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Rethinking Price-Fixing

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I. INTRODUCTION

"Price-fixing" by competitors is unlawful per se.[1] This is the best-known rule in antitrust—the one most often enforced in criminal proceedings, and the only one that appreciable numbers of businessmen have been convicted and sentenced to prison for violating. Through years of judicial application to agreements among competitors on the price of what they sell, the rule has acquired something approaching the dignity of a statute.

The rule began as a prohibition upon agreements on price among competitors with substantial collective market power.[2] In *United States v. Socony-Vacuum Oil Co.*,[3] the United States Supreme Court, extrapolating from its earlier decisions, laid down a broader rule: "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or

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[1]Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-48 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647-50 (1980); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 7-9 (1979); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

In antitrust cases and commentary concerning horizontal restraints, the term "price-fixing" is used in two senses. In the broad sense, it encompasses all arrangements unlawful per se under the rule of the *Socony* case (*see infra* text accompanying note 3). In the narrow sense, it refers to agreements among competitors on the price of what they sell. When the term is used in this Article in the broad sense, it appears in quotation marks.

[2]*See generally* United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

[3]310 U.S. 150 (1940).

foreign commerce is illegal per se."[4] In dictum, the Court went an important step further. To prove per se unlawful "price-fixing" under section 1 of the Sherman Act,[5] Justice Douglas wrote for the Court in *Socony*, neither power nor effect need be shown:

> It is the "contract, combination or conspiracy, in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other . . . [A] conspiracy to fix prices violates § 1 . . . though no overt act is shown, though it is not established that the conspirators had the means available for the accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity . . . [Price-fixing agreements] are all banned because of their actual or potential threat to the central nervous system of the economy.[6]

In subsequent cases involving agreements among competitors to fix the price of what they sold, the Court routinely applied the per se rule against "price-fixing," holding the agreements unlawful with and without proof of power and effect, and regardless of their purported justifications.[7] In 1951, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,*

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[4]*Id.* at 223.

The courts have applied the per se rule against "price-fixing" to a wide variety of horizontal restraints on price competition, including agreements to restrict or eliminate price advertising (United States v. Parke Davis & Co., 362 U.S. 29 (1960)), trade credit (Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980)), quantity discounts (United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956)), and trading stamps (United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961)); agreements on minimum markups (California Retail Grocers & Merchants Ass'n v. United States, 139 F.2d 978 (9th Cir. 1944)); basing-point pricing systems (FTC v. Cement Inst., 333 U.S. 683 (1948)); agreements to circulate uniform list prices (Plymouth Dealers' Ass'n v. United States, 279 F.2d 129 (9th Cir. 1960)) and "suggested" prices (Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962)); and boycotts of discounters (United States v. General Motors Corp., 384 U.S. 127 (1966)).

The rule has also been applied to a class of agreements that are beyond the scope of the term as used in this Article—agreements among firms on the price they will pay for what they buy. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[5]Ch. 647, 26 Stat. 209 (1890) (current version codified at 15 U.S.C. § 1 (1982)).

[6]*Socony*, 310 U.S. at 224 n.59.

[7]United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. United States Gypsum Co., 333 U.S. 364 (1948); United States v. Line Material Co., 333 U.S. 287 (1948); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Masonite Corp., 316 U.S. 265 (1942). *See generally* Comment, *The Per*

Inc.,[8] the Court unanimously affirmed a judgment against two competing distillers for setting *maximum* prices by agreement, on a record "devoid of evidence . . . that the defendants were capable of . . . influencing the market price of whisky or that they [had] actually produced an effect on the market. . . ."[9] By 1956, the controlling doctrine could be summarized in sweeping terms: "[Price-fixing] is conclusively presumed to be unreasonable . . . [regardless of] whether the motives of the participants are good or evil; . . . whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices."[10]

Unlike most of antitrust law, "thou shalt not agree with thy competitors on price" is easy to understand and remember. The essential wisdom of the rule is plain. For a generation after *Socony* the Court acknowledged no exceptions, other than cases involving conduct authorized by other federal statutes[11] or exempted from Sherman Act condemnation by state action.[12] Pre-*Socony* decisions, insofar as they qualified the general prohibition against horizontal agreements on price, were ignored.[13] Exceptions recognized by lower courts in reported cases[14] were exceedingly rare.

Se Illegality of Price-Fixing—Sans Power, Purpose, or Effect, 19 U. Chi. L. Rev. 837, 859-60 & nn.127-29 (1952).

[8]340 U.S. 211 (1951).

[9]*See* Comment, *supra* note 7, at 848.

[10]United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956) (footnotes omitted).

[11]*See, e.g.*, Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975) (stock exchange agreements fixing commission rates held to be immune from antitrust attack by virtue of grant of regulatory powers to the SEC in the Securities Exchange Act of 1934); United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1974) (implied immunity from antitrust liability for certain price-fixing agreements in connection with the distribution and sale of mutual fund shares held conferred by the Maloney Act of 1938 and the Investment Company Act of 1940).

[12]*See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (price-fixing by raisin growers as part of a comprehensive program of marketing controls authorized by state statute and supervised by a state commission held not to violate the Sherman Act).

[13]In *Socony*, the Court distinguished the two leading cases sustaining agreements among competitors on price, Board of Trade v. United States, 246 U.S. 231 (1918) (Chicago Board of Trade) and Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), on the ground that unlike the agreement in *Socony*—a large-scale buying program organized by major oil companies to eliminate the "excess" supply of gasoline on the market—the agreements in the earlier cases had not been entered into for the purpose or with the effect of raising the general level of market prices. 310 U.S. at 216, 217. As the rule announced in *Socony* evolved into a prohibition against fixing prices, irrespective of purpose, power, or effect, the Court simply ignored the contrary implications of *Chicago Board of Trade* and *Appalachian Coals*.

[14]*See, e.g.*, United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y.

