptance of these trade association rules suggests how unrealistic and inappropriate were the implications of Justice Black's extreme language. Perhaps then, a more meaningful comparison is not between the stated legal approach of the two countries but between the actual practice in both countries, on the one hand, and Justice Black's language, on the other. Nevertheless, the tradition represented by Justice Black plainly leaves its mark. The trade association rules commonplace in the United States tend to be far more perfunctory and far less ambitious than those of the British travel association.⁵³ They do not manifest the goal of controlling an entire industry, a goal which their British counterparts take for granted. A U.S. antitrust court would be troubled much more than was the Restrictive Trade Practices Court by the far-reaching character of the ABTA regulation, by the ABTA's capacity not merely to assist those who comply, but to exclude those who

⁵²*Re Association of British Travel Agents, Ltd Agreement*, [1984] I.C.R. 12 (Rest. Practices Ct.) [hereinafter *ABTA*].

⁵³*Moore v. Boating Industry Ass'n*, 754 F.2d 698 (7th Cir. 1985); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977). The trade association's rules may not go beyond what is necessary to keep the trade association operative and may not limit rivalry between the members.

did not, and, in general, by the resemblance of the ABTA's activity to government regulation. This concern would arise in the U.S. irrespective of the court's view of the ultimate merits of particular regulations or particular enforcement efforts.⁵⁴

C. Evaluation

I do not know why "the jealousy impulse" against extra-governmental rule has affected the U.S. courts so much more than their British counterparts. The explanation cannot lie in the text of the U.S. antitrust law, for England has likewise long condemned contracts in unreasonable restraint of trade. My guess is that the U.S.'s relatively recent lawless past helped to produce a judicial preoccupation with suppressing vigilantes and other manifestations of private rule. The fear of large private groups, such as the Ku Klux Klan, exercising what amounts to sovereign powers and challenging the rule of the government may have loomed larger in the United States.⁵⁵ The American belief that private groups should not perform governmental functions may also reflect the influence of its constitution, for that constitution emphasizes the distinct and, to some extent, mutually exclusive roles of the government and the people, with large private groups being included with the "people".

In contrast, the "corporatist" tradition that recognises a legitimate role for institutions intermediate between the individual and the State, has exercised greater influence not just in England, but in Europe generally. Moreover, the tendency to blur the public/private distinction and to allow guilds a share in rule-making is often associated by historians with late feudalism.⁵⁶ The U.S. attitude could then be attributed, as have so many other features of its culture, to the relative absence in the U.S. of a feudal tradition.⁵⁷ Perhaps a sociologist also would look for explanation in the closer social and educational ties between individuals in British ruling circles. Because of those ties, English judges may be more willing to concede authority to

⁵⁴E.g., *Denver Rockets v. All-Pro Management, Inc.*, *supra*, note 25. The court refused to consider the wisdom of the NBA's rule, finding that the NBA had failed to satisfy the threshold requirements for avoiding *per se* condemnation.

⁵⁵Without exception, scholars identify vigilantism to be a uniquely American phenomenon. P.B. Nolan, *Vigilantes on the Middle Border* (New York: Gorland Publishing Inc., 1987) at 1.

⁵⁶J. Williams, Book Review of *Public Property and Private Power: The Corporation of the City of New York in American Law*, by H. Hartog, (1985) 64 Tex. L. Rev. 225. English guilds sanctioned by a town or by the Crown possessed authority to enact and enforce legislation. American guilds never possessed such authority, which was reserved to the state legislatures, the political subdivisions the legislatures so empowered, and the Congress. To be sure, the English guilds' authority to legislate has gradually passed to Parliament.

⁵⁷L. Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt Brace, 1955) at 3-32.

former schoolmates now controlling private groups, even when that authority has not been sanctioned by an official government measure. Speculating further, one could attribute the different attitudes to the greater deference to authority, public or private, generally displayed by the English courts, and to their greater reluctance to voice and enforce their own views of social policy. A radical might also speculate that the "jealousy" impulse stems from and, in turn, helps to maintain a distinctively American illusion; namely, the illusion that all rulers are elected, directly or indirectly. This illusion distracts attention from the reality of entrenched private rule and a non-elected ruling class. English law, on the other hand, makes no attempt to obscure the reality of a non-elected ruling class, perhaps because that reality has long been accepted.

Whatever the explanation, the British courts appear much more sensible in accepting extra-governmental rule, in avoiding any presumption about its illegality, and in focusing immediately on the substance of the rule. Legal pluralism is a fact of modern life. That is, a variety of private rule-making and rule-enforcing bodies perform governing functions that parallel the government's own. Compared to the government, private groups will often prove more efficient, knowledgeable, and interested rulers. As explained previously, private rule can often be seen in economic terms as an integration aimed at enhancing efficiency by increasing demand, lowering costs, or overcoming market imperfections such as free-rider problems and informational asymmetry.

Efficiency concerns plainly do not support Justice Black's sweeping presumption against self-regulation. Indeed, the sweeping language of the populist cases such as *FOGA* and *AMA* condemned much concerted conduct that was irrelevant in terms of economic efficiency. To be sure, economic efficiency would have been threatened in those cases if the defendants had been fixing prices or had been engaged in any other "output restraining" conduct, for output restraining conduct, by definition, does threaten efficiency. The defendants' action against the plaintiff could have been used to maintain such price-fixing or other output restraining conduct by disciplining or eliminating a rival who threatened to upset their organization. In these types of situations, therefore, the defendants' conduct could threaten efficiency and could have been condemned on that ground.⁵⁸ But the Court did not attempt such an economic defence for its rule, nor was such a defence feasible. On the contrary, the defendants in those cases presumably continued to compete among themselves despite their joint action against the plaintiff and, by that rivalry, should have yielded a competitive output and price. Moreover, the defendants' formation of their private association, as

⁵⁸R. Posner, *Antitrust Law, An Economic Perspective*, *supra*, note 22 at 211.

well as their action against the plaintiff, may have enhanced efficiency. Accordingly, while Justice Black's populist approach protected competitors, it was not tailored to protect economic efficiency.

The British approach allows courts to address non-economic concerns on a case by case basis and to begin to indicate how private groups ought to act towards members and outsiders. Efficiency concerns aside, this evolving common law gives some guidance to private groups and to those with whom they deal. The English approach also allows guidelines to be fashioned context by context: for example, the court may require the defendants to give reasons for their injury to the plaintiff only in those contexts where the reasons are easily available and where the plaintiff's interest in reasons is particularly acute. Other procedural requirements, such as whether the plaintiff may have an attorney represent him, also can be determined context by context. Wisely or not, the English courts can impose different requirements on defendants in forfeiture cases (where the defendants upset the plaintiff's status by revoking his licence or expelling him from an association) than in expectation cases (where the defendants have created only an expectation that the plaintiff's application will be granted) or in mere application cases (where the plaintiff has neither an existing status nor an expectation).⁵⁹

In contrast, the American approach wastes a good deal of time and energy on the threshold issue of whether there is some compelling policy that allows the defendants to engage in any industry self-regulation in the first place. And because the American courts are construing an antitrust law that seems to apply to all concerted conduct that puts a rival at a competitive disadvantage, they tend to decide cases at much too high a level of generality. That is, the U.S. courts cannot frame different guidelines for standard-setting bodies that evaluate products than they can for multiple listing services that exclude applicants or for sporting associations that discipline athletes. Instead, all types of industry self-regulation tend to stand or fall depending on such elusive criteria as the effect on interstate commerce,⁶⁰ the presence of a *Sherman Act* agreement,⁶¹ or the presence of "market power".⁶² Specific

⁵⁹*McInnes*, *supra*, note 43 at 1529. See, e.g., *Hughes v. Architects' Registration Council of the United Kingdom*, [1957] 2 Q.B. 550, [1957] 3 W.L.R. 119, [1957] 2 All E.R. 436 (Div. Ct.) (forfeiture); *Breen v. Amalgamated Engineering Union*, [1971] 2 Q.B. 175, [1971] 2 W.L.R. 742, [1971] 1 All E.R. 1148 (C.A.) (expectation); *Nagle*, *supra*, note 1 (application).

⁶⁰*Cardio-Medical Ass'n v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 at 1176-1204 (E.D.Pa 1982), rev'd, 721 F.2d 68 (3d Cir. 1983); Note, "Sherman Act 'Jurisdiction' in Hospital Staff Exclusion Cases" (1983) 132 U.Pa. L. Rev. 121.

⁶¹*Cooper v. Forsyth County Hosp. Auth.*, 604 F. Supp. 685 (M.D.N.C. 1985), aff'd 789 F.2d 278 (4th Cir. 1986); *Pontius v. Children's Hosp.*, 552 F. Supp. 1352 (W.D.Pa 1982).

⁶²*Pacific Stationery*, *supra*, note 3; *United States v. Terminal R. R. Ass'n*, 224 U.S. 383 (1912).

context by context guidelines to help groups conform their behaviour to the law do not emerge.

