A TALE OF TWO STATUTES: *CIPRO*, *EDWARDS*, AND THE RULE OF REASON

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I. INTRODUCTION

This article tells the tale of two statutes that were enacted around the same time, that address many of the same issues, and that were interpreted for over one hundred years in the same way by the California courts. Recently, however, attempts have been made to tear apart these statutory neighbors. We speak, of course, of California's two antitrust statutes: the Cartwright Act, enacted in 1907, and Business & Professions Code section 16600, enacted in 1872.

The operative language of each of these statutes is set out below:

- **Section 16600**
  "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."

- **Cartwright Act—Section 16726**
  "Except as provided in this chapter, every trust is unlawful, against public policy and void."[2]

Although section 16600 and the Cartwright Act each employs absolutist language in describing its reach, the California Supreme Court has long interpreted both statutes as permitting "reasonable" restraints.[3] As a consequence, the Cartwright Act and section 16600 have existed in near-perfect harmony since the former was enacted. Under each statute, certain kinds of restraints on trade were presumed to be anticompetitive and were deemed invalid as a matter of law, while a more thorough analysis of market effects was employed when addressing other types of agreements.

Recently, however, litigants and *amici* have suggested that a 2008 Supreme Court decision, *Edwards v. Arthur Andersen LLP,*[4] created an enormous rift in California's antitrust landscape. Although *Edwards* concerned a covenant not to compete in an employment agreement, some have contended that the *Edwards* court established a broad rule that *all*

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2 A separate Cartwright Act provision, Cal. Bus. & Prof. Code § 16720, lists agreements that constitute an unlawful "trust," including agreements to "create or carry out restrictions in trade or commerce" and those that "prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

3 *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 665 (1984) ("[u]nder what has become termed the 'rule of reason,' many restraints are analyzed [under the Cartwright Act] in light of their economic effects on market conditions, and may be upheld if 'reasonable' . . .") (quoting *Chi. Bd. of Trade v. United States* 246 U.S. 231, 238 (1918) ("*Chi. Bd. of Trade*"); *Great Western Distillery Prods. v. John A. Walthen Distillery Co.*, 10 Cal. 2d 442, 448-49 (1937) (holding that under the predecessor to section 16600, a limited restriction will not be deemed invalid "although it in some degree may be said to restrain trade").

4 44 Cal. 4th 937 (2008).

agreements that in any way restrain trade, whether in the employment context or in the broader universe of commercial activity, are *per se* void. For example, the California Attorney General filed an amicus brief in the *Cipro* case[5] that asserted that *Edwards* "sets out a general rule in California making all contracts restraining trade illegal *per se* under California law (save for statutory exceptions), and not subject to a rule of reason analysis."[6] The Attorney General's brief relied on a statement in *Edwards* that "[s]ection 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect."[7]

The potential consequences of such a black-and-white legal regime—where all agreements that restrain trade to any extent are void, no matter how procompetitive they might be—are staggering. As Justice Brandeis observed in 1918 in the course of explaining why the Sherman Act forbade only unreasonable restraints, "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."[8] If the California Supreme Court in *Edwards* did, in fact, intend to hold that *all* agreements restraining trade are void, regardless of their procompetitive or limited nature, then every joint venture, lease, distribution agreement, license agreement and many other widely used business agreements that fall under California law would be at substantial risk of invalidation under section 16600.

This article posits that *Edwards*' precedential reach is not nearly so expansive. An examination of the procedural history of the *Edwards* case, both at the Court of Appeal and at the Supreme Court, reveals that those courts had limited the scope of their review and their holdings to non-competition provisions in employment agreements, where California's particularly strong public policy favoring employee mobility would play a significant role in the analysis. It is, of course, fundamental that a decision, even a Supreme Court decision, "is not authority for what is *said* in the opinion but only for the points *actually involved* and actually decided."[9] The *Edwards* court thus should not be presumed to have held invalid large numbers of agreements outside the employment context given that it had explicitly limited its review (and the parties' briefing) to the employment context.

In addition, as we explain in this article, any holding by the *Edwards* court that agreements challenged under section 16600 could never be subjected to a rule of reason analysis would be directly contrary to two California Supreme Court decisions that the *Edwards* court did not mention. It is very unlikely that the Supreme Court intended to overrule at least two of its own longstanding precedents without even mentioning those decisions or explaining why they were no longer good law.[10]

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5 *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015) ("*Cipro*").

6 Brief of California Attorney General as Amicus Curiae at 13, *Cipro*, 61 Cal. 4th 116 (2015) (March 19, 2014) (No. S198616) 2014 WL 1765268 ("Cal. AG *Cipro* Amicus").

7 *Edwards*, 44 Cal. 4th at 950.

8 *Chi. Bd. of Trade*, 246 U.S. at 238 (1918).

9 *Childers v. Childers*, 74 Cal. App. 2d 56, 61 (1946) (emphasis in original); *see also Trope v. Katz*, 11 Cal. 4th 274, 284 (1995) (quoting *Childers*, 74 Cal. App. at 61).

10 *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

The *Edwards* opinion is thus best understood as another in a long line of Court of Appeal and Supreme Court cases that have treated employee non-compete agreements as presumptively invalid under section 16600. Under that approach, as described in this article, the mode of analysis under section 16600 would mirror the framework applied in Cartwright Act cases, as most recently described in *Cipro:* (1) Certain categories of agreements and practices that "can be said to always lack redeeming value" may be held *per se* invalid without extensive analysis; and (2) Agreements falling outside the *per se* category will be subject to a "nuanced" analysis of "the circumstances, detail, and logic" of the challenged restraint in order to "determine whether an agreement harms competition more than it helps."[11]

This proposed approach to *Edwards,* and to section 16600 analysis more generally, has two additional virtues: (1) By harmonizing the antitrust analysis applicable to California's two antitrust statutes, the proposed approach recognizes and applies the basic principle of statutory interpretation that courts "should adopt[ ] the construction that best harmonizes the statute internally and with related statutes;"[12] and (2) The proposed approach acknowledges that the California Legislature has "effectively codifie[d]" the traditional rule of reason in Cal. Bus. & Prof. Code § 16725, which provides that "[i]t is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade."[13]

In the pages that follow, we first describe the analytical framework set out by the California Supreme Court in *Cipro.* We then trace the history of section 16600 jurisprudence and explain how the California courts developed a two-pronged analytical framework for section 16600 claims that essentially mirrored the framework used by courts to address Sherman Act and Cartwright Act claims, set out most recently in *Cipro*. Finally, we explain why *Edwards* fits comfortably into the courts' two-pronged approach to section 16600 claims, and why it would be inappropriate to assume that the *Edwards* court intended to create a schism between section 16600 and the Cartwright Act by holding that all restraints on trade, no matter how limited or procompetitive, are void under section 16600.