Now, in three cases, the Court has reopened the question of per se illegality for agreements among competitors on price that have some potential to "'increase economic efficiency and render markets more rather than less competitive.'"[15] In *Broadcast Music, Inc. v. CBS, Inc.*,[16] the Court unanimously declined to hold a horizontal agreement on price in the music copyright industry unlawful per se.[17] In *Arizona v. Maricopa County Medical Society*,[18] a bare plurality of the Court held two agreements among competing physicians setting maximum fees unlawful per se, over a vigorous dissent.[19] In the third case, *NCAA v. Board of Regents*,[20] seven Justices declared a horizontal agreement on the price of college football television rights unlawful under the rule of reason, expressly declining to condemn it under the per se rule.[21]

These developments represent a partial triumph for proponents of the view that the objective of the antitrust laws is to promote economic efficiency. For more than twenty years, proponents of this view have contended that agreements among competitors on prices should not invariably be unlawful because a flat ban condemns, without good reason, practices capable of contributing significantly to economic efficiency.[22] All four major recent opinions—the majority opinions in *Broadcast Music* and *NCAA* and the plurality and dissenting opinions in *Maricopa*—treat economic efficiency as a value entitled to recognition in evaluating the "competitive significance" of horizontal restraints on price competition under section 1.

1960); United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953). The cases are collected and discussed in Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUSTON L. REV. 761 (1979).

[15]Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 20 (1979) (citing United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

[16]441 U.S. 1 (1979).

[17]*Id.* at 10. In determining whether a practice is unlawful per se as price-fixing, Justice White wrote for the Court, it is not conclusive that "two or more potential competitors have literally 'fixed' a 'price.'" *Id.* at 9.

[18]457 U.S. 332 (1982).

[19]*Id.* at 357. The dissent, authored by Justice Powell, was joined by Chief Justice Burger and Justice Rehnquist.

[20]468 U.S. 85 (1984).

[21]*Id.* at 100-01, 120.

[22]The pioneering article is Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (parts 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966). *See also* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 263-79 (1978); Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417 (1965); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981); Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319; Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 UCLA L. REV. 1 (1982); Comment, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706 (1983).

With respect to the kinds of practices involved in these cases—price-fixing agreements accompanying potentially procompetitive collaboration on matters other than price—the law is now seriously muddled. In *Broadcast Music*, the Court implied that per se condemnation is reserved for practices with which the courts have had considerable experience.[23] Shortly thereafter, in *Maricopa*, the Court held precisely to the contrary, striking down on traditional principles an agreement on price that was quite different in some respects from any in the precedents.[24] In *Maricopa*, the Court seemed to interpret *Broadcast Music* as holding narrowly that an agreement among competitors on the price of a product they produce jointly is not unlawful per se where such an agreement is "necessary to market the product at all."[25] In *NCAA*, the Court found that the competitors' agreement on price was unnecessary to the marketing of their jointly produced product, but applied the rule of reason nevertheless.[26] Two commentators have summarized the lesson of these cases this way: "Horizontal price-fixing is always illegal; but not all horizontal price-fixing is price-fixing, and some types of price-fixing may thus be upheld."[27]

This Article is an appreciation and a critique of the Supreme Court's exploratory efforts in these cases to reduce the costs of the per se rule against "price-fixing" in terms of over-deterrence, without destroying its effectiveness. This Article deals primarily with price-fixing in its narrow sense—agreements among competitors on specific prices[28] or on procedures by which specific prices are fixed.[29] All three cases—*Broadcast Music*, *Maricopa*, and *NCAA*—involved agreements of these types. As will be noted, however, the Court's decisions in these cases have important implications for the law of "price-fixing" in general.

From the opinions, it is clear that the Court has not embraced the theory that the antitrust laws exist to promote economic efficiency, but

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[23]441 U.S. at 8, 9, 19 n.33.

[24]The Court attempted to reconcile the two positions by differentiating between the application of an established per se rule and the creation of a new one. Explaining that the facts in *Maricopa* fell within the established per se rule, the Court went on to state that "a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." 457 U.S. at 349 & n.19.

[25]*Id.* at 355-56. The quotation is from *Broadcast Music*, 441 U.S. at 23.

[26]468 U.S. at 100, 113-14.

[27]Marks & Jacobson, *Price-Fixing: An Overview*, 30 ANTITRUST BULL. 199, 256 (1985).

[28]*See supra* note 1. Prohibited agreements that fix specific prices include agreements on both minimum and maximum prices.

[29]An example is an agreement among competitors to delegate the function of setting prices for the group to a single firm. *See, e.g.*, United States v. Masonite Corp., 316 U.S. 265 (1942) (agreement among manufacturers of a patented product to charge no less than the price fixed by the manufacturer-patentee).

is instead proceeding on the premise that when competitors conspire or combine, the law's first concern is to protect the economic interests of consumers in competition in the marketplace. On this premise, the appropriate measure of legality in price-fixing cases is not whether the combination makes a positive or negative contribution to economic efficiency, but whether it promotes or suppresses competition. The Court's opinions in this regard are consistent, and its position has strong support both in the legislative history of the Sherman Act and in the long-standing tradition of judicial interpretation of the Act.

At the doctrinal level, nothing in these cases implies any relaxation of the per se rule as applied to conventional agreements among competitors on price. Straight price-fixing, unaccompanied by any other potentially procompetitive agreement, is per se illegal. The problem addressed in these cases is the problem of the agreement on price that functions as part of a larger potentially procompetitive scheme. In this Article several possible interpretations of the decisions are explored. The Article concludes that the cases are best read to stand for the proposition that agreements among competitors on price are unlawful per se, unless the parties are also engaged in potentially procompetitive collaboration on matters other than price, and the agreement on price performs some essential function in that collaboration other than raising prices. Where those conditions are met, the agreement is ordinarily to be judged under the rule of reason. It is unlawful per se only if further inquiry discloses that any potential gains to consumers from the price-fixing are so slight, in relation to the competitive risks that the costs of rule-of-reason adjudication outweigh the benefits.