While the British approach may give better guidance to private actors engaged in, or affected by, industry self-regulation, the goal of the British courts lies elsewhere. That goal is to define and protect the supposed rights and obligations of the regulator and the injured individual or firm toward each other. This mere adjusting of private grievances, divorced from any grander public policy mission, generally has disappeared from U.S. trade law and especially from U.S. antitrust law. In the U.S., even so-called private law, such as tort and contract law, is increasingly driven by larger public policy concerns.⁶³

III. Determining the Reasonableness of the Regulations

A. Policy Considerations

Those defendants who survive the initial hostility of the U.S. courts will find that those courts are often more pro-defendant than are the English courts in dealing with the merits of the particular instance of self-regulation. In the U.S., the Chicago School approach dominates this stage of the lawsuit and calls for interference with the defendants' actions only when those actions produce a net welfare loss to consumers, i.e., a net loss in efficiency.⁶⁴ Since *National Society of Professional Engineers v. United States*,⁶⁵ the U.S. courts are directed, under the Rule of Reason, to balance the pro-competitive effect of the defendants' action (the gain to productive efficiency), against its anti-competitive effect (the loss to allocative efficiency). Concerted behaviour is upheld or condemned based solely on whether that trade-off is likely to be positive or negative. Expressed graphically, U.S. courts are to ascertain the larger of area D, the loss in output from the defendants' collaboration, or area C, the cost saving achieved by the defendants' collaboration.⁶⁶

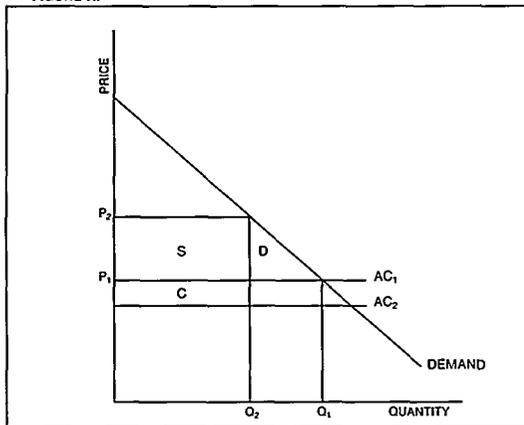
⁶³B.A. Ackerman, *Reconstructing American Law* (Cambridge, Mass.: Harvard University Press, 1984) at 6-45.

⁶⁴W. Liebler, *Antitrust Advisor*, 2d ed. (Colorado Springs: Shepard's / McGraw Hill, 1983) s. 1.32, at 45-59.

⁶⁵*Supra*, note 23.

⁶⁶Although no opinions have yet reproduced this famous graph, it appears throughout U.S. antitrust scholarship as an illustration of *NSPE's* rule: W.J. Liebler, "Intrabrand 'Cartels' Under GTE *Sylvania*" (1982) U.C.L.A. L. Rev. 1 at 13-16 [hereinafter "Intrabrand Cartels"]. A monopoly, or any collaboration of rivals which allows the group to reduce rivalry and create an artificial scarcity, tends to reduce output from Q1 to Q2 and to allow price to rise from P1 to P2. It also, however, may make possible cheaper production, lowering the average cost of production from AC1 to AC2. The lost output, D, represents a societal loss since the goods not produced are valued at a price greater than their cost of production. On the other hand,

FIGURE A:



The Chicago School approach does not consider non-economic factors such as whether the injury to the plaintiff was “fair”.⁶⁷

The English courts, in contrast, will interfere with the defendants’ actions even when those actions do not reduce economic efficiency. They will interfere in order to protect a plaintiff’s right to work, to rectify injuries that offend natural justice, or to achieve other non-economic goals. To be sure, the English emphasis on these non-economic factors, and especially the emphasis on protecting the defendants’ existing status, may sometimes aid defendants. If, for example, the defendants show that their action was necessary as a means of defending their very existence or some other “legitimate interest”, the English courts will almost certainly uphold it.

This justification will even excuse defendants, like the travel agents in the *ABTA* case discussed above, who agree to refrain from certain dimen-

the cost savings means that those goods which are produced are produced more cheaply, saving resources in the amount of C.

Although no one claims that courts can undertake this welfare calculus with anything like precision, it is nonetheless a profoundly pro-defendant approach: horizontal restraints will not reduce output, i.e., will not produce any D, as long as the defendants continue to engage in rivalry with each other, or as long as other rivals or potential rivals can expand their output when defendants attempt to create an artificial scarcity.

⁶⁷The Chicago School approach suffers from several shortcomings. A particularly serious one is the practical difficulty, if not impossibility, of measuring the welfare tradeoff between the loss in allocative efficiency and the gain in productive efficiency in each particular case. F. H. Easterbrook, “The Limits of Antitrust” (1984) 63 Tex. L. Rev. 1 at 11-14; but see, O.E. Williamson, “Economics as an Antitrust Defense Revisited” (1977) 125 U. Pa. L. Rev. 699 at 726-29. He argues that such a tradeoff must be attempted. See also, O.E. Williamson, “Economics as an Antitrust Defense, The Welfare Tradeoffs” (1968) 58 Am. Econ. Rev. 18.

sions of rivalry. Such agreements, which are closely akin (and analytically identical) to price-fixing, would never be upheld in the U.S., as they are in England, on non-economic grounds. In *NSPE*,⁶⁸ for example, a trade association of engineers adopted an ethical canon requiring that its members wait to negotiate prices with customers until after the customer had tentatively selected an engineer. The U.S. Supreme Court accepted that the canon "was adopted by members of a learned profession for the purpose of minimizing the risk ... of ... inferior engineering work endangering the public safety." In ruling against the engineers, the Court deemed this concern for public safety illegitimate in principle. Concern for safety would never justify even this modest tampering with the *Sherman Act's* policy of price competition:

[The engineers'] attempt to [justify this restraint] on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the *Sherman Act*.

...

The *Sherman Act* reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.⁶⁹

In contrast, the English courts surely would acknowledge this justification, especially if the engineers could also allege that the restraint preserved their existence or protected some other legitimate interest.

Other authors have shown that the English courts weigh factors unrelated to economic efficiency more heavily than do their U.S. counterparts.⁷⁰ After all, the *Restrictive Trade Practices Act* establishes gateway considerations that expressly direct attention to matters other than the economic efficiency of a registrable joint activity.⁷¹ In evaluating whether a practice constitutes an unreasonable restraint of trade, offends natural justice, or interferes with the right to work, the British courts plainly look to factors other than efficiency.⁷²

But this article maintains that the differences between the English and the American courts go beyond the mere evaluation of gateways or of whether some legally protected interest unrelated to efficiency is implicated. The English courts simply do not care what the market is saying. They do not draw any inferences from the results which the market produces. For example, they do not draw any inference from a market's failure to produce

⁶⁸*NSPE*, *supra*, note 23.

⁶⁹*Ibid.* at 695.

⁷⁰R. Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (The Hague: Martinus Nijhoff, 1967) at 5-7, 59-66, 71-73.

⁷¹*Restrictive Trade Practices Act* (U.K.), c. 34, s. 19.

⁷²See, *infra*, text accompanying notes 76-101.

the same result that the defendants' joint activity seeks to impose. That consumers through the marketplace have not called for anything resembling the regulation the defendants are seeking to enforce does not provide any signal of interest to the English courts. Rather, these courts routinely ignore the possibility that consumers could easily opt for the protection that the defendants' joint activity forces them to take. Unlike the U.S. courts, the English courts do not feel obliged to identify market imperfections that keep the market from yielding the efficient result, and that the defendants' joint activity may be attempting to overcome. The English courts do not recognize the underlying liberal assumptions about the role of the market and the proper spheres of private management and the courts. Instead, the English courts resort to the most blatant paternalism and uphold or condemn private regulations without regard to the choices of consumers, but with regard to the courts' own view of whether the regulations are fair or unfair, appropriate or inappropriate.

In deciding whether concerted conduct unreasonably restrains trade, the English courts display a bias in favour of protecting the existing status of the parties that is flatly contrary to the indifference to the status quo inherent in an economic approach.⁷³ The resulting jurisprudence smacks of feudalism, of a protective attempt to ensure that well-established parties, efficient or not, are never seriously hurt and, though not in so many words, of an attempt to determine the "just price".⁷⁴ Whether willfully or unknowingly, the English courts do not merely override the voices of consumers in favour of some goal of their own; they seem not to hear those voices to begin with. They take upon themselves the task of redefining the parties' rights and obligations toward each other, as if the restraint of trade doctrine and the *Restrictive Trade Practices Act* contemplated nothing more than the most private of private law considerations.