II. *CIPRO* AND THE RULE OF REASON UNDER THE CARTWRIGHT ACT

At issue in *Cipro* was the legality of "reverse payment" settlements of patent lawsuits involving pharmaceutical companies. The *Cipro* court described such settlements as involving a payment by a plaintiff (a brand-name drug manufacturer that holds fundamental patents on a drug) to a defendant (a generic drug manufacturer that has announced plans to enter the market for that drug).[14] In return for the payment by the patentholder, the generic drug manufacturer drops its challenges to the validity of the plaintiffs' patents and often agrees to stay out of the market for a period of time.[15] The case before the court involved consumer class actions under the Cartwright Act that had been filed against a brand-name drug manufacturer and a generic manufacturer who had reached such a settlement agreement in 1997.[16]

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11 *Cipro*, 61 Cal. 4th at 147.

12 *Pac. Gas & Elec. v. Stanislaus*, 16 Cal. 4th 1143, 1152 (1997).

13 *Cipro*, 61 Cal. 4th at 137 n.5 (quoting Cal. Bus. & Prof. Code § 16725).

14 *Cipro*, 61 Cal. 4th at 130.

15 *Id.*

16 *Id.* at 133.

The relevant portions of the *Cipro* decision for our purposes are those where the court addressed the analytical framework that would be used to decide the plaintiffs' Cartwright Act claims. The court began by explaining that although "the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. "[17] Put differently, "deciding antitrust illegality is not as simple as identifying whether a challenged agreement involves a restraint of trade[18]," despite the "superficially absolute language" used in the Cartwright Act.[19] Instead, courts must "determine whether an agreement harms competition more than it helps," for "only unreasonable restraints of trade are prohibited."[20]

After surveying the historical development of the rule of reason under both federal and California antitrust law, the *Cipro* court confirmed that the rule of reason will continue to be applied to Cartwright Act claims unless the challenged restraint falls into one of the "categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal," such as cartel agreements.[21] The *Cipro* court placed in the presumptively illegal category all agreements between competitors "to establish or maintain a monopoly."[22]

The *Cipro* court also explained that there is no rigid formula that courts must use when applying the rule of reason. Instead, because "nothing in the text of the Cartwright Act dictates the precise details of the per se and rule of reason approaches," the courts should consider "the circumstances, details, and logic" of the challenged restraint and employ a "nuanced" approach in order to achieve the ultimate goal of determining whether an agreement is "unreasonable."[23] The *Cipro* court also concluded that courts faced with a Cartwright Act challenge "must consider not simply whether per se or rule of reason analysis applies" in the case before it.[24] Instead, if and to the extent that a rule of reason analysis applies, a court "must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade" in the case at hand.[25] The *Cipro* court proceeded to develop that structure, as applied to the patent settlements before it, at some considerable length.[26]

As noted in the introduction to this article, some *amici* in *Cipro* contended that the Supreme Court should, in considering the validity of the agreements at issue in that case, apply a per se standard instead of the "nuanced," multi-factor analysis that the court eventually chose as the appropriate approach under the Cartwright Act. The California Attorney General's office, in particular, urged the Supreme Court to harmonize the

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17 *Id*. at 136.

18 *Id*. at 145.

19 *Id*. at 145–46 (quoting *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 930 (1976)).

20 *Id*. at 145.

21 *Id*. at 146.

22 *Id*. at 148. As examples of such presumptively unlawful agreements, the *Cipro* court cited, *inter alia*, the agreements at issue in two early section 16600 cases: *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 514-15 (1892), and *Getz Bros. & Co. v. Fed. Salt Co.*, 147 Cal. 115, 119 (1905).

23 *Id*. at 146–147 (quoting *Cal. Dental Assn. v. FTC*, 526 U.S. 756, 781 (1986)).

24 *Id*. at 147.

25 *Id*.

26 *Id*. at 149–160.

Cartwright Act with section 16600 by adopting what it described as the holding in *Edwards* that "all contracts restraining trade [are] illegal per se [under section 16600] and not subject to a rule of reason analysis."[27] Under that approach, the court's analysis of the agreements at issue in *Cipro* would have begun *and* ended with the "simple" question of "whether a challenged agreement involves a restraint of trade."[28]

Although the *Cipro* court did not adopt the per se standard that it had been encouraged to embrace, it also did not comment on the scope of section 16600 or on the proper interpretation of the Supreme Court's earlier opinion in *Edwards*. We thus still face, and in this article try to answer, the question of whether section 16600 requires a black-and-white approach to *all* challenged agreements or should be interpreted as invalidating only unreasonable restraints. Answering that question requires, in part, a thorough understanding of section 16600's interpretation and application since its enactment in 1872. We turn to that history now, in principal part to explain why the broad statements in *Edwards* about the reach of section 16600 only make sense—and are only consistent with longstanding precedents—if *Edwards'* holdings are confined to non-compete provisions in employment agreements.

III. SECTION 16600 AND THE RULE OF REASON: THE HISTORY

A. The First Seventy Years (1868-1938)

In 1868, prior to California's enactment of any statute governing restraints of trade, the California Supreme Court in *Wright v. Ryder* addressed the legality at common law of a restrictive covenant involving a steamboat called the "New World."[29] The California Steam Navigation Company had sold the New World to the Oregon Steam Navigation Company for $75,000 and had extracted a covenant barring said steamboat from traveling on any California river, bay or other body of water for ten years. After a series of subsequent transactions, the New World ended up in the hands of James Ryder, who had purchased it to move passengers and freight between San Francisco and Vallejo. Only upon taking possession of the New World did Ryder learn of the covenant that barred the vessel from sailing in California waters. He then refused to pay for the boat, and litigation ensued.[30]

The primary question for the Supreme Court in *Wright* was the legality at common law of the restrictive covenant at hand. The court held the covenant invalid, but not without a lengthy history lesson:

> The general principles which govern contracts in restraint of trade are well settled, both in England and the United States. They proceed on the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecution of trades, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest.

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27 *See* Cal. AG *Cipro* Amicus, *supra* note 6, at 15.

28 *Cipro*, 61 Cal. 4th at 145 (describing the starting point for Cartwright Act analysis).

29 36 Cal. 342 (1868).

30 *Id.* at 342-47.