II. The Cases

Two earlier Burger Court decisions supply an important part of the predicate for the decisions in *Broadcast Music*, *Maricopa*, and *NCAA*. They are *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[30] in which the Court abolished a per se rule for the first time in the history of the Sherman Act,[31] and *National Society of Professional Engineers v. United States*,[32] in which the Court applied the rule of reason to an arrangement both lower courts had held unlawful under the broad per se rule of *Socony*.[33]

Provided with a chance to clarify the per se rule announced some years earlier in *United States v. Arnold, Schwinn & Co.*,[34] the Court

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[30]433 U.S. 36 (1977).

[31]*Id.* at 58.

[32]435 U.S. 679 (1978).

[33]*Id.* at 695-96.

[34]388 U.S. 365 (1967). In *Schwinn*, the Court held that the per se status of vertically imposed territorial restrictions under § 1 differed depending on whether the restrictions

in *Sylvania* instead annulled it. Though the Court's holding was limited to vertical non-price restraints, the explicit recognition in the opinion that efficiencies that result from a restraint may have a significant bearing on its reasonableness, and the criteria put forth for the formulation and evaluation of per se rules, had considerably broader implications.

Throughout its opinion, the Court emphasized competition. In the evaluation of any class of competitive restraints, Justice Powell wrote for the Court, "[t]he probability that anticompetitive consequences will result from [the] practice and the severity of those consequences must be balanced against its procompetitive consequenses."[35] Vertical non-price restrictions, he noted, "reduce intrabrand competition by limiting the number of sellers of a particular produce competing for the business of a particular group of buyers."[36] On the other hand, such restrictions may enable manufacturers to realize marketing efficiencies which may in turn enable them to "compete more effectively"[37] vertical restraints may facilitate new entry,[38] or they may revive a failing or "faltering" firm.[39]

The issue, then, was whether vertical territorial restraints, notwithstanding their potential competitive virtues, should be held unlawful per se because they almost invariably restrain some competition. Just five years earlier, the Court had declared horizontal territorial restraints unlawful per se.[40] In *Sylvania*, the Court rejected the argument that vertical restraints should be similarly classified.[41]

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in question involved a technical restraint on alienation. Sales by a manufacturer to its distributors subject to territorial restrictions on resale were held to be unlawful *per se.* Similar restrictions imposed on distributors "[w]here the manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer . . . are . . . indistinguishable from those of an agent or salesman of the manufacturer" were held to be lawful if reasonable. *Id.* at 379, 380.

[35]*Sylvania*, 433 U.S. at 50 n. 16.

[36]*Id.* at 54.

[37]*Id.* at 55.

> For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.

Id.

[38]*Id.* at 55.

[39]*Id.* at 58 n.29.

[40]United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). The Court, in an opinion by Justice Marshall, held that horizontal territorial restraints could not be defended on the ground that they enhanced interbrand competition: "Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules." *Id.* at 609-10.

[41]The Court distinguished *Topco*, without further explanation, on the ground that

"[T]he prevailing standard of analysis" in section 1 cases, Justice Powell wrote for the court, is the rule of reason.[42] Any departure from that standard "must be based upon demonstrable economic effect rather than . . . formalistic line drawing."[43] The fact that in some instances a particular practice may be procompetitive on balance does not ensure rule-of-reason treatment: "a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."[44] In the case of vertical non-price restrictions on distribution, however, there was no basis for such a judgment. Noting that the great weight of scholarly opinion lay against the *Schwinn* per se rule,[45] that the lower courts had been devoting considerable ingenuity to devising ways around it,[46] and that there was an almost total lack of support for the rule from any quarter, the Court overruled it.[47]

The Court in *Sylvania* did not say, nor did it imply, that the primary concern of antitrust law is the promotion of economic efficiency. Throughout the opinion, the Court treated efficiency as an instrumental value—a means to the end of promoting competition. Nor did the Court "indicate that the *per se* rule should be limited to those transactions which do not have any potential for efficiency creation."[48] The closest the Court came to such a pronouncement (not really very close) was to state that where a practice has procompetitive potential—perhaps because it generates efficiencies that enable firms to compete more effectively—per se condemnation is inappropriate without a careful weighing of the costs and benefits.

In the term following *Sylvania*, the Court decided *National Society of Professional Engineers v. United States*.[49] The Society sought to defend a canon of ethics forbidding its members from engaging in competitive bidding. Its argument, which emphasized the canon's contribution to public health and safety, was also in a way an efficiency defense. Competitive bidding among engineers, it argued, leads to shoddy work-

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it concerned horizontal and not vertical restraints. *Sylvania*, 433 U.S. at 57 n.27.

[42]*Id.* at 49. Justice Powell then quoted the classic formulation of the rule from Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Sylvania*, 433 U.S. at 49.

[43]*Sylvania*, 433 U.S. at 58-59. This remark appears to have been directed at the distinction in *Schwinn* between sale and non-sale transactions.

[44]*Id.*

[45]*Id.* at 47-48, 47 n.13.

[46]*Id.* at 48 & n.14.

[47]*Id.* at 58.

[48]Liebeler, *supra* note 22, at 1-2.

[49]435 U.S. 679 (1978).

manship, which in turn leads to higher project costs and disastrous structural failures.[50] A ban on competitive bidding would ensure that consulting engineers would commit the resources necessary to do the job well, and would yield substantial public benefits in terms of safety and material well-being.[51]

The Court, however, rejected the defense as a "frontal assault on the basic policy of the Sherman Act."[52] Justice Stevens wrote for the Court:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[53]

Of course, individual engineers were free to offer clients high-quality engineering services. Some clients might well reject these offers; of those, some might eventually regret it. But under the Sherman Act, neither the Society nor the Court was free to substitute its judgment for the clients' as to what they *should* want.