⁷³F. Easterbrook, "Foreword: The Court and the Economic System" (1984) 98 Harv. L. Rev. 4. It is inefficient for courts in a competitive system to show any bias for existing firms over possible replacements, or to concern themselves with whether particular firms survive. See L. Kaplow, "An Economic Analysis of Legal Transitions" (1985-86) 99 Harv. L. Rev. 509 at 531 n. 60; D. Wittman, "First Come, First Served: An Economic Analysis of Coming to the Nuisance" (1980) 9 J. Legal Stud. 557; R.C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls" (1973) 40 U. Chi. L. Rev. 681 at 758, n. 260 These three articles all emphasize that efficiency calls for putting land to its most valuable use, and that the first use will by no means be the most valuable.

⁷⁴Before 1967, the Restrictive Trade Practices Court had come close to admitting explicitly that it felt able to determine the "just price". In *Re Water-Tube Boilmakers' Agreement*, [1959] 1 W.L.R. 118, [1959] 3 All E.R. 257, 103 S.J. 695, the court upheld a price-fixing agreement on the ground that it yielded only a "reasonable profit". Indeed, Gateway (d) of s. 19 of the *Restrictive Trade Practices Act* calls for upholding agreements which are necessary to secure "fair terms". Of course even agreements satisfying Gateway (d) may yet be condemned under the tailpiece provision to the Act.

The refusal of the English courts to pursue efficiency goals may stem from their relative reluctance to involve themselves in any public policy mission. In contrast, the U.S. courts, having interpreted the *Sherman Act* as a congressional mandate for efficiency, do not hesitate to accept that mandate and intervene in private regulation as that mandate directs. The attitude of the English courts may also stem from uncertainty about Parliament's own commitment to efficiency. If so, the courts' attitude may be altered by a statute that embraces efficiency more expressly than did the *Restrictive Trade Practices Act* and clearly calls on the courts to assist in implementing its policy. More likely, however, the tradition against an active judicial role in economic management would still prevail.

B. The English Interpretation of the Restrictive Trade Practices Act

The *ABTA* case,⁷⁵ mentioned above, illustrates the English courts' cavalier disregard of the market. The case was brought by the Office of Fair Trading, which alleged that the restrictions imposed by the defendants' trade association were unlawful under the *Restrictive Trade Practices Act*.

One should note at the outset that the *Restrictive Trade Practices Act* shows a greater commitment to competition and efficiency than do the doctrines of unreasonable restraint of trade or the various tort actions, such as interference with contract or infringement of the right to work. In dealing with these other actions, English courts will occasionally explain their refusal to address efficiency considerations by claiming that those considerations are instead the province of the *Restrictive Trade Practices Act*.⁷⁶ In short, the *Restrictive Trade Practices Act* resembles the *Sherman Act* in that efficiency concerns play a more dominant role in its interpretation than in the interpretation of any other doctrine in the respective countries. This similarity only serves to underscore the discovery that the Restrictive Trade Practices Court does not attempt to employ an efficiency-based analysis, does not use the grammar of an economic approach, and does not seem to be aware of the implications of such an approach.⁷⁷

At issue in the *ABTA* case were a variety of restrictions imposed by the trade associations on all of its tour operators and retailer members. Also at

⁷⁵*ABTA*, *supra*, note 52. See text accompanying notes 52-54.

⁷⁶*Texaco v. Mulberry Filling Station*, [1972] 1 W.L.R. 814 at 828-29, [1972] 1 All E.R. 513, (1971) 116 S.J. 119 (Ch.) [hereinafter *Texaco*]. Economic considerations should affect decisions only of the Restrictive Trade Practices Court.

⁷⁷Occasionally, the Restrictive Trade Practices Court pays less attention to economic considerations than do the English courts of general jurisdiction. Compare *ABTA* with *Dickson v. Pharmaceutical Society of Great Britain*, *supra*, note 13, in which the Court of Appeal struck down an agreement among pharmacists to refrain from certain methods of rivalry on the ground that consumers in the marketplace should decide the wisdom of these methods.

issue was the association's "stabilizer" enforcement device which required members to refuse to deal with non-members. As previously noted, retailers were prohibited from selling the tours of non-member tour operators. Tour operators were prohibited from accepting bookings placed by non-member retailers.

Other restrictions plainly reduced the ability of the members to compete with each other. For instance, tour operators agreed not to attempt to sell directly to the public, or to distribute their tour packages in any way other than through member retailers. Retailers agreed not to operate part-time and not to attempt certain cost-cutting devices, such as reducing the number of employees, that might give them a competitive edge. The restrictions not only limited rivalry between members; they also severely dampened rivalry from foreign tour operators, for few foreign operators belonged to the ABTA.⁷⁸

Many of the restrictions were ostensibly aimed at eliminating any possibility of a traveller being stranded overseas by the financial collapse of his retailer, tour operator or charter airline. Thus, members were required to post a bond equalling 5% of their annual turnover. They were also required to carry insurance to protect the travelling consumer, even though the traveller could easily buy insurance himself. Members were also required to supply a great deal of financial information to the ABTA, again ostensibly in order to enable the ABTA to assure itself of the member's continuing financial viability.

⁷⁸Admittedly, my characterization of *ABTA*, *supra*, note 52, as an industry self-regulation case is open to question. Unlike the other cases discussed in this paper, the complaining party was not an excluded or disciplined firm. Moreover, insofar as the case involves the elimination of some dimensions of rivalry between firms, rather than the exclusion or handicapping of non-complying firms, the case more resembles price-fixing than industry self-regulation. Nevertheless, I treat it as an industry self-regulation case because of the agreement's obvious tendency to handicap or exclude non-complying firms.

The Restrictive Trade Practices Court has shown the same disregard for the market in its price-fixing cases that it showed in *ABTA*. Thus, the Court has upheld price-fixing agreements on the ground that the set price saved customers the cost of shopping around; *e.g. Re Black Bolt and Nut Association of Great Britain's Agreement*, [1960] 1 W.L.R. 884, [1960] 3 All E.R. 122, 104 S.J. 665. They have also upheld price-fixing agreements on the grounds that they kept prices at a lower than competitive level; *e.g. Re Cement Makers' Federation's Agreement*, [1961] 1 W.L.R. 581, [1961] 2 All E.R. 75, 105 S.J. 284. Price-fixing has been held to encourage the sharing of knowledge among producers, as in *Re Permanent Magnet Association's Agreement*, [1962] 1 W.L.R. 781, [1962] 2 All E.R. 775, 106 S.J. 492. It was held to have facilitated the modernization of an industry; *e.g. Re Distant Water Vessels Development Scheme*, [1967] 1 W.L.R. 203, [1966] 3 All E.R. 897, 110 S.J. 905. The current Restrictive Trade Practices Court, however, might not accept such justifications for price-fixing. See generally Whish, *Competition Law*, *supra*, note 5 at 136-39.

The ABTA imposed these requirements despite previous parliamentary action directed at the problem of the stranded traveller. Several years before, Parliament had enacted legislation to protect travellers against a financial collapse either of charter airlines or of tour operators working with charters. Indeed, as the Restrictive Trade Practices Court found, "the major proportion of the total volume of foreign holiday travellers fall within the statutory protection".⁷⁹ Nevertheless, the ABTA continued its additional restrictions.

The fact that the ABTA included 95% of all tour operators and retailers would have been of great importance to a U.S. court. Thus, the association could not be characterized as an integration by a few sellers, in a market of many sellers, to take advantage of economies of scale in selling and marketing heightened reliability. If such a characterization was possible, that is, if consumers could easily patronize agents and operators not subject to these restraints, then consumers acting through the market could determine whether this heightened reliability was worth the increase in the price it obviously entailed. Instead, the ABTA denied consumers any choice in the matter and operated as a *de facto* licensing agency that limited entry to particularly stable firms and that necessarily raised the cost of entry and of doing business for all.⁸⁰

The defendants took the forthright position that the Restrictive Trade Practices Court should deem these restrictions on rivalry, including the "stabilizer" restriction, to be in the public interest⁸¹ because they benefited consumers of travel services. The defendants were saying, in effect, that rivalry in this area ran against the interest of consumers, a claim that the American court in *NSPE* had deemed illegitimate in principal.⁸² But the Restrictive Trade Practices Court, far from thinking this claim out of bounds, accepted it as the key issue in the case.⁸³

The most striking feature of the Restrictive Trade Practices Court's approach in *ABTA* lay in the sequence of steps it followed to determine

⁷⁹*ABTA*, *supra*, note 52 at 21.

⁸⁰*Ibid.* at 20-21. In contrast, no association of travel agents in the U.S. would try to do openly what the ABTA attempted. At most, a U.S. counterpart would try to give a special certification to those travel agents who joined together to offer added insurance against stranding travellers. Letter from Charles F. Rule, Assistant U.S. Attorney, to Burton J. Ruben, General Counsel, American Society of Travel Agents (April 25, 1988) Washington, D.C.. The letter approved special certification of agents offering added safety if participation was voluntary.

⁸¹*NSPE*, *supra*, note 23.

⁸²*Ibid.* at 686-96. "[T]he Rule of Reason does not support a defense based on the assumption that competition is unreasonable."