> At an early period in English jurisprudence, when trade and the mechanic arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence the rule first established was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rule which before prevailed had in a greater measure ceased, and the rule itself was greatly relaxed and modified . . . Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operations within reasonable limits.[31]

After reciting this history, the *Wright* court examined the covenant before it and found it to be void under a "long line of adjudications in England and America" that invalidated any covenant that restrained a party from operating a business in an *entire* state or nation.[32]

The *Wright* decision was followed in short order by the legislature's enactment in 1872 of California's first antitrust statute, section 1673 of the California Civil Code, which provided that:

> Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by the next two sections, is to that extent void.[33]

The California Supreme Court did not explore this new statute's scope or meaning until 1892, some twenty years later. That year, in *Vulcan Powder Co.,* the court addressed a cartel agreement involving a group of dynamite manufacturers.[34] The manufacturers had agreed to production quotas and territorial limitations and had ceded pricing authority to a committee made up of cartel members.[35] When one of those members, Vulcan Powder, sued the other members for reneging on the deal, a defendant successfully demurred on the ground that the agreement restrained trade in violation of section 1673.[36] The Supreme Court affirmed the dismissal, holding that the agreement was "clearly in restraint of trade and against public policy."[37]

The court in *Vulcan Powder* prefaced its holding with a brief description of the common law principles that had governed claims of restraint of trade prior to section 1673's enactment, including the principle that "contracts in which the restraint was confined to reasonable

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31 *Id.* at 357 (paragraph breaks added).

32 *Id.* at 362. The *Cipro* court cited the covenant at issue in *Wright* as an example of agreements not to compete that are *per se* unlawful. *Cipro*, 61 Cal. 4th at 148.

33 The referenced exceptions involved covenants attendant to the sale of a business (Cal. Civ. Code § 1674) and to the dissolution of a partnership (Cal. Civ. Code § 1675), which were deemed legal in certain circumstances. Sections 1673-75 were moved into the Bus. & Prof. Code in the 1941 recodification as sections 16600-16602, with a few slight edits to the text. Cal. Bus. & Prof. Code § 16600 currently provides that: "[E]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."

34 96 Cal. at 514–15.

35 *Id.*

36 *Id.* at 512–13.

37 *Id.* at 515.

limits of time or place, and which were founded upon sufficient consideration," were valid.[38] The court explained that this common law rule "was uncertain, and led to much perplexing legislation," and had been replaced by section 1673.[39]

It is possible to construe this passage in *Vulcan Powder* as adopting a *per se* rule that *all* agreements that restrained trade in *any* respect are void under section 1673 unless they fall within the enumerated exceptions in sections 1674–75. The court in *Vulcan Powder* did not, however, simply invoke a blanket rule. Instead, in order to confirm that the agreement before it should be condemned as "clearly in restraint of trade," it engaged in a thorough review of the agreement that focused on the territorial and geographic extent of the restraints, the particularities of the production quotas agreed to, the procedure by which a cartel member would transfer its excess profits to other members if it exceeded its quota, and the fact that the pricing committee had the power to fine members who sold their dynamite at lower-than-allowed prices.[40] Only after that examination did the court find that the cartel agreement was "clearly in restraint of trade and against public policy."[41]

Subsequent California Supreme Court decisions demonstrated that *Vulcan Powder's* per se approach was limited to cartel cases and other pernicious restraints, while the rule of reasonableness would be applied to other claims under section 1673. In 1909, for example, the Supreme Court held squarely that section 1673 did not invalidate reasonable restraints on trade. The plaintiff in *Grogan v. Chaffee,* Charles Grogan, claimed to have invented a process for making "pure" olive oil, and he had gained a loyal following for his product through savvy advertising.[42] Grogan was also an early adopter of the shrink-wrap license—affixing a notice to every container of olive oil he sold that was intended to bind purchasers to "maintain [Grogan's] fixed retail selling price" if they resold the olive oil.[43] When H.G. Chaffee, a Pasadena grocer, resold Grogan's olive oil for less than the stipulated price, Grogan sought an injunction, claiming that Chaffee was violating the pricing restriction that had accompanied Chaffee's purchase of the olive oil.[44] The trial court dismissed Grogan's claims after concluding, *inter alia,* that the pricing restriction violated section 1673.[45]

The Supreme Court reversed, holding that section 1673 only barred unreasonable restraints of trade.[46] The court observed that "[t]he tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade."[47] Moreover, "[i]t is not every limitation on absolute freedom of dealing that is prohibited. . . . 'The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved

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38 *Id.* at 513 (citing *Wright*, 36 Cal. 356).

39 *Id.*

40 *Vulcan Powder*, 96 Cal. at 515.

41 *Id.*

42 156 Cal. 611, 612 (1909).

43 *Id.*

44 *Id.* at 613.

45 *Id.*

46 *Id.* at 614–15.

47 *Id.* at 615.

in it, the contract is, or is not, unreasonable.'"[48] The *Grogan* court further held that "it must be taken to be settled" that section 1673 is "to be construed in the light of these [common law] principles."[49] The court distinguished *Vulcan Powder* on the ground that "the objectionable feature of the agreement" in that case was its "tendency to create a monopoly."[50]

The California Supreme Court soon signaled, however, that it would take a much stricter approach to agreements that restrained an individual's ability to practice his chosen profession. The defendant in a 1916 case, *Chamberlain v. Augustine,* had sold an interest in a Los Angeles-based foundry to the plaintiffs.[51] The defendant had agreed as part of the sale that if he conducted a foundry business in California, Oregon, or Washington in the following three years, he would pay $5,000 in liquidated damages to the plaintiffs.[52] Shortly after signing the agreement, the defendant took over a Los Angeles-based foundry, and the plaintiffs sued to recover the liquidated damages.[53] The trial court entered judgment for the defendant on the ground that the parties' agreement was invalid under section 1673. On appeal, the court rejected plaintiffs' argument that the covenant was valid because it acted as only a partial restraint and allowed the defendant to work at a foundry outside of the three designated states. "The obvious answer to" plaintiffs' argument, the court stated, "is the very language of section 1673," which made "no exception in favor of contracts only in partial restraint of trade."[54]

The court also discussed the application of section 1673 in a 1922 case, *Morey v. Paladini,* that involved territorial restrictions on the sale of lobsters.[55] The plaintiff had entered into contracts with fishing companies to buy virtually the entire supply of lobsters caught on the West Coast.[56] The defendant agreed to purchase certain quantities of lobsters from the plaintiff, who in turn agreed that the defendant would have the exclusive right to sell plaintiffs' lobsters in northern California and three western states."[57] After the defendant failed to purchase the agreed-upon quantities of lobsters, the plaintiff recovered $4,500 in damages in the trial court.[58] On appeal, the defendant raised an illegality defense, arguing that the agreement violated the Sherman Act.[59]

The California Supreme Court held that the parties' agreement was unlawful under the Sherman Act because it was "intended to effect a virtual monopoly of the lobster trade in the central and northern portions of this state, and so far as shipments to Oregon, Washington, and Nevada were concerned."[60] The court then discussed the question of

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48 *Id.* (quoting *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 409 (1889)).

49 *Id.*

50 *Id.* at 613.

51 172 Cal. 285, 286–87 (1916).

52 *Id.*

53 *Id.* at 287.

54 *Id.* at 288–89.

55 187 Cal. 727, 732, 739 (1922).