The Society's defense based on the rule of reason, Justice Stevens noted, was predicated on a misunderstanding of the rule: "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."[54] The Court had consistently so held since *Standard Oil Co. v. United States*,[55] the seminal rule-of-reason case:

> From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in [*Sylvania*], the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition . . . [T]he purpose of the analysis

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[50]Brief for Petitioner at 27-35.
[51]*Id.* at 27-35, 54-55.
[52]*Professional Engineers*, 435 U.S. at 695.
[53]*Id.*
[54]*Id.* at 688.
[55]221 U.S. 1 (1911).

> is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest . . . .[56]

The Society's restraint suppressed competition and did not promote it. The proffered defense amounted to the assertion that in the defendant's market, "competition itself is unreasonable."[57] Under the Sherman Act, there could be no such defense.[58]

Viewing the *Sylvania* and *Professional Engineers* opinions in retrospect, one can see a distinction taking shape between efficiencies that promote or enhance competition and efficiencies that do not. In the subsequent opinions dealing with explicit horizontal agreements on price—*Broadcast Music*, *Maricopa*, and *NCAA*—the Court affirmed the importance of the distinction, and began to work out its implications for the law of price-fixing.

A. Broadcast Music, Inc. v. CBS, Inc.

In *Broadcast Music*,[59] the Columbia Broadcasting System attacked as "price-fixing" the long-established practice of blanket licensing in the music copyright industry. For many years, owners of copyrights in musical works had combined to issue blanket copyright licenses through performing rights organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[60] The blanket license authorized licensees to perform any work in the licensing organization's inventory for a single fee—usually a flat fee, but sometimes a fee computed on the licensee's revenues. For many years, CBS, as proprietor of the CBS television network, had purchased blanket licenses from ASCAP and BMI. After negotiations for license renewal broke down in 1969, CBS sued ASCAP, BMI, and their members and affiliates, contending that blanket licensing violated the Sherman Act. At the time of suit, ASCAP's inventory included more than three million works; BMI's contained more than one million.

Blanket licensing necessarily entailed agreement among sellers of competing products[61] on the price of sale. Every blanket licensee bought rights at a price fixed by a process which eliminated competition among

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[56]*Professional Engineers*, 435 U.S. at 691-92.

[57]*Id.* at 696.

[58]*Id.* Justices Blackmun and Rehnquist concurred separately.

[59]441 U.S. 1 (1969).

[60]Unless otherwise indicated, the facts are taken from the opinion of the district court, CBS, Inc. v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975).

[61]The district judge found "that musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable." *Id.* at 751-52.

the individual licensors. True, the licensors did not agree on the prices at which they would separately license their works. Nevertheless, CBS argued persuasively, blanket licensing clearly presented the normal risks of price enhancement from pricing-fixing. The copyright owners affiliated with each defendant had enormous collective leverage and they knew it.[62] Even assuming they remained willing in fact to issue individual licenses, the profitability of blanket licensing would tend almost inevitably to raise the price of those licenses. Such an effect, however, would be difficult to prove. The whole point of the per se rule was to eliminate the necessity of detailed economic proof in cases of this kind.[63] Unless, CBS argued, the per se rule's prohibition on agreements among competitors on prices allowed for exceptions—and since *Socony* in 1940 the Court had acknowledged none—blanket licensing was unlawful without regard to any purported justifications.[64]

Despite the force of these arguments, CBS' position in the lawsuit was, in some ways, peculiarly unappealing. The practice it was attacking had unique and well-documented advantages not only for licensors, but also for many licensees. For firms engaged in small-scale "performances" of copyrighted musical works—radio stations, roller rinks, night clubs, concert halls—it was vastly more economical to license performance rights in bulk than through individual bilateral licenses. On the licensors' side, there were additional economies in monitoring and enforcement. The products here, copyright licenses, were creatures of a federal statute enacted primarily to promote progress in science and useful arts by establishing financial incentives for the creation and publication of works of authorship, including musical works.[65] To the extent that blanket licensing helped composers and publishers reach a larger market and enforce their rights against small users who otherwise would have purchased no license at all, infringing on copyrights, blanket licensing furthered the policy of the copyright statute.[66] Both the Department of Justice and the lower courts had approved of blanket licensing as a practical alternative to individual bilateral licensing in the industry.[67] On

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[62]*See* Brief for Respondent at 62-85, 139-43 & Addendum A.

[63]*See id.* at 78-79.

[64]*See id.* at 50-59. BMI argued that "[w]hen presented with joint delegation of pricing decisions to an agency controlled by a group of competitors, . . . [the] Court has looked to the purpose, effect and industry context of such agreements, and often upheld them under the rule of reason." Brief for Petitioner at 18-19. As authority for that proposition, however, BMI could cite no decision more recent than *Appalachian Coals*. *See supra* note 13.

[65]*See* Mazer v. Stein, 347 U.S. 201, 219 (1954); 1 M. Nimmer, Nimmer on Copyright § 1.03[A] (1986).

[66]*See Broadcast Music*, 441 U.S. at 18-19.

[67]*See id.* at 10-15.

their face, at least, the blanket licensing arrangements were nonexclusive; there was no explicit agreement among copyright owners to license performance rights by this means alone, and there was no agreement on what they would charge for licenses sold individually. Though CBS attacked blanket licensing as "price-fixing," what it really wanted was not individual bilateral licensing, but rather bulk licenses from BMI and ASCAP in a different and cheaper form.[68] That greatly increased the awkwardness of its position; if blanket licensing was unlawful per se, any form of licensing by the copyright owners acting in concert was equally unlawful.[69]

The district judge, after a lengthy trial, dismissed the complaint on all counts.[70] A divided panel of the Second Circuit reversed, holding the practice of blanket licensing unlawful per se.[71] The Supreme Court, by a vote of eight to one, reversed the Second Circuit and remanded the case for further consideration under the rule of reason.[72]

Before Justice White, writing for the Court, could reach the merits of the practice, he had to address the per se rule. "[A]greements among competitors to fix prices," he wrote, "are among those concerted activities that the Court has held to be within the *per se* category. But easy labels do not always supply ready answers."[73] Determining whether a practice is unlawful per se as "price-fixing"

> is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." . . . When two partners set the price of their goods or services they are literally "price-fixing," but they are not *per se* in violation of

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[68]*See CBS*, 400 F. Supp. at 747 & n.7.