⁸³No doubt the court was influenced by the language of s. 19(1)(a) of the *Restrictive Trade Practices Act* which directs the court to consider whether the restriction is reasonably necessary to protect the public against injury in its use of the services involved. *Restrictive Trade Practices Act* (U.K.), 1976, c. 34, s. 19(1)(a).

whether the "public interest" supported these restrictions. That sequence of steps suggests, to use the U.S. vocabulary, that "public interest" meant neither consumer welfare (as used in antitrust law) nor consumer protection (as public interest and consumer protection groups use the term), but rather the interests of the dominant sellers in the industry. For the court began its inquiry by questioning whether the stabilizer restriction *was necessary to protect the ABTA's control over the industry*.⁸⁴ If so, the restriction was probably lawful. Apparently, the court was assuming that the public interest called for ABTA's continuing control.

What a startling and inexplicable assumption! Whether powerful private trade associations retain their status, power and viability is a matter of supreme indifference under an economic approach. Why should the court care about the ABTA's status and continued control of the industry? Why should the court assume that one large trade association ought to control the industry, and that the ABTA ought to be the one? Why should the court apparently prefer the existing association over the association or associations likely to replace it? Why should the court assume that those who are no longer members of the ABTA, or who develop rival trade associations, will want to mistreat consumers or will be less interested in responding to consumer desires?

Once the issue in *ABTA* became whether the stabilizer was needed for the association to retain its influence, a great deal of evidence became relevant that would be irrelevant in a similar case in the U.S.. The court explored such matters as whether small operators, who were especially disadvantaged by the bonding and insurance requirements, would leave the ABTA without the stabilizer rule. Experts were asked to offer predictions on the matter. Those opposed to the ABTA's position speculated that the attractions and advantages of the ABTA, such as its prestige and its standing with the government, would induce operators and retailers to remain even without the stabilizer rule. Thus the stabilizer rule was unnecessary; ABTA would retain its control over the industry even if the Court struck down the rule. Those defending the ABTA argued, in effect, that it did not offer any efficiency-enhancing advantages to its members. Without the stabilizer, therefore, members might abandon the ABTA. Accordingly, its legitimate interest in self-preservation justified the stabilizer rule.

⁸⁴This interpretation of "public interest" by the Restrictive Trade Practices Court approximated the interpretation of public interest used in applying the common law restraint of trade doctrine. See, e.g., *Greig v. Insole*, [1978] 1 W.L.R. 302, [1978] 3 All E.R. 449, 122 S.J. 163 (Ch.). No reason for incorporating this interpretation into the *Restrictive Trade Practices Act* appears. See R.O. Wilberforce, A. Campbell & N. Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2d ed. (London: Sweet & Maxwell, 1966) at s. 218.

Once again, an economist would say the court was foolishly trying to answer a question the market should be allowed to answer. Why not let the consumers, through their patronage, "vote" on whether they want the heightened reliability that one association of travel firms offers and advertises? If consumers "vote" for the heightened reliability given by a group like ABTA that uses the stabilizer enforcement rule, other travel firms will no doubt want to join ABTA or develop associations with similar rules. If consumers "vote" against heightened reliability, without some suggestion of a market failure, then their "vote" provides powerful evidence that the ABTA restrictions are not in their interest. And, of course, the way to allow consumers to vote is to strike down the compulsory restriction of this monopoly, while allowing travel firms to advertise their heightened reliability and to join with other travel firms that do the same.

The court next discussed the gravity of a financial failure by retail agents or operators,⁸⁵ but plainly seemed more concerned with the welfare of the travel service providers than with the welfare of consumers. For the distinctive harm of a financial failure, in the court's view, was the disproportionate publicity received by stranded travellers, publicity that taruished the responsible operators and retailers as well as the ones whose collapse precipitated the incident.

An American court could have conceptualized this injury to the responsible operators and retailers in economic terms as an external cost produced by the irresponsible. Such an externality is a classic market failure and in extreme cases may justify constraining the irresponsible in order to provide optimum incentives for investment in heightened reliability. This externality may explain why the ABTA sought to control all travel firms and not merely to form a small group that would sell heightened reliability. But, of course, the Restrictive Trade Practices Court was not using the jargon or grammar of an economic approach.

Had the *ABTA* court focused only on protecting consumers, it might have been more influenced by the fact that the Civil Aviation Authority licensing program safeguarded more travellers than did the ABTA restrictions. Because this licensing program was aimed at tours involving travel by chartered aircraft, more travellers were at risk in those travel sectors protected by the legislation than in those protected only by the ABTA restrictions. Despite this fact, the court concluded that the severe harm from an agent or operator failure called for an unusual degree of protection for the consumer.⁸⁶

⁸⁵*ABTA*, *supra*, note 52 at 27-33.

⁸⁶*Ibid.* at 31.

Again, what the *ABTA* court did not consider spoke the loudest. At no point did the court consider the cost of avoiding the risk of financial failure or the possibility of a market imperfection that could justify its intervention. These considerations would arise instantly in a court versed in an economic approach. After all, those consumers wishing to incur the cost of avoiding the risk could buy the readily available insurance. Some travellers would conceivably prefer to pay less and run the small risk of their agent or operator's financial collapse. Far from finding a market imperfection, the *ABTA* court assumed that the traveling consumer had the normal shopping ability and the normal resistance to exploitation of any buyer. The closest the court came to finding a market failure was its statement, which was not based on any apparent evidence, that "the majority of purchasers are not directing their minds or having their minds directed to [the risk of failure] when engaged in the process of choosing where they wish to tour".⁸⁷

Instead of letting the market decide the value of the *ABTA* protection, the Restrictive Practices Court displayed a heavy-handed paternalism. It concluded that the grave impact on the individual traveller caused by a failure demanded the protection that the *ABTA* was offering. Moreover, the court concluded that insurance would not be adequate protection because it could only offer financial compensation, and would still leave a traveller facing cancelled hotel rooms, impounded baggage, the loss of his return flight, and a generally negative experience. The *ABTA* policy provided more complete protection because it was aimed at allowing the traveller to complete his holiday in the place of his choice and to return on the date due. In response to evidence indicating that the insurance agencies could soon offer protection equal to that offered by the *ABTA*, the court concluded that the implementation of this protection would take too long, and that *ABTA*'s access to its members' airline seats gave it too great an advantage for the insurance company to overcome. The court's belief that it could anticipate the costs that private enterprises would incur and could confidently set limits on what those enterprises could achieve presumes a judicial capacity to identify and articulate all the possible cost-saving methods available, a capacity that no economist would claim. For decades, economists studying the theory of the firm, for example, have pointed out that many cost-savings, especially those achieved by crafting governance structures to reduce transaction costs, remain unidentified and impossible to articulate, even with hindsight.⁸⁸

⁸⁷*Ibid.* at 29.

⁸⁸R.H. Coase, "The Nature of the Firm" (1937) 4 *Economica* 386. O. Williamson, *Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (New York: Free Press, 1975). A willingness to predict whether private actors will be able to improve efficiency appears throughout the British government and civil services. The authors of a famous report on restrictive practices in the professions presume to conclude

Thus, the court upheld the bonding requirement, the information disclosure requirement, the ABTA's insurance plan and the stabilizer enforcement device.⁸⁹ It suggested that those unhappy with these requirements should appeal to the ultimate decision maker within the ABTA.

This approach provides the parties involved with no rudder and leaves them with no benchmark. To determine whether such horizontal restrictions on rivalry should stand or fall, one can refer only to the particular judge's sense of whether the restriction is wise. This case gives no hint that another judge ought to be heard, if not deferred to. This judge is the combined choice of consumers acting through the marketplace.

C. *The Interpretation of "Unreasonable Restraint of Trade"*

The different attitudes of the courts in England and the U.S. are also reflected in the different interpretations given the notion of an agreement in "unreasonable restraint of trade". Participating in unreasonable restraint of trade offends the laws of both countries: in the U.S., s. 1 of the *Sherman Act* and in England, the Common Law. But in the two countries this doctrine is interpreted to mean very different things.⁹⁰ Even the aims of the rules differ: in the United States the aim is to secure the ultimate economic advantage to consumers,⁹¹ while in England the aim is to assure each firm of the freedom to trade with whomever it wishes.⁹² In fact, the claim of unreasonable restraint of trade in England often arises when the plaintiff has voluntarily agreed with another to limit his trading in some manner,

that "in some professions an increased scale of operations seems likely to offer scope for economies and improved efficiency. In others there would be little or no advantages in this respect." Based in part on this conclusion, the authors were opposed to allowing surgeons, architects, or veterinarians to operate under corporate or various other organizational forms. Their opposition was also based on the belief that these organizations would endanger the personal relationship that should exist between the professional and his client. There was no thought given to the possibility that rivalry between professionals using various forms would produce, or at least produce evidence of, the forms consumers most preferred. *Report on the General Effect on the Public Interest of Certain Restrictive Practices So Far As They Prevail in Relation to the Supply of Professional Services*, (Oct. 1970) Cmnd 4463. Similarly the Monopoly Commission routinely feels competent to say, for example, that proposed mergers have a negligible chance of leading to improved efficiency; e.g., *Monopoly Commission Report on Proposed Merger of the United Draperies Stores Ltd and Montague Burton Ltd*, Cmnd 3397 (Sept. 1967).