56 *Id.*

57 *Id.*

58 *Id.* at 733.

59 *Id.*

60 *Id.* at 737.

whether the parties' contract also violated section 1673, even though neither party had addressed that statute.[61] The court stated that "[s]o far as our own statute is material," there was "no doubt" that the agreement was intended to create "a monopoly of the lobster business in the selected territory" and was therefore void under section 1673.[62] The court followed *Chamberlain* and an 1888 decision, *Santa Clara Valley Mill & Lumber Co. v. Hayes,* where the court had relied on the common law to strike down a cartel agreement in the lumber industry without mention of section 1673.[63]

In 1933, the Supreme Court reaffirmed the position it had set out in *Grogan*—that the ordinary analytical framework for a claim brought under section 1673 is "whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."[64] The plaintiff in *Associated Oil Co. v. Myers* had leased a service station from the defendants.[65] The lease gave the plaintiff the exclusive right to use the property for advertising its gasoline products, while allowing the defendants to continue operating the gas station as long as they bought all their gasoline from the plaintiff.[66] When the defendants began to purchase and sell gasoline from other vendors, the plaintiff sought injunctive relief.[67] The trial court sustained defendants' demurrer, in part on the ground that the parties' agreement was void under section 1673.[68]

The Supreme Court reversed, finding that the contractual restraints were reasonable and thus were not invalid under section 1673.[69] The court did not rely on the statutory exceptions set out in sections 1674 and 1675, finding them inapplicable. Instead, it applied *Grogan* and held squarely that in cases where the public welfare is not involved, and the challenged agreement does not fix prices or limit production, a restraint may be upheld if it is "reasonable."[70] The court also distinguished *Morey* and *Santa Clara Valley Mill & Lumber* on the ground that the contracts in those cases were designed "to secure a complete monopoly. . . ." and thus were *per se* void under section 16600.[71]

In 1937, California's Supreme Court again held squarely that section 1673 challenges are subject to the application of the rule of reason. In *Great Western Distillery Prods. v. John A. Wathen Distillery Co.,*[72] the plaintiff had obtained exclusive rights to sell the defendant's

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61 *Id.* at 736–38.

62 *Id.*

63 76 Cal. 387 (1888).

64 Grogan, 156 Cal. at 615 (quoting *Gibbs*, 130 U.S. at 409).

65 217 Cal. 297, 299 (1933).

66 *Id.* at 299–300.

67 *Id.*

68 *Id.* at 300.

69 *Id.* at 306.

70 *Id.*

71 *Id.* at 305.

72 10 Cal. 2d 442 (1937).

whiskey receipts (which were essentially securities) in certain territories.[73] When the defendant distillery breached the agreement by selling its receipts to other purchasers in the excluded territories, the plaintiff sued, complaining that its efforts to advertise the securities had gone to waste.[74] The defendant contended that the contract was invalid as an unreasonable restraint of trade under section 1673.[75] The trial court agreed and dismissed plaintiffs' claims.

The Supreme Court held that the trial court had erred in holding the agreement invalid. The court synthesized the cases interpreting section 1673 and endorsed "[t]he decisions in this state [that] have recognized and applied the distinction made by authority elsewhere that if the public welfare be not involved and the restraint upon one party be not greater than protection to the other requires, the contract will be sustained although it in some degree may be said to restrain trade."[76] The court then upheld the contract at issue because the exclusivity provision was reasonable under the circumstances: "[s]uch a limited restriction does not appear to affect the public interests and is obviously designed only to protect the respective parties in dealing with each other. Furthermore, it does not appear that it was the intent of the parties to control by monopoly the market price of the securities or in any manner to interfere with the normal fluctuations resulting from the law of supply and demand."[77]

The *Great Western* court also distinguished *Chamberlain* and *Morey*. The court suggested that the exclusive dealing contract for lobsters in *Morey* had run afoul of antitrust laws because "the evidence showed that the purpose of the plaintiff's assignor was to control the entire shipment of lobsters into the territory. . . ."[78] In other words, the challenged agreement in *Morey* was void under section 1673 not merely because it restrained trade, but because it threatened to create a monopoly that eliminated all competition in the market at hand.[79] As for *Chamberlain,* the court concluded that the employee non-compete agreement in that case had been "directly within the contemplation" of section 1673, because it had prevented the individual plaintiff from practicing his chosen profession.[80]

The court in *Great Western* thus could not have been clearer: Section 1673 does not invalidate "reasonable" restraints of trade, and many section 1673 claims should be analyzed using the traditional rule of reason approach.[81] In reaching this conclusion, the court cited and relied on several seminal cases decided by the United States Supreme Court in

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73 *Id*. at 444–45. Warehouse receipts are notes that convey an ownership interest in goods stored in warehouses. Whiskey distillers would sell receipts in whiskey after they barreled it, to pay for the expense of keeping the whiskey in the warehouse as it aged. *See* Hugh F. Owens, Securities and Exchange Commission, *A Review of the SEC's Enforcement Program* (Oct. 8, 1973), https://www.sec.gov/news/speech/1973/100873owens.pdf.

74 10 Cal. 2d at 445.

75 *Id*.

76 *Id*. at 448–49 (citing, *inter alia*, Assoc. Oil, 217 Cal. 297, and Grogan, 156 Cal. 611).

77 *Id*. at 449–50.

78 *Id*. at 447–48.

79 *Id*.

80 *Id*. at 448.

81 *Id*. at 448–49.

connection with the Sherman Act.[82] Indeed, the federal courts' somewhat circuitous path to the adoption of the rule of reason in Sherman Act cases is similar to the path taken by the California courts with respect to section 16600, and is thus worth reviewing here.

The Sherman Act, which was enacted in 1890, made illegal "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ."[83] Initially, the United States Supreme Court held 5-4 that the Sherman Act outlawed *all* restraints of trade, regardless of whether they were reasonable or not.[84] The Court reasoned that "the plain and ordinary meaning of [the Sherman Act] is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."[85]

The United States Supreme Court "soon retreated from this manichean view" of the Sherman Act.[86] In 1911, the court explained that its holding in *Trans-Missouri* had necessarily included a reasoned consideration of "the nature and character of the contract or agreement" at issue, and it held that it would in the future resort to the rule of reason when determining whether any particular agreement violated the statute.[87] Several years later, Justice Brandeis provided a more nuanced explanation of why Sherman Act claims would be governed in part by the multi-faceted analysis that undergirds the rule of reason:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.[88]

As noted above, the California Supreme Court in *Great Western* cited and "applied" Justice Brandeis' reasoning in *Chi. Bd. of Trade* (and other Sherman Act cases) in the course of holding that section 16600 did not invalidate all agreements that restrained trade.[89] It was

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82 *Id.* at 449 (citing, *inter alia*, *Chi. Bd. of Trade*, 246 U.S. 231; *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360–61 (1933); and *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179–80 (1911)).