[69]*Cf. Broadcast Music*, 441 U.S. at 17 n.27.

[70]*CBS*, 400 F. Supp. at 783. Judge Lasker distinguished the precedents cited by CBS on the ground that in this case, the competing sellers, ASCAP and BMI, were offering buyers a choice: buyers might either purchase the seller's products separately at competitively determined prices or purchase them together at a package price. *Id.* at 748-49.

[71]CBS, Inc. v. ASCAP, 562 F.2d 130 (2d Cir. 1977). "[T]he very availability of the blanket license," Judge Gurfein wrote for the majority, "involves the fixing of a collective price, which must, inevitably, permit the copyright owner to *choose* the blanket license as his medium of licensing in preference to individual bargaining. The blanket license dulls his incentive to compete." *Id.* at 139 (italics in original).

[72]*Broadcast Music*, 441 U.S. at 24-25. Justice Stevens dissented. In his view, on the record before the Court, the defendant's refusal to license performance rights *en bloc* in any form other than a blanket license was plainly unlawful under the rule of reason. *Id.* at 26 n.4, 35 (Stevens, J., dissenting).

On remand, the Second Circuit affirmed the district court's exoneration of the defendants under the rule of reason, on the ground that CBS had failed to show that blanket licensing of music copyrights to television networks had any actual anticompetitive effect. CBS, Inc. v. ASCAP, 620 F.2d 930, 939 (2d Cir. 1980).

[73]*Broadcast Music*, 441 U.S. at 8 (footnote omitted).

> the Sherman Act. . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing."[74]

Though he framed the inquiry in terms of "redeeming competitive virtues,"[75] throughout much of the opinion, Justice White implied that efficiency was the redemptive factor. "The blanket license," he noted, "accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use . . . . Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers."[76] Though the economies were greater for some classes of licensees than others, they were present to some degree in every transaction:

> even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times . . . . [A] bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.[77]

Had the opinion ended on that note, *Broadcast Music* would stand as an exception to the general prohibition against agreements among competitors on price for arrangements that have the potential to create efficiencies, regardless of their competitive effects. However, at the close, the opinion took a turn. Following the pattern established by *Sylvania* and *Professional Engineers*, the Court tied its observations about the efficiencies of the practice before it to a conclusion regarding the impact of the practice on competition. "[W]e have some doubt," Justice White wrote, "about the extent to which this practice threatens the 'central nervous system of the economy,' . . . that is, competitive pricing as the free market's means of allocating resources."[78] Blanket licensing was efficient; it was also procompetitive.

> This substantial lowering of costs . . . differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. . . . Many consumers

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[74]*Id.* at 9.
[75]*Id.* at 13.
[76]*Id.* at 20.
[77]*Id.* at 21 (footnote omitted).
[78]*Id.* at 23 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

> clearly prefer the characteristics and cost advantages of this marketable package . . . . ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.[79]

The composers and publishers had not agreed to license their works exclusively through BMI and ASCAP; they had not agreed on what they would charge for their products sold separately. Though CBS argued that blanket licensing made individual licensing impracticable, the district court had found that "there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice."[80] CBS' argument thus came down to the contention that the law forbids competitors to combine under any circumstances to provide a product that cannot be provided without agreement among them on the price at which it will be sold. No precedent compelled such a holding, and the Court declined to so hold.

B. Catalano, Inc., v. Target Sales, Inc.

In the term after *Broadcast Music*, the Court, in *Catalano, Inc. v. Target Sales, Inc.*,[81] struck down *per curiam* an agreement among local beer wholesalers to deny trade credit to retailers. Credit, the Court observed, is part of the price of a product. In economic effect, the agreement was similar to an agreement among competing sellers to eliminate discounts. Because it was "merely one form of price-fixing," the agreement was "conclusively presumed illegal without further examination . . . ."[82] Unlike the blanket licensing in *Broadcast Music*, the restraint on price competition in *Catalano* involved no potentially procompetitive collaboration of any kind on matters other than price. From the standpoint of competitive benefits, it was scarcely different from an ordinary industry-wide price-fixing agreement.[83]

In that respect, the next case, *Arizona v. Maricopa County Medical Society*,[84] was distinguishable from *Catalano* and much more like *Broadcast Music*. Nevertheless, the Court held the practice before it unlawful per se.

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[79]*Id.* at 21-23 (footnotes omitted).
[80]*Id.* at 23-24.
[81]446 U.S. 643 (1980).
[82]*Id.* at 650.
[83]*Id.* at 648-49.
[84]457 U.S. 332 (1982).

C. Arizona v. Maricopa County Medical Society

Maricopa, like *Broadcast Music*, involved an explicit agreement among competitors on price. Physicians in Maricopa and Pima Counties in Arizona who were members of "foundations for medical care" organized under the auspices of their county medical associations periodically adopted, by majority vote, maximum fee schedules to be used in conjunction with insurance plans offered by certain insurers. Patients insured under these plans were guaranteed "full dollar coverage"[85] for medical expenses incurred within the range of services subject to the plans, with a wide choice of doctors. The participating physicians agreed to bill the insurance companies no more than the maximum scheduled fees for services rendered to insured patients. Once adopted, the fee schedules were circulated throughout the membership, which in Maricopa County comprised seventy percent of the practicing doctors.[86]

The state of Arizona brought suit under section 1 of the Sherman Act against the two "foundations" and their county medical societies to enjoin further concerted fixing of fees by the doctors. Under the guise of protecting consumer interests, the state contended, the defendants were raising the general level of medical fees in the state's two most populous counties.[87] The district court denied the state's motion for partial summary judgment, but certified for interlocutory appeal the question "'whether the . . . agreements, which contain the promise to abide by maximum fee schedules, are illegal per se . . . .'"[88] By a vote of two to one, a panel of the Ninth Circuit affirmed.[89]

On the record before the Court in *Maricopa*, the doctors' commitment to maximum fees reduced the costs of calculating risks and computing

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[85]"Full dollar coverage" signifies 100% reimbursement for covered services, subject to a deductible.