⁸⁹ABTA, *supra*, note 52 at 29-34.

⁹⁰The British requirement that a plaintiff be in contractual privity with a defendant generally prevents the British restraint of trade doctrine from serving consumers. See C. Yuen, "Exclusive Purchasing at Common Law and Under Anti-Trust Law: A Reexamination of the Restraint of Trade Doctrine" (1987) 16 *Anglo-Am. L. Rev.* 1 at 13.

⁹¹E.g., NSPE, *supra*, note 23.

⁹²E.g., *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd*, [1894] A.C. 535 at 565, [1891-94] All E.R. Rep. 1 at 18 [hereinafter *Nordenfelt*].

and subsequently invokes the court's paternalistic instincts in order to have that agreement nullified.⁹³ Unlike their U.S. counterparts, the English courts seem not to have recognized that every agreement restrains trading in this sense, and that such restraints often enhance efficiency.⁹⁴ Thus, the English restraint of trade doctrine still reflects its origin during the labour shortage created by the Black Death, when it was used by courts to nullify agreements that kept badly needed workers idle.⁹⁵

The doctrine is also used in England to subsidize or defend businesses threatened by rivalry even, if necessary, at the expense of consumers. In the U.S., this would be considered a goal more appropriate to a social security law for private firms than to an antitrust law. The embrace of this goal results from the tendency of the English courts to ignore public interest and to focus only on the interests of the private parties. Indeed, the English courts equate the interests of the public with the interests of the parties. Occasionally, an English court will admit explicitly that its notion of unreasonable restraint of trade has nothing to do with any wider public interest, such as economic efficiency.⁹⁶

These different goals naturally lead the English courts to consider different factors in determining whether a restraint is reasonable. The English courts typically begin by asking whether the defendants' action was necessary to achieve its legitimate interests. In fact, this inquiry appears throughout British trade law. It even seems to dominate the Restrictive Trade Practices Court's determinations of whether agreements are unlawful within the meaning of the *Restrictive Trade Practices Act*.⁹⁷ Thus the English courts consider, for example, how severe a restriction on a person's right to work is imposed by the agreement. Courts look to the types of work and geographical areas for work that are foreclosed to the person restrained. On the other hand, the greater the benefits given the person restrained, the more reasonable the restraint appears. The cases also display concern for other factors relating

⁹³*Eastham v. Newcastle United Football Club, Ltd*, *supra*, note 9. In this case, a player signed with a club and when his transfer request was denied under club rules, he successfully claimed restraint of trade.

⁹⁴For instance, restrictive covenants may enhance efficiency by assuring optimum incentives for a business to invest in and develop firm-specific goodwill. Without the restraint, the seller of a business may not be able to realize the benefit of his bargain.

Even if the U.K. goal were interpreted not as the protection of the supposed right to trade but instead as the protection of the process of rivalry (against practices like exclusive dealing arrangements that would replace rivalry with administrative fiat), the goal would still collide with economic teachings that explain why the suppression of rivalry will often enhance efficiency.

⁹⁵M. Handler & D. Lozaroff "Restraint of Trade and the Restatement (Second) of Contracts" (1982) 57 N.Y.U.L. Rev. 669 at 721-27.

⁹⁶*Texaco*, *supra*, note 76 at 828.

⁹⁷See *ABTA*, *supra*, note 52.

to the plaintiff's personal welfare. These include the degree of injury inflicted on the parties, or, in other words, whether the restraint hurts some participant or some third party too much for the court's liking.

A closely related concern is whether the restraint may actually destroy a firm or organization. This concern can arise in at least two contexts. A restraint may be deemed reasonable because a participant needs it in order to preserve himself as a going concern.⁹⁸ More commonly, a restraint may be deemed reasonable because it does not injure others to such a degree that their existence is threatened.

Another factor unrelated to efficiency is whether the plaintiff has in some way agreed to the restraint, say, by joining the defendant association with the knowledge that the association might impose the restraint. Thus, an association member who has long operated under the association's "jurisdiction" arouses less judicial sympathy than a foreclosed applicant who has never "consented" to the association's jurisdiction.⁹⁹ Indeed, by voluntarily submitting to the association's jurisdiction, the member may be deemed to have waived any action in the courts. Another related factor, but one rarely defended on any ground other than a feudalistic wish to preserve the status quo, is whether the restraint is customary for the business.¹⁰⁰ The more customary it is, the more likely it is to be deemed ancillary to the defendants' legitimate interests.

The classic statement of the doctrine of unreasonable restraint of trade in England resembles the corresponding statement in the U.S.¹⁰¹ and does not reflect the different meaning that was ultimately adopted:

⁹⁸There is a fundamental difference between asking whether the defendant needs a restraint in order to assure optimum incentives for investment or to otherwise promote efficiency and asking whether the defendant needs the restraint merely to defend its own viability. Restrictive covenants barring the seller of a business from competing against the buyer exemplify a restraint needed to assure optimum incentive for investment in goodwill, customer lists, and other assets, the value of which would be greatly diminished absent the restraint. Such restraints protecting investments by the seller enhance efficiency by, in effect, recognizing a more complete specification of property rights and by overcoming the market imperfection that would result if the seller could not transfer an exclusive right to the goodwill and other assets to the buyer. P. Reubin and P. Shedd, "Human Capital and Covenants Not To Compete" (1981) 10 J. of Leg. Stud. 93. But the English courts apparently do not distinguish between restraints that enhance efficiency and those that do not. Instead they simply ask whether the restraint is needed to keep the defendant financially viable.

⁹⁹D. Lloyd, "Natural Justice And The 'Warned Off' Bookmaker" (1963) 26 Mod. L. Rev. 412 (citing, for example, *Demera Turf Club v. Phang*, [1961] 3 W.L.R. 454 (S. Ct. of British Guiana)).

¹⁰⁰*Halsbury's Laws of England*, vol. 47, 4th ed. (London: Butterworths, 1984) paras 10, 22.

¹⁰¹*Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918); *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911).

All interference with individual liberty of action in trading and all restraints of trade of themselves ... are contrary to public policy and therefore void. That is the general rule It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public.¹⁰²

It is the insistence that the restraint be reasonable with reference to the interest of the public that has tempted U.S. scholars, especially Judges Bork and Posner and others associated with the Chicago School, to claim that the doctrine aims to aid consumers by promoting economic efficiency.¹⁰³ The English courts, however, simply do not agree.

The refusal of the English courts to acknowledge issues of economic efficiency was explicitly stated in *Texaco Limited v. Mulberry Filling Station, Ltd.*¹⁰⁴ In this case, the British court deemed irrelevant expert economic evidence about whether the tying arrangement at issue might yield economic advantages and disadvantages to the public. “Such abstruse economic considerations” are “of a different order altogether” from the question of whether a restraint is reasonable.¹⁰⁵ The interest of the public concerned only the individual traders’ economic liberty, not economic efficiency:

But what is meant by reasonableness with reference to the interest of the public? It is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage. It is part of the doctrine of the common law and not of economics. So it must, of course, refer to interests as recognizable and recognised by law.¹⁰⁶

Saying that the public interest must “refer to interests as recognizable and recognised by law” amounts to saying, in terms familiar to a U.S. lawyer, that one must find in private law that the plaintiff has some legally protected interest that the agreement infringes. The public’s interest does not concern the best balance of allocative and productive efficiency, the *raison d’être* of trade law for the Chicago School. Such economic considerations are also inappropriate, the court continued, because a court of law is ill-adapted to assess them and because such considerations “lack sufficiently specific formulation to be capable of judicial, as contrasted with unregulated personal decision and application”.¹⁰⁷

¹⁰²*Nordenfelt, supra*, note 92.

¹⁰³R. Bork, *Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978) at 36-37.

¹⁰⁴*Texaco, supra*, note 76.

¹⁰⁵*Ibid.* at 827.

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.*

Indeed, about the only public interest actually recognized in restraint of trade cases in England is in the personal ability of traders to trade. The Chicago School may argue that the only logical reason for the public to care about a person's ability to trade is because of the public interest in economic efficiency, but the English courts do not usually bother to explain in utilitarian terms why the trader's ability to trade serves the public interest. Their key *desideratum*, and their focus of attention, is the trader's ability itself, and not the ultimate economic conditions such as competitive price and output that the trader's ability to trade may produce. To a U.S. court, this emphasis on the liberty of an individual trader smacks of protecting competitors and not competition, a goal U.S. courts and commentators have long denounced.¹⁰⁸ As Judge Posner has emphasized, the situation of the individual trader is not an important concern of U.S. antitrust laws:

Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated The consumer does not care how many sellers of a particular good or service there are; [the consumer] cares only that there be enough to assure him a competitive price and quality.¹⁰⁹

Under English law, however, concern for the single competitor remains the focus of the court's approach.