83 15 U.S.C. § 1.

84 *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 328 (1897).

85 *Id.*

86 *Fisher v. City of Berkeley,* 37 Cal. 3d 644, 700 (1984).

87 *Standard Oil Co. v. United States,* 221 U.S. 1, 64–65 (1911).

88 *Chi. Bd. of Trade*, 246 U.S. at 238.

89 *Great Western*, 10 Cal. 2d at 449. The California Supreme Court also cited *Chicago Bd. of Trade* in 1953 in explaining that "it may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception to the one that validates reasonable restraints of trade under the federal Sherman Antitrust Act," *People v. Bldg. Maint. Contactors' Ass'n*, 41 Cal. 2d 719, 727 (1953), and again in 1984, when it observed that "under what has been termed the 'rule of reason,' many restraints are analyzed in light of their economic effects on market conditions, and may be upheld if 'reasonable.'" Fisher, 37 Cal.3d at 665 (quoting *Chi. Bd. of Trade*, 246 U.S. at 238).

thus very clear by 1937 that the California Supreme Court, like the United States Supreme Court, had embraced the rule of reason as the primary mode of analysis in determining whether an agreement survived antitrust scrutiny.

B. The Next Seventy Years Of Section 16600 Jurisprudence (1938-2008)

During the seventy years between the *Great Western* decision in 1937 and the Supreme Court's 2008 decision in *Edwards,* the California courts continued their practice of applying a two-pronged approach to section 1673 and section 16600 challenges: (1) Non-compete provisions in employment agreements were deemed presumptively invalid; and (2) The courts applied a reasonableness test to section 1673 and section 16600 challenges in cases outside of the employment context. For example, in a 1940 case, *Keating v. Preston,* the California Court of Appeal upheld a provision barring a lessor from leasing space to competing businesses, observing that "[t]he modern trend of authorities . . . is to construe such statutes as section 1673 of the Civil Code, and contracts between individuals intended to promote rather than to restrict a particular business, '[i]n the light of reason and common sense' so as to uphold reasonable limited restrictions."[90]

Forty years after *Keating,* the California Court of Appeal held in *Centeno v. Roseville Community Hospital* that a hospital's exclusive arrangement with a group of radiologists was valid under section 16600.[91] The court in that case held that "there must be a balancing test in light of *all* the circumstances to determine the validity of such an agreement," in part because "the antitrust laws prohibit only those contracts which unreasonably restrain competition."[92] The California Court of Appeal in *Martikian v. Hong* similarly relied on *Great Western* in upholding a provision in a shopping center lease that gave a lessee the exclusive right to sell liquor in the center while prohibiting him from selling anything other than liquor.[93] The court held that "only those restraints which *unduly* or *unreasonably* interfere with trade and commerce have been subject to . . . condemnation" under California's antitrust statutes.[94]

It appears that unlike the Courts of Appeal, the California Supreme Court did not, in the seventy-year period between *Great Western* and *Edwards,* consider the applicability of the rule of reason under section 1673 or section 16600 outside of the employment context.[95]

During this same period of time (after *Great Western* was decided in 1937 and before *Edwards* was decided in 2008), the California Courts of Appeal and the California Supreme Court also addressed section 16600 claims involving non-competition provisions in employment agreements. Those courts consistently held such provisions to be invalid and did so without any substantive analysis of market effects. For example, the Supreme Court held in 1965 that section 16600 "invalidate[d]" a provision in an employment contract

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90 42 Cal. App. 2d 110, 123 (1940) (quoting *Great Western*, 10 Cal. 2d at 446).

91 107 Cal. App. 3d 62, 72 (1979).

92 *Id.* at 70, 72 (emphasis in original).

93 164 Cal. App. 3d 1130, 1133 (1985).

94 *Id.* (emphasis in original).

95 The Supreme Court did observe in a 1951 case that section 16600 "has not been deemed to avoid express restrictive covenants as to the use of retained premises frequently incorporated in leases." *Stockton Dry Goods Co. v. Girsh*, 36 Cal. 2d 677, 680 (1951).

that forfeited an employee's pension rights if he were to work for a competitor.[96] Similarly, the Court of Appeal in *Metro Traffic Control, Inc. v. Shadow Traffic Network*[97] held invalid several post-employment non-competition provisions in the employment agreements of traffic reporters and producers. The court noted that "Section 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets."[98] The Court of Appeal arrived at a similar result in *D'Sa v. Playhut, Inc.,*[99] holding that an employer could be sued for wrongfully terminating an employee when the employee refused to sign a "very broad covenant not to compete" that, the court held, was unenforceable as a matter of law.[100]

It is clear from the foregoing discussion that California's courts had, over the course of the twentieth century, developed two separate strands of case law applying section 1673 and section 16600 to alleged restraints of trade. On the one hand, if the restraint involved a restrictive covenant arising from an employer-employee relationship, or if the challenged agreement involved such classic cartel conduct as price-fixing or supply restrictions, the restraint was deemed per se invalid and void. If, on the other hand, the challenged restraint arose outside the employer-employee context and did not involve cartel conduct, the courts would engage in a more robust "reasonableness" inquiry into the extent and scope of the restraint, its procompetitive nature, and its impact on the market in question. The Ninth Circuit, however, had taken a different approach to section 16600 by declining to apply a per se rule to employee non-competes.

That brings us to *Edwards* and to the question that we posed in the introduction to this article: Did the *Edwards* court intend to hold that *all* restraints on trade are per se invalid under section 16600, regardless of their duration, scope or market impact, and regardless of whether they are procompetitive? In the next section of this article, we present an answer to that question, along with a proposal for reconciling *Edwards* with existing precedent and with long-settled antitrust and jurisprudential principles.

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96 *Muggill v. Reuben H. Donnelley Corp.*, 62 Cal. 2d 239, 242–3 (1965) (citing Chamberlain, 172 Cal. at 288).

97 22 Cal. App. 4th 853 (1994).

98 *Id.* at 859 (citing *Muggill*, 62 Cal. 2d at 242).

99 85 Cal. App. 4th 927, 931–34 (2000).

100 The Ninth Circuit, however, took a different approach to employee non-competition agreements in a series of cases beginning with its 1987 decision in *Campbell v. Bd. of Trustees*, 817 F.2d 499 (9th Cir. 1987). The Ninth Circuit declined in these cases to apply a *per se* standard to employee non-competes and instead construed section 16600 as prohibiting only those employee covenants that completely restrained the employee from practicing his profession. The Ninth Circuit approach came to be known as the "narrow-restraint" exception to section 16600. *See Edwards*, 44 Cal. 4th at 949.

IV. DID THE *EDWARDS* COURT HOLD THAT ALL RESTRAINTS ON TRADE, NO MATTER HOW LIMITED OR PROCOMPETITIVE, ARE *PER SE* INVALID UNDER SECTION 16600?