[86]*Maricopa*, 457 U.S. at 340. The Pima County percentage was disputed. *Id.* n.8. However, the Court treated the Maricopa and Pima County arrangements as identical for all practical purposes and held both unlawful without regard to market share. *Id.* at 340.

[87]The state argued:

> Although the foundations' fee schedules supposedly set only maximum prices and purportedly are limited to foundation endorsed health plans, they actually have had an inflationary impact which belies their characterizations as "maximum" fee schedules and which reaches much further than formally endorsed plans . . . [T]he foundations' fee schedules have been set at levels higher than both the average and median fees of Arizona doctors as determined by the foundations' own price surveys. . . . And, once the fee schedules are established through the elaborate process of price surveys and formal voting, foundation members revise their prices so that some 85 to 95 percent charge prices at or above those established by the fee schedules.

Brief for Petitioner at 7.

[88]457 U.S. at 336-37 (quoting the Court of Appeals' statement of the issue).

[89]Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553 (9th Cir. 1980).

the payments due on insured claims. Though the insurers were capable of negotiating maximum fee commitments with the physicians individually, arguably, greater economies were possible if the doctors fixed the fees by agreement among themselves. Like the blanket licenses in *Broadcast Music*, the insurance plans constituted an attractive product—medical insurance with guaranteed "full dollar coverage" and a choice among doctors practicing privately in the community—different from anything that could be offered by the participants acting independently. Moreover, without agreements by the physicians to charge no more than a fixed maximum, the program probably would not have worked. In the absence of a fixed maximum, physicians would take advantage of guaranteed 100% reimbursement by unilaterally raising fees. Costs and premiums would then increase to the point that the insurance plans would no longer be attractive to subscribers.[90]

Nevertheless, by a vote of four to three with two abstentions,[91] the Supreme Court reversed both lower courts and held the agreement unlawful per se.[92]

Writing for the plurality—Justices Brennan, White, Stevens, and Marshall—Justice Stevens began his analysis with the established per se rule of per se illegality for horizontal price-fixing. Since *Standard Oil* in 1911, he noted, the Court had consistently held that once "price-fixing" was proved, the section 1 inquiry was over: a "conclusive presumption" brought the case within the statute.[93] Since at least 1952, it had been clear that "horizontal agreements to fix maximum prices [stood] on the same legal . . . footing as agreements to fix minimum or uniform prices."[94] Nothing in *Maricopa*—the fact that the competitors were professionals, the fact that the judiciary lacked much experience in evaluating "price-fixing" claims in the health care industry, or the fact that the arrangement had some potential procompetitive effects—called for any special treatment.[95] The case was entirely different from *Broadcast Music*. In *Broadcast Music*, price-fixing by competitors was

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[90]"[I]n the absence of the maximum price constraints individual fee hikes would pig the program to death. The 100 per cent coverage program . . . would not be able to survive in competition with other ways of providing health care." W. Liebeler, Antitrust Advisor § 1.29, at 28 (2d ed. Supp. 1983). The Court apparently so assumed. *See* 457 U.S. at 352. There is no indication that the Court assumed or should have assumed from the record before it that the maximum fee for each physician for each procedure had to be the same.

[91]Justices Blackmun and O'Connor took no part in the decision.

[92]*Maricopa*, 457 U.S. at 357.

[93]*Id.* at 344-45 (quoting Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911)).

[94]*Id.* at 348 (citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)) (footnote omitted).

[95]*Id.* at 348-51.

"a 'necessary consequence' of the creation of [a] blanket license."[96] In *Maricopa*, although some understanding between insurers and individual participating physicians on maximum fees was essential to enable the insurers to offer full dollar coverage,[97] there was no necessity whatsoever that the *doctors* combine to fix the fees. The insurers themselves were fully capable "not only of fixing maximum reimbursable prices but also of obtaining binding agreements with providers guaranteeing the insured full reimbursement of a participating provider's fee."[98]

Justice Powell, joined by the Chief Justice and Justice Rehnquist, dissented in *Maricopa*. In *Sylvania*, he wrote, the Court had held that as part of the inquiry required to determine whether a practice is unlawful per se, "a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement."[99] On the abbreviated record before the Court in *Maricopa,* it was impossible to make that determination. Given the posture of the case, the Court was required to accept the defendants' contentions, supported by evidence in the record, that their arrangement "'serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars.'"[100] The insurance plans, Justice Powell thought, were like the blanket licenses in *Broadcast Music* in every important respect: "Each involved competitors and resulted in cooperative pricing. Each . . . was prompted by the need for better service to the consumers. And each arrangement makes possible a new product by reaping otherwise unattainable effi-

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[96] *Id.* at 355-56 (quoting *Broadcast Music*, 441 U.S. at 21).

[97] "It is true," Justice Stevens wrote,

> that a binding assurance of complete insurance coverage—as well as most of the respondents' potential for lower insurance premiums [through cost savings in risk calculation and the computation of benefits]—can be obtained only if the insurer and the doctor agree in advance on the maximum fee that the doctor will accept as full payment for a particular service. Even if a fee schedule is therefore desirable, *it is not necessary that the doctors do the price fixing*.

Id. at 352 (emphasis added) (footnotes omitted).