What I am calling the social security aims ("welfare" having become an economic word) of the English restraint of trade doctrine are illustrated by the judicial approach in another sporting case, *Greig v. Insole*.¹¹⁰ In this case, some cricketers who had played in matches sponsored by World Series Cricket Pty. Ltd. (WSC) attacked the recently created rules of the International Cricket Conference (ICC), and the Test and County Cricket Board (TCCB) banning World Series Cricket players from international test matches and county cricket matches. The WSC claimed that the ICC and TCCB ban unreasonably restrained trade. Predictably, the court, invoking the "liberty to trade" notion, found a clear restraint of trade because the ban sought "to substantially restrict the area in which a person may earn his living in the capacity in which he is qualified to do so."¹¹¹ Because of this infringement on the liberty of traders, the defendants ICC and TCCB had to justify their actions by proving that the ban was reasonable.

In the U.S., the issue would instead have been whether the ban threatened to reduce the output of the product in question — player's services,

¹⁰⁸*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) at 344. It is competition, not competitors, that the *Sherman Act* protects.

¹⁰⁹*Products Liability Ins. Agency v. Crum and Forster Inc.*, 682 F.2d 660 (7th Cir. 1982) at 663-64.

¹¹⁰*Supra*, note 84.

¹¹¹*Ibid.* at 345.

cricket events and related paraphernalia — to an extent not warranted by any gain to productive efficiency.¹¹² Unilateral conduct rarely, if ever, threatens output.¹¹³ Under the Chicago School approach, therefore, the ICC and TCCB would easily have prevailed.

The English court in *Greig*, however, began by asking what, if any, interest the ICC and TCCB were entitled to protect.¹¹⁴ This question, which dominates much of British trade law, plainly calls for a normative judgment unrelated to efficiency. It is not an economic question in any respect. From an economic perspective, all parties are entitled to maximize their profits as long as they do not unduly restrain output in the process. By asking what interest the defendants were entitled to protect, the court was implicitly limiting the defendants' freedom of action and authorizing greater judicial interference with the defendants' action than an economic approach would allow. Asking that question, however, accords fully with the English courts' mission of defining (and redefining) each party's rights and obligations towards each other, case by case.

Ultimately, the British court reached a conclusion that its American counterpart would confidently take for granted, namely that the legitimate interest of ICC and the TCCB entitled them to act to preserve themselves as financially viable bodies. But this conclusion was justified only on the ground that the ICC and TCCB "were in a sense custodians of the public interest".¹¹⁵ That is, the court recognized a public interest in the game of cricket being "properly organised and administered."¹¹⁶ Without explanation or discussion, the court also decided that the defendants (rather than the WSC) were the custodians of that interest. Apparently, whether an organization is entitled to exist and to act in self-preservation depends on

¹¹²"Intrabrand Cartels", *supra*, note 66 at 13-19.

¹¹³*Ibid.*

¹¹⁴The inquiry as to whether the defendants' act seeks to achieve "legitimate interests" has become a cornerstone of the restraint of trade doctrine. *Bridge v. Deacons*, [1984] 1 AC 705 (P.C.H.K.). As others have emphasized, the inquiry leads to highly formalistic distinctions, allows the parties by their customary behavior to create their own legitimate interest, and favors established firms over new entrants. C. Yuen, *supra*, note 90 at 16-17.

The emphasis on whether the defendants' action furthers their "legitimate interests", or impairs the plaintiff's "legitimate interests", traces back to the origin of the restraint of trade doctrine in contract law. The notion seems to be that the courts should apply the usual principles of contract interpretation to determine each party's expectations about the contract at the time he entered it. Those expectations constituted his legitimate interest. Other legitimate interests, such as a party's right to trade, stem not from expectations but from past judicial determinations of every person's rights and obligations.

The legitimate interests inquiry seems to have nothing whatever to do with the effect of the defendants' action on economic efficiency. See, generally, Yuen, *ibid.*, at 16-19.

¹¹⁵*Greig v. Insole*, *supra*, note 84 at 347.

¹¹⁶*Ibid.*

whether the court believes it serves a public interest. And that determination may turn on whether the court approves of its product. Cricket yes, jai alai, maybe not. The court never thought of relying on the self-interest of the organizers to assure that the games were organized and administered in line with consumer desires. Nor did the court entertain the notion that a firm's survival should depend not on the court's approval, but on the choices of consumers acting through the marketplace.

Having decided that, as custodians of the public, the ICC and TCCB were entitled to preserve themselves, the question in *Greig* became whether the ban was necessary for this end. This question bears a superficial resemblance to the question a U.S. court might ask once it found that the defendants' ban threatened to reduce output.¹¹⁷ At that point, the U.S. court might ask whether the defendants' ban might help to achieve productive efficiency gains that would offset the reduction in output. The U.S. court would look at whether the ban helps consumers by lowering the costs of the product being produced, by producing a better product (in other words by increasing the demand), or by overcoming a market imperfection, such as the free-rider problem, that prevents the market from responding to consumer desires. For instance, the ban would help internalize the gain to the ICC and TCCB created by their past efforts to increase the market value of the players. Thus, the ban prevented others, like the WSC, from free-riding on defendants' past efforts. By mitigating the free-rider problem, the ban created better incentives for sporting associations to undertake these efficiency-enhancing efforts. The value of increased efficiency, which would be encouraged by allowing the ban, would be balanced against the loss, if any, in the value of the output of the player's services. In short, the U.S. courts would look at the effect of the ban on the generic product market. A U.S. court would never be concerned, however, with whether the ban preserved the viability of the ICC or the TCCB, or of any organization in particular. That judges should decide whether certain organizations are worthwhile, and then assist them by justifying those actions necessary for their survival, is more appropriate to a feudal tradition than to a liberal one. It is not a notion an American court would accept.

In the hands of the English court, the question of whether the ban was necessary for the protection of the defendant organizations meant that the social security aims of the English restraint of trade doctrine would dominate. Those social security aims led the court to its ultimate embarrassment, at least in the eyes of an economist — penalizing a firm for successfully engaging in the very rivalry which a competitive system nurtures and cher-

¹¹⁷This is not to suggest that the ban in *Greig v. Insole* actually would reduce output. See "Intrabrand Cartels", *supra*, note 66, at 24 which suggests that no unilateral action is likely to reduce output. I am merely illustrating the steps of an economic approach.

ishes. Incredibly, the likelihood that the demand for WSC events would be great, thus threatening to divert the defendants' fans and diminish defendants' income from their events, was held against the WSC. This put the WSC in the absurd position of having to argue that it had not met consumer desires well enough to detract from the financial success of the defendants' events. Thus, the more the WSC increased consumer satisfaction by introducing a product consumers enjoyed, the worse its treatment at the hands of the court. The WSC satisfied the court that it did not present a serious immediate threat to test-play cricket in the United Kingdom, Pakistan, New Zealand and India. But as for Australian cricket, WSC's success in responding to consumers spelled its doom:

Accordingly, I accept that World Series Cricket, both by removing star players and by providing a competing attraction, is on the balance of probabilities likely to diminish the receipts of the Australian Cricket Board ... and thus to be detrimental to the financial interests of ... Australian cricket as at present organised.¹¹⁸

The court then went on to find that the WSC presented a long term threat to all test-playing countries:

first because other players might thereafter join World Series Cricket, secondly, because it was theoretically possible that its programme might be extended beyond the projected three years, and thirdly because other private promoters might conceivably be encouraged to follow [the WSC's] example.¹¹⁹

The approach adopted by the U.K. courts also punishes a business for doing well economically by making an action's legality turn on the firm's financial strength. If the ICC was financially marginal and needed the ban to survive, the ban would be reasonable. As the ICC needs the ban less, the ban becomes less reasonable.

Since the Chicago School revolution, the U.S. courts are implicitly enjoined to emphasize marginal rather than average effects and to approach unreasonable restraint of trade cases *ex ante* rather than *ex post*. An *ex ante* approach requires that the courts should attempt to influence future behaviour; they should not treat the parties' circumstances as fixed and then try to apportion gains and losses fairly. Emphasizing marginal returns means that courts must look at how their decisions affect incentives on the margins, for behaviour is influenced by changes in marginal returns, not in average returns. An *ex ante* marginal approach would ask in *Greig* "what is the effect of our decision on the incentive to organize cricket matches and to run them most efficiently (i.e., in a way that will maximize their value and lower their costs)?" An *ex ante* marginal approach would never ask, as the

¹¹⁸*Greig v. Insole, supra*, note 84 at 352.