A. *Edwards v. Arthur Andersen LLP*

Edwards involved a dispute over a non-competition agreement between accounting firm Arthur Andersen LLP and Raymond Edwards, an employee.[101] The firm shuttered its United States operations in 2002 after being indicted during the federal government's investigation into the failure of Enron.[102] In connection with that development, Andersen sold off various practice groups, including the group that Edwards worked in, to HSBC.[103] Although HSBC offered Edwards a job, it required him to obtain a release from Andersen of his non-competition agreement. But Andersen would not release any employee from her or his non-compete unless the employee agreed to release Andersen from all claims for further compensation, which Edwards was unwilling to do.[104] At that point, HSBC withdrew its offer to Edwards, Andersen fired Edwards, and Edwards sued for intentional interference with prospective economic advantage.[105] Edwards contended that Andersen's refusal to release him from the non-compete agreement constituted the "wrongful act" required for an intentional interference claim because the non-compete violated section 16600.[106]

Andersen argued that its agreement with Edwards, while restraining him in certain ways from practicing his profession, was nonetheless "reasonable"—and thus not in violation of section 16600—because it had, on balance, an insignificant or pro-competitive effect on the market.[107] The trial court agreed, finding that the agreement did not violate section 16600 because it was "narrowly tailored" and did not completely deprive Edwards of the ability to pursue his profession.[108]

The California Court of Appeal reversed and rejected the trial court's conclusion that section 16600 allowed the use of "narrow restraints" in employment contracts.[109] The court concluded that "[i]n our view, section 16600 prohibits noncompetition agreements between employers and employees even where the restriction is narrowly drawn and leaves a substantial portion of the market available for the employee."[110]

The Supreme Court affirmed and "conclude[d] that section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception. . . ."[111] The court also stated broadly that "[t]oday in California, covenants not to compete are void, subject to several exceptions discussed briefly below."[112] The court further observed that:

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101 44 Cal. 4th at 942.

102 *Id.*

103 *Id.* at 942–43.

104 *Id.*

105 *Id.* at 943.

106 *Id.*

107 *Id.* at 944.

108 *Id.*

109 *Id.* at 945.

110 *Edwards v. Arthur Andersen LLP*, 47 Cal. Rptr. 3d 788, 800 (2006).

111 *Edwards*, 44 Cal. 4th at 942.

112 *Id.* at 945.

> Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject Andersen's contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.[113]

B. Debate Ensues Over The Contours And Scope Of The Supreme Court's Opinion In *Edwards*

Since *Edwards* was decided in 2008, commentators and courts have expressed uncertainty about its scope and whether the numerous cases upholding reasonable restraints under section 16600 survive its holdings. Some commentators and litigants have described *Edwards* as holding that *all* contracts in restraint of trade are per se void under California law, regardless of whether they are procompetitive and regardless of whether they would pass muster as reasonable restraints under the Cartwright Act. For example, an amicus brief submitted in *Cipro* by a group of professors contended that the *Edwards* court had "made clear that section 16600 is not subject to a general reasonableness defense."[114] The California Attorney General's amicus brief in *Cipro* similarly asserted that *Edwards* had held broadly that agreements challenged under section 16600 would not be subject to a rule of reason analysis.[115]

On the other hand, the Antitrust Section's treatise on California's antitrust laws continues to list "the types of restraints that have been upheld under section 16600," citing, inter alia, the *Centeno* case, where the Court of Appeal had rejected a section 16600 challenge to a hospital's exclusive arrangement with a group of radiologists and had held that "the antitrust laws prohibit only those contracts which unreasonably restrain competition.[116] But the treatise also notes that after *Edwards,* the "list is subject to application, if at all, only where the restraint is not contained in an employment agreement, and rather, is contained in a non-employment related legal instrument or context."[117] The Ninth Circuit has also expressed uncertainty about the scope of section 16600, stating that "[t]he courts of California have not clearly indicated the boundaries of section 16600's stark prohibition but have nevertheless intimated that they extend to a considerable breadth."[118]

The authors of this article do not believe that the *Edwards* court intended to overturn longstanding precedent, *sub silentio,* and adopt a blanket per se approach to all restraints of trade challenged under section 16600. We believe instead that the court in *Edwards* intended to, and did, hold that non-competition clauses in employment agreements fall into the category of per se illegal practices that are presumed to have a pernicious impact on competition. But the court did not extend that blanket condemnation to *all* agreements between two or

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113 *Id.* at 950.

114 Brief for 49 Professors as Amici Curiae Supporting Petitioners, *Cipro*, 61 Cal. 4th 116 (2015) (No. S198616) (Mar. 25, 2014), 2014 WL 1765271 at *19.

115 *See* Cal. AG *Cipro* Amicus, *supra* note 6, at 15.

116 Cal. Antitrust & Unfair Competition Law § 20.05(c) (2014 ed.)-(citing *Centeno*, 107 Cal. App. 3d at 72).

117 *Id.*

118 *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1093 (9th Cir. 2015).

more economic actors in all settings and regardless of their duration, scope, market impact or procompetitive nature. We base our conclusion on the procedural nature of the *Edwards* case, the Supreme Court's orders and opinion in that case, and several well settled jurisprudential principles. The remainder of this article explains our reasoning in this regard.

C. The Court Of Appeal In *Edwards* Expressly Limited Its Holding To The Employment Context, While Explicitly Excluding Other Types Of Agreements From Those Holdings.

The commentators who have advocated for a broad, manichean interpretation of *Edwards* have failed to note that the Court of Appeal in *Edwards* was careful to confine its holdings to the employment context. After stating that "[n]oncompetition agreements are invalid under section 16600 even if narrowly drawn, unless they fall within the statutory or trade secret exceptions,"[119] the Court of Appeal immediately acknowledged, citing *Centeno* and *Keating,* that California courts had held in the commercial context "that section 16600 and similar statutes should be construed 'in the light of reason and common sense' so as to uphold reasonable limited restrictions."[120] The Court of Appeal then stated that "[t]hese cases did not involve employee noncompetition contracts and are not germane to our analysis. *We express no opinion on the operation of section 16600 outside the context of employee noncompetition agreements*."[121]

In other words, *Edwards* arrived at the Supreme Court's doorstep without any holding by the Court of Appeal that extended beyond the employment context.

D. The California Supreme Court Ordered The Parties in *Edwards* To Limit Their Briefing To The Impact Of Section 16600 On Employee Non-Competition Agreements, And The Parties Complied With That Order.

The parties' briefing in connection with Andersen's petition for review by the California Supreme Court, and the court's subsequent order limiting merits briefing, also shed light on the scope of the court's eventual holdings.