[98] *Id.* at 353. Justice Stevens continued:

> The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers. The validity of that assumption is far from obvious, but in any event there is no reason to believe that any savings that might accrue [from having the doctors fix the prices] would be sufficiently great to affect the competitiveness of these kinds of insurance plans. It is entirely possible that the potential or actual power of the foundations to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which the respondents' defense ultimately rests.

Id. at 353-54 (footnotes omitted).

[99] *Id.* at 362 (Powell, J. dissenting).

[100] *Id.* at 360 (quoting the plurality opinion at 342).

ciencies . . . ."[101] Because the state had failed to prove that the defendants had "entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification," the Court (in the dissenters' view) should have affirmed the ruling of the trial court on the issue of per se illegality.[102]

Quite clearly, there were two distinctions between the agreements on price in *Broadcast Music* and *Maricopa* that could reasonably be regarded as important. First, unlike the composers and publishers in *Broadcast Music*, the physicians in *Maricopa* fixed the prices of services which they sold separately. The foundation arrangements therefore involved all of the conventional competitive risks of horizontal agreements fixing maximum prices.[103] Second, in *Broadcast Music,* the product literally could not be sold without explicit agreement among the competitors on price; in *Maricopa,* this was not true. As the plurality pointed out, assuming the insurance plans could not be sold without commitments by individual doctors to maximum fees, there was no reason why the doctors had to do the fee-fixing. The insurers could do it. Although this might be less economical, that was a far cry from saying that the plans could not be provided otherwise.[104] The effect of a decree imple-

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[101]*Id.* at 364-65 (footnotes omitted).

[102]*Id.* at 366.

[103]As Justice Stevens observed: "The agreement under attack is an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." *Id.* at 356-57. The maximum fee schedules for the doctors' services were adopted by the doctors themselves. Once adopted, they were circulated throughout the group of participating physicians. Thereafter, there was no incentive for any individual physician to charge less than the "maximum" fee to any patient insured under the plans. As the United States pointed out, appearing as amicus curiae:

> Doctors have no financial incentive to charge insured patients less than the maximum fee because the insurers, in order to obtain foundation approval, previously have agreed to pay any fee up to that maximum. Moreover, insured patients have no direct incentive to select a doctor who charges less. The doctor's charge is paid by the insurer, and an individual patient's premiums do not vary on the basis of the fees charged by a particular doctor.

Brief for the United States as Amicus Curiae at 8. Moreover, by virtue of a provision in the foundation scheme forbidding member physicians "to discriminate in billing Foundation insured patients as compared to non-Foundation insured patients," *see* Brief for Respondents at 44, the participating physicians were apparently required, if they charged the agreed-upon "maximum" fees to patients insured under the special plans, to charge no less to patients throughout the community. The *Broadcast Music* arrangements, as Justice White had carefully noted, had no such feature. *See supra* text accompanying note 80.

[104]*Maricopa*, 457 U.S. at 352-54. Had it been seriously argued that the effect of transferring the fee-setting responsibility from the foundations to the insurers would have been to raise the administrative costs of the program to the point that the plans would have been priced out of the market, the economic impact of per se condemnation in

menting the Court's decision would be to shift the initiative in the determination of maximum fees from the foundations, created by physicians whose interests lay in raising general fee levels, to the insurers, whose interests lay (with consumers) in keeping fees down. The desired product could then be provided on a competitive basis, without incurring the risks inherent in an explicit agreement among competitors on maximum prices.[105]

The fact remained that there was evidence that the "foundation" method of establishing maximum fee schedules was economical, and that the resulting economies were "procompetitive" in the sense in which the dissenters obviously meant the term, i.e., the economies benefited consumers.[106] "As we have noted," Justice Powell wrote, "the antitrust

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Maricopa and *Broadcast Music* might have been the same. Nobody, however, raised that argument.

[105]The Court's opinion has been criticized on this point for "formalism." "For purposes of demonstrable economic effect," Professor Liebeler has written, "what difference does it make whether the doctors are 'canvassed' by a foundation of their own creation which then deals with the various insurers or whether the doctors are 'canvassed' by the various insurers directly?" W. Liebeler, *supra* note 90, at 32.

Implicit in the opinion, I believe, is this answer, supplied by the Department of Justice:

> [T]he agreements here at issue serve to inhibit unilateral actions by insurers to restrain costs through prescription of their own maximum payments to physicians . . . . When competing physicians do not set prices, insurers have an economic incentive to negotiate fee schedules that will minimize costs for medical services rendered to their subscribers, for they maximize their own profits by doing so. And when there is competition or potential competition among insurers to minimize medical payments, the benefits of their actions accrue to the public. Insurers who succeed in limiting their costs are able to offer lower premiums than insurers who do not . . . .
>
> When all insurers are faced with a single price schedule fixed by doctors through foundations, however, competition has a much more limited potential for minimizing consumer costs . . . .

Brief for the United States as Amicus Curiae at 8-9.

Prof. Liebeler's criticism, however, continues:

> Even from a formalistic standpoint, Justice Stevens' suggestion does not avoid the "problem" of a concert amongst the providers. There is plenty of authority for the proposition that if the doctors entered into agreements with the insurers, knowing that other doctors were doing the same thing, they have entered into a horizontal concert of action.

W. Liebeler, *supra* note 90, at 32. This is a substantial point, which the Court did not address. A response consistent with its opinion would be: The record before the Court failed to show that direct horizontal price-fixing, in the form of explicit agreements among physicians on fees, was essential to the provision of any product. If another case were to come before the Court on a record demonstrating that the product in question could be provided only by means of horizontal price-fixing in some less pernicious form, the Court, following *Broadcast Music*, would withhold per se condemnation. *See supra* note 90.