¹¹⁹*Ibid.*

court did in *Greig*, whether the ICC and the TCCB would survive without the ban. Such a question would only be asked by those looking at average rather than marginal returns, by those trying to be “fair” rather than to influence future conduct, or by those willing to suppress rivalry in order to protect the inefficient. Indeed a court that would raise such a question would probably decide whether a copyright holder deserves to be protected from a particular type of use by asking whether that copyright holder would make “a lot” of money or a “fair profit” without the copyright protection. Such an *ex post* perspective, according to the economic view, inevitably yields sub-optimal incentives for the creators of new ideas or new products, the principal sources of economic growth. The *ex ante* approach would try to resolve the dispute in a way that maximizes efficiency. This approach would balance the need to establish optimum incentives for invention against the need to avoid monopoly restrictions on use. The case would not be treated as a squabble over who should get the benefit from existing copyrighted works.

The difference between American and English approaches to the restraint of trade doctrine may reflect fundamentally different views about the nature of the economic system. As Frank Easterbrook, a proponent of the Chicago School, has written:

The degree to which fairness or other *ex post* arguments dominate in legal decision-making is directly related to the court’s assumptions about the nature of the economic system. Judges who see economic transactions as zero-sum games are likely to favour ‘fair’ divisions of the gains and losses. If the stakes are established in advance and will not be altered by courts, why should judges harshly require one party to bear the whole loss or allow another to take the gain? Yet, if legal rules can create larger gains (or larger losses), the argument concerning fairness becomes weaker. The judge will pay less attention to today’s unfortunates and more attention to the effects of the rules.

...

[W]hether the Justices take an *ex ante* or an *ex post* perspective in analyzing issues ... will depend, in part, on the extent to which they appreciate how the economic system creates new gains and losses.¹²⁰

Because WSC cricketers presented a serious threat to test match cricket, the court suggested the ban would be reasonable if imposed prospectively. But then, almost as an afterthought, the court concluded that the retrospective ban on players who had already signed with WSC was not reasonable. The primary reason for this decision was that the players who signed with the WSC without knowing of the ban did not “deserve” to be banned; the ban was “unfair” to them. Under the economic approach, of course,

¹²⁰F.H. Easterbrook, “Foreword: The Court and the Economic System”, *supra*, note 73 at 11-12.

fairness to the players has little to do with economic efficiency or with the concept of unreasonable restraint of trade under the antitrust laws.¹²¹

Another reason offered for condemning the retrospective ban shows the willingness of English courts to substitute their own judgment for the judgment of private firms — even on the issue of how those firms should best maximize revenue from their operations. The court in *Greig* criticized the ban on the grounds that it would decrease the defendants' own gate receipts from ICC and TCCB test matches, at least in the short run. The defendants naturally protested "that it was necessary to make that sacrifice to safeguard the present and long-term interest of international cricket",¹²² but the court derided the defendants' judgment as "at most, speculative".¹²³ The court refused to acknowledge the backdrop assumption of economic liberalism which maintains that the defendants — being more familiar with and more keenly interested in their own economic situation — know better than the courts how best to maximize their revenue. Nor did the court acknowledge the normal presumption that defendants are free to decide for themselves how best to maximize revenue, with society relying on the market to correct defendants' errors. Once again, the liberal backdrop assumptions about the respective roles of the market, private actors and the courts are either ignored or never considered in the first place. If the British courts at least recognized and discussed these backdrop assumptions and only then overrode them, the approaches of the two countries would differ less dramatically.

D. The Common Law Doctrines

The many other doctrines used by the English courts to control industry self-regulation pay no greater attention to efficiency. Even a brief description of those doctrines will illustrate their different and narrower goals. The doctrines aim to control the power of the defendant groups in relation to the plaintiff, not the power of the defendants to restrict output to consumers. They aim to rectify unfair treatment of the plaintiff at the hands of the defendants. They aim to protect the plaintiff's reasonable expectations and opportunity to work in an occupation for which he has trained. They do not seek to break up concerted behaviour that restrains rivalry and reduces output.

¹²¹Liebeler, *supra*, note 64.

¹²²*Greig v. Insole*, *supra*, note 84 at 354.

¹²³*Ibid.*

1. Contract

One contract doctrine available to English plaintiffs holds that a member's entry into an association gives rise to a contract (or many separate contracts) binding all members to follow the rules of the association.¹²⁴ Thus, restrictive actions taken by the defendant association in violation of its own rules can be viewed as a breach of contract. The contract notion applies to social clubs and other associations of little economic import, as well as to trade associations. At one time this notion of contract was the primary basis for giving courts jurisdiction over such disputes.¹²⁵ It also provides a basis for justifying the defendant association's power over the plaintiff. Thus, association action that conforms with the association's rules cannot be reviewed by the courts on any other grounds, a position that nicely illustrates the English courts' reluctance to let public policy concerns dominate "private law" disputes. One of the many difficulties with the notion of contract is its failure to indicate the defendant association's rights and obligations vis-à-vis non-members, such as applicants or prospective participants in the association's events. The courts have swung between the poles of denying any obligation to non-members, on the one hand, and allowing no justification for injuring non-members, on the other.¹²⁶

A second doctrine, closely related to the first, is provided by *Dawkins v. Antrobus*.¹²⁷ According to this doctrine, an expelled member becomes entitled to relief by showing: (a) the rules and proceedings of the association are contrary to natural justice; (b) the expulsion is not in accordance with the association's rules; or (c) the proceedings are not free from malice (bad faith). Again, this doctrine, which could be categorized under either the law of torts or that of private associations, applies to all types of associations

¹²⁴*Davis v. Carew-Pole*, *supra*, note 18; *Abbott v. Sullivan*, *supra*, note 18; *Halsbury's*, vol. 47, *supra*, note 18, paras 116, 251. See also the discussion of this principle in the *dicta* of *Nagle*, *supra*, note 1 at 650-51.

¹²⁵For many years in England, an individual's acceptance of the offer to become a group member was said to create an implied contract with the group obliging that group to follow its own rules and observe the requirements of natural justice. Absent the contract, the member could not sue the tribunal in court unless one of the few torts recognized in the early common law was committed. In return, the contract gave the domestic tribunal jurisdiction to disqualify or fine the member, or warn him off to others. But a domestic tribunal's power to act against a non-member with whom no contract existed was in doubt. Some scholars suggested that a group might be liable when it injured a non-member, regardless of whether its action was reasonable. Lloyd, *supra*, note 79 at 414-15.

¹²⁶A modern remnant of this reliance on the notion of contract arises when a member of a club voluntarily submits his dispute to the club before approaching the courts. English courts may hold that the earlier approach to the club waived the member's rights before the court; e.g., *Enderby Town Football Club Ltd v. Football Ass'n* (1970), [1971] Ch. 591 at 607, [1970] 3 W.L.R. 1021, [1971] 1 All E.R. 215 (C.A.).

¹²⁷(1881) 17 Ch. D. 615 (C.A.).

including social clubs. And again, the doctrine arises primarily when a defendant association attempts to expel a member.

2. The Right to Work Doctrine

The right to work doctrine, closely associated with Lord Denning, emerged as a means of circumventing the requirement of privity of contract.¹²⁸ This doctrine may also have developed as a basis upon which to justify judicial review of those domestic tribunals whose actions affected employment without extending jurisdiction over more benign domestic tribunals such as social clubs. It is triggered by a judicial finding that the defendant association's action forecloses the plaintiff from a line of work. Once triggered, the doctrine asks not only whether the defendants' action offends natural justice, but also whether it is reasonable in light of the objectives of the parties.¹²⁹ This latter test tends to be more demanding than the natural justice test, which often focuses solely on the procedures afforded the plaintiff. It allows the court to explore possible alternative actions the defendants might have taken that would have injured the plaintiff less while still achieving the defendants' goals. For obvious reasons, the right to work doctrine threatens the closed shop and, more generally, the sovereignty of labour unions over their members and over the determination of union membership. To limit the doctrine, the courts have emphasized that it only seeks to prevent arbitrary action.¹³⁰

On economic grounds, private actions that affect the right to work do not necessarily merit greater judicial interest and scrutiny than do similar actions that advantage or disadvantage products. The ability to work in a chosen field, like the ability to market any product, would normally be governed by market forces and by individual employers acting under market constraints. To be sure, the notion that English courts should protect the right to work stretches back at least to the *Case of the Tailors of Ipswich* in 1614.¹³¹ It reflects an attitude that Marx derided as "feudal socialism", the

¹²⁸*Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 at 343, [1952] 1 All E.R. 1175, [1952] T.L.R. 1115 (C.A.).

¹²⁹*Nagle*, *supra*, note 1 at 644-47.

¹³⁰R.W. Rideout, "Upon Training An Unruly Horse" (1966) 29 Mod. L. Rev. 424.