In its reply in support of its petition for review, Andersen argued that review should be granted in part because the Court of Appeal's opinion might be interpreted as "flatly prohibit[ing] 'every' contract which restrains a business 'of any kind' (throwing franchise agreements and other contracts into chaos). . . ."[122] The Supreme Court accepted Andersen's petition for review in November 2006.[123] Shortly thereafter, however, the court issued an order directing the parties to "limit their briefing" to two issues, including "(1) To what extent does Business and Professions Code Section 16600 prohibit *employee*

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119 *Edwards*, 47 Cal. Rptr. 3d at 803.

120 *Id.* at 803 n.6.

121 *Id.* (emphasis added).

122 Reply in Support of Petition for Review, *Edwards v. Arthur Andersen LLP* (No. 5147190) (Nov. 8, 2006), 2006 WL 3886776 at *7 n.3.

123 *Edwards v. Arthur Andersen LLP*, 147 P.3d 1013 (2006).

noncompetition agreements."[124] The Supreme Court's order limiting the scope of the merits briefs was thus consistent with the explicit limitations on the Court of Appeal's holdings that were under review.

In compliance with the Supreme Court's order, the parties' merits briefs focused on cases arising in the employment context and did not cite the Supreme Court's decisions, such as *Great Western, Associated Oil* or *Grogan,* that had applied the rule of reason to section 1673 and section 16600 claims outside the employment context, nor did those briefs cite any of the court's Cartwright Act decisions applying the rule of reason.[125]

In short, the Supreme Court's limitations on merits briefing were intended to and did eliminate any discussion of section 16600 cases arising outside of the employment context, including the court's own precedents.

E. The Court's Opinion In *Edwards* Began With Confirmation That The Court Had Limited Its Review To The Impact Of Section 16600 On Employee Non-Competition Agreements.

At the outset of its opinion in *Edwards,* the Supreme Court confirmed that the court had indeed limited its review to the two issues it had ordered the parties to brief, one of which was whether "Business and Professions Code section 16600 prohibit[s] *employee* noncompetition agreements."[126] Consistent with that limitation, the *Edwards* court then stated that "[w]e conclude that section 16600 prohibits *employee* noncompetition agreements unless the agreement falls within a statutory exception."[127]

California case law is clear that language used in an opinion "is to be understood in the light of the facts and the issue then before the court,"[128] because cases are "not authority for propositions not considered."[129] Moreover, as the Supreme Court recently explained in *City of San Diego v. Board of Trustees,*[130] statements that are "not necessary to the decision" are dictum, not precedential holdings.[131]

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124 Order Limiting Issues, *Edwards v. Arthur Andersen LLP* (No. S147190) (Jan. 17, 2007) (emphasis added). The only other issue to be briefed involved the impact of a Labor Code section on a release provision. *Id.*

125 Opening Brief on the Merits, *Edwards v. Arthur Andersen LLP* (No. S147190) (Jan. 26, 2007), 2007 WL 1221499; Answering Brief on the Merits, *Edwards v. Arthur Andersen LLP* (No. S147190) (Mar. 27, 2007), 2007 WL 1335190; Reply Brief on the Merits, *Edwards v. Arthur Andersen LLP* (No. S147190) (April 13, 2007), 2007 WL 5288759.

126 44 Cal. 4th at 941 (emphasis added). The second listed issue involved the Labor Code's impact on a release provision. *Id.*

127 *Id.* at 942 (emphasis added).

128 *McDowell & Craig v. City of Santa Fe Springs*, 54 Cal. 2d 33, 38 (1960).

129 *Id.*, *see also Trope*, 11 Cal. 4th at 284; *Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964); *Elisa B. v. Sup. Ct.*, 37 Cal. 4th 108, 118 (2005); *In re Tobacco II Cases*, 46 Cal. 4th 298, 323 (2009).

130 2015 WL 4605356 at *8-9 (Aug. 3, 2015).

131 *Id.* (explaining that a broad statement in a 2006 Supreme Court decision regarding the appropriate interpretation of a CEQA provision was "simply an overstatement" that "embodied dictum rather than a principle necessary to our decision. . . .").

Accordingly, and in light of the limitations placed by the Court of Appeal on the scope of its opinion and the limitations placed by the Supreme Court on the scope of briefing, the most, if not the only, reasonable assumption is that the *Edwards* court did not render a broad ruling on section 16600's application to agreements outside of the employee-employer setting.

F. The *Edwards* Court Did Not Cite Any Of Its Own Precedents That Had Applied The Rule Of Reason To Section 16600 Claims Outside The Employment Context, And Jurisprudential Principles Discourage Any Presumption That The Court Would Have Overruled Such Precedents *Sub Silentio*.

The Supreme Court in *Edwards* nowhere mentions its own precedents, such as *Associated Oil, Great Western* and *Grogan,* that had applied a rule of reason analysis to claims under section 1673 or section 16600 in the commercial context. Settled jurisprudential principles discourage lower courts from presuming that a higher tribunal has overruled its own precedents without saying what it was doing. As the United States Supreme Court has observed, "[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."[132] The California Supreme Court has similarly observed that "[a] precedent cannot be overruled in dictum, of course, because only the ratio decidendi of an appellate opinion has precedential effect. . . . [T]o hold otherwise . . . would be to conclude that a statement by this court that *is not* a precedent can somehow abrogate an earlier statement by this court that *is* a precedent. This is not the law."[133]

When these principles are placed alongside the Court of Appeal's limitation on its holdings, the Supreme Court's order limiting merits briefing, and the Supreme Court's subsequent description of the manner in which it had "limited [its] review,"[134] it is clear that *Edwards* should not be viewed as rendering a judgment on the invalidity under section 16600 of *all* restraints on trade.

G. The *Edwards* Court Should Not Be Presumed To Have Deliberately Construed Section 1673 In A Radically Different Manner Than It Has Construed The Cartwright Act.

Another basic principle of statutory interpretation is that courts should "adopt[ ] the construction that best harmonizes the statute internally *and with related statutes*."[135] Therefore, if the *Edwards* court had intended to hold that section 16600 invalidates all restraints on trade in California, regardless of their scope, duration, impact on competition or benefits to consumers, it would likely have taken pains to explain why it had decided to open up such an enormous chasm between section 16600 and the Cartwright Act.

Indeed, it is self-evident that many Cartwright Act decisions issued over the past few decades would have been decided differently if the courts had employed a blanket *per se* approach that rendered unlawful every restraint of trade. For example, all vertical restraints,

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132 *Shalala*, 529 U.S. at 18; *see also S.F. Unified Sch. Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1332 (1995) ("If the California Supreme Court intended to overrule these cases, it is unlikely that it would do so—especially a landmark case such as *Seely—sub silentio*.").

133 *Trope*, 11 Cal. 4th at 287 (emphasis in original).

134 *Edwards*, 44 Cal. 4th at 941.