¹³¹(1614), 11 Co. Rep. 53A, 77 Eng. Rep. 1218 (K.B.).

belief that feudalism's protection of a person's working status should survive in a capitalist world.¹³²

3. Inducement of Breach of Contract

Certain efforts at self-regulation may also give rise to the tort of inducement of breach of contract. The elements of this tort in England are: 1) direct interference with a contract or indirect interference combined with unlawful means; 2) knowledge of the contract; 3) intent to interfere; 4) special damages; and 5) lack of justification for the interference.¹³³ Once again, a similar tort exists in the United States but is rarely used because of the decisive practical advantages of relying on antitrust law. In the U.S., moreover, a broader view of justification is taken to ensure that the tort cannot be based on normal competitive rivalry. Nevertheless, Chicago School commentators severely criticize the U.S. tort on efficiency grounds. Professor Perlman has argued that facilitating a breach of contract will often be efficient:

If allocative efficiency is the objective of contract law, legal rules should encourage persons to search for and to take advantage of more highly valued uses for resources under their command. In efficiency terms, there is no reason why formation of one contract should bring the process to a halt or prevent third parties from inducing non-performance of inefficient contracts. Contract rules seem designed to facilitate breach where efficiency gains result; [tort rules] in contrast, [seem] designed to reduce the number of such breaches and thus [run] counter to a plausible objective of contract doctrine.¹³⁴

Perlman also describes how tort liability impairs the inducer's ability to negotiate with the party better able to take advantage of the alternate opportunities. He claims that tort liability creates inefficient search and salvage incentives and increases transaction costs.¹³⁵ As inefficient as the U.S. tort may be, the English tort is substantially worse. The *Greig* cricket case illustrates why. In *Greig*, a tort was found based on the announcement by

¹³²K. Marx & F. Engels, *The Communist Manifesto*, ed. by L. Fever (Garden City, N.Y.: Anchor Books, 1959). In Marx's view, spokesmen for English aristocracy — most notably Disraeli, Carlyle, and the "Young England" movement — "took up" the vocation of indicting bourgeois society in the interest of preserving working class entitlement. He described their efforts as follows at 23:

feudal socialism: half lamentation, half lampoon; half echo of the past, half menace of the future; at times, by its bitter, witty and incisive criticism, striking the bourgeoisie to the very heart's core, but always ludicrous in its effect, through total incapacity to comprehend the march of modern history.

See also B. Disraeli, *Sybil, or, The Two Nations* (London: Oxford University Press, 1941).

¹³³*Greig v. Insole, supra*, note 84 at 332.

¹³⁴H.S. Perlman, "Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine" (1982) 49 U. Chi. L. Rev. 61 at 82-83.

¹³⁵*Ibid.* at 82-85.

the defendant ICC that it would ban players under contract with the WSC from test matches. The announcement itself was found to be sufficient direct interference. Intent to induce a breach of contract was easily supplied by the notion that the defendants made the announcement knowing a breach was a natural and probable consequence of their act. And the court took an extraordinarily narrow view of possible justifications. It saw no merit in claims by ICC that this was a normal course of rivalry or that the ban was needed to prevent the WSC from, in effect, free-riding on the past efforts of the ICC to increase the value of the players' reputations. Rather, the court took an approach that effectively barred from consideration any justification based only on the *social* desirability of defendants' action. Instead, defendants were required to justify their action vis-à-vis the WSC.

Apparently, the court was requiring that the ICC show some past dealing between it and the WSC which gave it an equitable claim to retaliate by means of the ban. The English court's extraordinarily cramped view of possible justifications seems shockingly at odds with an economy supposedly committed to competition. It illustrates the extent to which public policy considerations such as economic efficiency may still fail to affect, much less dominate, English trade law.

4. Interference with a Business by Unlawful Means

A possible but rarely used theory by which an injured person may resist self-regulation is the English tort of interference with a business by unlawful means. This tort can reach self-regulation that does not induce an actual breach of contract. It may extend to self-regulation that merely drives away possible future business which is not yet the subject of any contract. The sole element, apart from the injury itself, is the defendant's use of unlawful means. Past cases illustrate the means deemed unlawful: 1) intimidating the plaintiff's employers into refusing to hire the plaintiff;¹³⁶ 2) inducing the plaintiff's employees to refuse to handle specified future work, such as unloading particular barges;¹³⁷ and 3) complying with unlawful orders from a supplier not to sell to the plaintiff.¹³⁸ The order not to sell may be unlawful because it is in breach of a contract or in violation of a court order. The

¹³⁶*Rookes v. Barnard*, *supra*, note 14. The tort of intimidation may also be alleged in a restraint of trade case. *Halsbury's Laws of England*, 4th ed., vol. 45, s. 1524. The tort is most commonly used in the context of labour and trade union disputes, where it seeks to control the methods of unions in such disputes. The tort has never been said to contain an efficiency component; e.g., *Midland Cold Storage Ltd v. Turner*, *supra*, note 14; *Cory Lighterage Ltd v. Transport and General Workers' Union*, [1973] 1 W.L.R. 792, [1973] 2 All E.R. 341, 117 S.J. 266 (Ch.); *Rookes v. Barnard*, *ibid*.

¹³⁷*Stratford (J.T.) & Son Ltd v. Lindly*, *supra*, note 10.

¹³⁸*Torquay Hotel Co. v. Cousins*, *supra*, note 11 at 139-40.

most common unlawful means may be “blacking” the plaintiff, provided the “blacking” is not in furtherance of any trade dispute between the plaintiff and defendant.¹³⁹ Because “blacking” is a common means of self-regulation, and indeed arises implicitly whenever a plaintiff is refused a licence or a necessary membership, this tort should, in theory, provide a widely available vehicle for controlling self-regulation. The tort seems to be a reaction against methods deemed improper on moral grounds, rather than a manifestation of commitment to efficiency.

At no point in their treatment of industry self-regulation, therefore, do the courts of England give efficiency concerns a dominant role. In their solicitude for existing institutions and for fair treatment of the parties, they adopt an approach infected with a feudal ethos. Nor do the English courts display awareness of the language or grammar of economic analysis. Instead, they dispose of these cases without any economic discussion and without any apparent consciousness of the contrast between their approach and the approach a liberal economic order would seem to prescribe.

Conclusion

Until the triumph of the Chicago School, the treatment of industry self-regulation in the United States reflected a populist hostility towards the exercise of any power by private associations. Any self-regulation not mandated by the government, or at least any that seemed to usurp the rule-making and rule-enforcing functions of the government, was presumptively illegal. In England, by contrast, industry self-regulation received a much warmer reception. Even when an injured plaintiff could get the courts to review unauthorized self-regulation, rather than leave him to the mercy of the regulators, the courts accepted the legitimacy of the attempt to regulate and required the plaintiff to show something plainly amiss with the particular treatment afforded him.

When the courts in the two countries get beyond their initial reactions, however, the comparison changes. The U.S. courts strive to balance the pro-competitive features of the regulation — the likely gain to productive efficiency — against the anti-competitive features — the likely loss to allocative efficiency. While the difficulty of this calculus may render the approach incoherent, the approach forces the courts to look at the regulation *ex ante*, to consider marginal effects, and to focus exclusively on economic efficiency. It also leads the courts to begin to employ the grammar of an economic approach. The English courts, on the other hand, show little if any movement towards an economic approach. They show no appreciation for the market’s ability to decide questions they take it upon themselves to

¹³⁹*Ibid.*

decide. Even the Restrictive Trade Practices Court, the closest equivalent to an "efficiency court", upholds or condemns regulations based on its sense of the regulation's fairness and propriety, without any more objective benchmark. The English Rule of Reason bears no resemblance to an efficiency calculus. Rather, it aims to protect a party's personal ability to trade (despite his past commitments) and to protect the economic security of existing firms. Similarly, the other English actions that might check self-regulation focus on whether businesses behave fairly and reasonably toward each other, rather than on whether their behaviour helps or hurts consumers.

Those scholars who emphasize the importance of a feudal tradition, or more commonly, the importance of the feudal tradition's absence in the United States, offer a compelling explanation for both comparisons.¹⁴⁰ They point out that the liberal tradition of the U.S. contained an atomistic, populist aspect that looked upon any enforcement of associational power as suspect and "un-American". Of greater importance, however, is the fact that the tradition was so purely liberal. It was liberal in its subjectivity of values, in its commitment to running the Lockian race, in its relative willingness to accept the judgment of the market, and in its indifference to protecting entitlement based on status. It was also liberal in its blindness to social oppression, especially the oppression suffered by losers of the Lockian race. In England, on the other hand, liberalism has never held the field alone. One prominent challenge comes from "feudal socialism" which lashes out at liberalism in the spirit of Disraeli and Carlyle in order to protect feudal entitlement and existing institutions.¹⁴¹ The failure of economic analysis to gain a foothold among the English courts can perhaps be attributed to this feature of the English tradition, a tradition that has been described as a "marvelous organic cohesion of feudal, liberal and socialist ideas".¹⁴²

¹⁴⁰Hartz, *supra*, note 57; R. Bellah, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985) at 114.

¹⁴¹Hartz, *ibid.*; B. Disraeli, *supra*, note 132; T. Carlyle, *Chartism* (London, 1941).

¹⁴²Hartz, *ibid.* at 10.