135 *Pac. Gas & Elec.*, 16 Cal. 4th at 1152 (emphasis added).

including all exclusive dealing contracts, would be *per se* unlawful under a broad interpretation of *Edwards,* although under the Cartwright Act, "exclusive dealing arrangements are not deemed illegal per se."[136] Similarly, the petroleum "exchange agreements" that the Supreme Court addressed at length in *Aguilar v. Atlantic Richfield Co.* would have been deemed *per se* invalid regardless of the fact that they are "common in the industry" and "have long been recognized as procompetitive in purpose and effect."[137] A blanket condemnation of all restraints of trade would also place at risk all joint ventures and other competitor collaborations that are formed or operate in California, even though such ventures are typically evaluated under the rule of reason.[138] It is extremely unlikely that the California Supreme Court would have deliberately put at risk such a broad swath of economic activity without an extended analysis of its reasons for so holding.

H. The *Edwards* Court's Reliance On *Bosley* Also Supports The Proposition That Its Holdings Are Limited To Employment Agreements.

Commentators who have proposed a broad reading of *Edwards* have also pointed to the court's expressed understanding that the Legislature had in 1872 "settled public policy in favor of open competition, and rejected the common law 'rule of reasonableness.'"[139] The court's statement was accompanied not by any discussion of its own precedents that had applied the rule of reason to section 16600 challenges, but by a citation to a passage in a single case, *Bosley Medical Group v. Abramson*.[140] The Court of Appeal in *Bosley,* however, had limited the scope of the particular passage cited in *Edwards* to cases involving "restraint[s] on the practice of a trade or occupation."[141] Even more telling is the fact that the law review comment that the *Bosley* court had relied on, a 1953 case note in the *Southern California Law Review,* itself acknowledged the very different approach that the California courts had taken in cases outside the employment context.[142] The case note stated that "many" California cases, including *Associated Oil* and *Keating,* had upheld "reasonable" or limited restraints under section 16600.[143] The case note stated further that section 16600 "applies only when a person is restrained from pursuing an entire trade, business or profession, and conversely does not apply when he is restrained only as to some small part of it."[144]

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136 *Fisherman's Wharf Bay Cruise Corp. v. Sup. Ct.*, 114 Cal. App. 4th 309, 335 (2003) (holding that the illegality of exclusive dealing agreements "is tested under a rule of reason and 'requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market.'") (internal citations omitted).

137 25 Cal. 4th 826, 872–73 (2001).

138 *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202–03 (2010); *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006); *see also* U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors at 5–8, 13–15 (April 2000) (noting that competitor collaborations are "often procompetitive" and that "[g]iven the great variety of competitor collaborations, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.").

139 44 Cal. 4th at 945.

140 161 Cal. App. 3d 284, 288 (1984).

141 *Id.*

142 *Id.* (citing *Mullender*, Contracts In Restraint Of Trade, 26 S. Cal. L. Rev. 208, 209 (1953)).

143 *Mullender, supra* note 142, at 209.

144 *Id.* at 210.

In short, the *Bosley* case that *Edwards* relied upon provides no support for any broad holding regarding the application of section 16600 outside the employment context.

I. The *Edwards* Court's Treatment Of The Ninth Circuit's "Narrow-Restraint" Exception Also Demonstrates That The Court's Holdings Do Not Extend Outside The Employee-Employer Context.

The court's opinion in *Edwards* examined and rejected the Ninth Circuit cases that had adopted a "narrow-restraint" exception to section 16600 in employment cases.[145] Some commentators have asserted that the Supreme Court's rejection of the "narrow-restraint" exception in *Edwards* represents a broader rejection of the use of the rule of reason when considering contractual restraints outside the employment context. In fact, however, two of the points made by the *Edwards* court in rejecting the Ninth Circuit's "narrow-restraint" doctrine demonstrate clearly that its focus was solely on the employment context. First, the court was necessarily referring only to employment cases when it stated that "no reported California state court decision has endorsed the Ninth Circuit's reasoning."[146] The court could not have stated, and should not be presumed to have stated, that there are "no reported California state court decision[s]" applying the rule of reason to section 16600 claims outside of the employment context, for there are *many* reported decisions in that category, including *Centeno, Keating* and the court's own decisions in *Associated Oil, Great Western* and *Grogan*. The court's statement was thus necessarily limited to employment agreements.

Similarly, the *Edwards* court was necessarily referring only to employment cases when it stated that it was up to the legislature to enact clarifying legislation if it wished to endorse the Ninth Circuit's "narrow-restraint" approach to employee non-competes.[147] That statement cannot be interpreted as an invitation to the legislature to enact a statutory version of the rule of reason that would govern agreements *outside* the employment context, for the simple reason that the California Legislature had *already* enacted a general statute that, as *Cipro* reminded us, "effectively codifies" the traditional rule of reason.[148] That 1909 statute, currently residing in the Business and Professions Code as section 16725, provides that:

> It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.[149]

In light of this already-existing statutory embodiment of the rule of reason, which by its terms protects pro-competitive agreements from invalidation, the *Edwards* court's reference to potential legislation could not have represented a suggestion that the legislature enact a duplicate statute that provided the same protection. Instead, the court must have been focused on possible legislative disapproval of the court's decision to place employee non-competition agreements into the category of presumptively illegal agreements.

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145 44 Cal. 4th at 948–950.

146 *Id.* at 949.

147 *Id.* at 950.

148 *Cipro*, 61 Cal. 4th at 137 n.5 (citing Cal. Bus. & Prof. Code § 16725).

149 *Id.*

VI. CONCLUSION

As noted earlier, seventy years passed between the California Supreme Court's opinions regarding the scope of section 16600 in *Great Western* and in *Edwards*. If that gap is any indication, a considerable amount of time may pass before the Supreme Court again takes an opportunity to address section 16600's contours. In the interim, we may see more battles involving the proper interpretation of *Edwards* and the proper role of the rule of reason in antitrust analysis. Such clashes should not, however, be prolonged or difficult to resolve, for it is clear that the *Edwards* court did not intend to overturn established precedents that hold—consistent with *Cipro's* approach to the Cartwright Act, and consistent with section 16725—that courts should employ the rule of reason when evaluating many types of agreements challenged under section 16600. It is simply implausible that the *Edwards* court intended to create a schism between California's two antitrust statutes without any explanation, and it is equally implausible that the court intended—again without explanation—to send California's economy back to that "early period in English jurisprudence when trade and the mechanic arts were in their infancy . . . [and] all contracts were [deemed] void which in any degree tended to the restraint of trade."[150] It is instead evident that the *Edwards* court intended only to confirm that under California law, non-competition agreements in the employment context fall within the "categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal."[151]

150 *Wright*, 36 Cal. at 357.

151 *Cipro*, 61 Cal. 4th at 146.