[106]Throughout the dissenting opinion, Justice Powell distinguished implicitly between

laws are a 'consumer welfare prescription.'"[107] The record did not *compel* a finding that consumers[108] were benefiting, through lower fees and insurance premiums, from the economies specifically attributable to the concerted fixing of fees; for all the record showed, as the plurality pointed out, the practice resulted in higher fees, not lower ones. But why should the case not be remanded for trial to find out? Given the possibility of procompetitive efficiencies from the arrangement, it could certainly be argued that it was wrong to "condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers."[109]

In *Maricopa*, the Court, by a narrow margin, rejected the proposition that the prospect of procompetitive efficiencies from an agreement among competitors to fix prices in and of itself justifies an exception to the general prohibition. Affirming and applying the per se rule, the plurality never fully explained why, after *Sylvania* and *Broadcast Music*, the existence of some procompetitive efficiencies should not be recognized as a complete defense to a charge of per se illegality. On the other hand, the dissent, invoking the principles of *Sylvania* and *Broadcast Music*, never squarely addressed the issue of whether economies arising out of the mere process of fixing prices should be the basis for an exception to the per se rule.

D. NCAA v. Board of Regents

Two years after *Maricopa*, the Court held that the rule of reason applied to a set of controls on the licensing of college football television rights that included the fixing of prices by competitors in combination.[110] Though the Court's opinion in *NCAA* shed new light on the nature of the defendant's burden of justification in a rule-of-reason case involving an agreement among competitors on price, it also raised further questions concerning the criteria for exceptions to the general rule of per se illegality.

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efficiencies that are "procompetitive" and efficiencies that are not. *See, e.g.*, *supra* text accompanying notes 99-102. This point is overlooked when *Broadcast Music* and the dissent in *Maricopa* are read together for the proposition that no practice should be condemned per se if it has the potential to create significant efficiencies. *See, e.g.*, W. Liebeler, *supra* note 90, at 28-32; Gerhart, *supra* note 22, at 344-48.

[107] *Maricopa*, 457 U.S. at 367 (Powell, J., dissenting) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

[108] Lest he be misunderstood in his use of the word "consumer," Justice Powell defined it in the context of the case: "The term 'consumer'—commonly used in antitrust cases and literature—is used herein to mean persons who need or may need medical services from physicians." *Id.* at 360 n.5. The misunderstanding he apparently wished to avoid is discussed below. *See infra* text accompanying notes 139-45.

[109] *Maricopa*, 457 U.S. at 360 (emphasis in original).

[110] NCAA v. Board of Regents, 468 U.S. 85 (1984).

Since 1953, the National Collegiate Athletic Association had imposed controls on the broadcasting of football games by its member colleges and universities.[111] These controls, instituted originally to protect live attendance at games, evolved over time into a device for increasing television broadcast revenues and distributing them widely among the member schools. In 1977, the NCAA granted the ABC television network the exclusive right for four years to televise regular-season football games between NCAA schools on a network basis, on terms which severely limited the number of times any school could appear. In 1981, a new four-year television plan granted shared exclusive rights on similar terms to ABC and CBS.[112] When a group of NCAA member schools with major football programs, dissatisfied with the plan, secured a competing offer from NBC, the NCAA threatened retribution. Two of the dissidents, the Universities of Oklahoma and Georgia, sued the NCAA, alleging antitrust violations, including per se unlawful "price-fixing."

The NCAA controls fixed prices at two levels. The 1981 plan, developed pursuant to an NCAA bylaw and ratified by the membership, was essentially an agreement among competitors to bundle competing products[113] and sell the bundle at a single price. The price—called the "minimum aggregate fee" in the network contracts—was negotiated by the member schools jointly, through the NCAA as their agent. Subject to severe constraints, the contracts left the final choice of games to the networks. By a custom so long-standing that it was regarded as part of the agreement, however, once a network had selected a given game, the compensation paid to the participating schools was determined ac-

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[111]Except as otherwise noted, the facts are taken from the opinion of the district court, Board of Regents v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).

At the time of suit, the NCAA was composed of approximately 900 members, most of them four-year colleges and universities. *Id.* at 1282-83. These members will be referred to here as "colleges" or "schools."

[112]*Id.* at 1283-84, 1289-93. By the terms of the 1981 plan, member schools were limited to six appearances on regular network television, no more than four of which could be nationally televised. With the NCAA's permission, member schools could contract for "exception telecasts," but only on a local basis and only if certain conditions were met. These restrictions were designed to guarantee increased television exposure for schools with lesser-known football programs by curtailing exposure of other games viewers would probably have chosen to watch, i.e., games between the prominent NCAA Division I teams. To ensure that the networks did in fact broadcast games between lesser-known teams, each network was required, over each two-year period, to schedule appearances for at least 82 NCAA member schools.

The NCAA plan also provided for a contract granting the Turner Broadcasting System the exclusive right to cablecast live performances of NCAA games. *Id.* at 1291-92.

[113]In the marketing of college football television rights, colleges are natural competitors: the rights are valuable, the demand for them is finite, and in a free market, colleges would vie with one another for the revenues available from their sale. *See id.* at 1298.

cording to the NCAA's "recommended" schedule. The schedule set uniform prices for national and regional telecasts for each of the NCAA's three divisions.

At the close of a six-week trial, the district judge entered judgment for the plaintiffs. The NCAA controls were found to be anticompetitive both on their face and in effect. They yielded an array of televised games entirely different from the one a free market, responsive to consumer preferences, would have produced, and they grossly distorted the prices paid for the rights to broadcast individual games. The district court held the controls unlawful as "price-fixing" and as unreasonable restraints under the rule of reason.[114] A divided panel of the Tenth Circuit sustained both rulings.[115]

In the Supreme Court, the NCAA argued that the controls were highly procompetitive. College football, though in some ways unique in its appeal to television viewers and thus attractive to advertisers and broadcasters, had to compete with a variety of other televised entertainments. To enable college football to compete effectively, it was crucial that NCAA members provide a large and varied "menu" of "close and exciting games" every season.[116] The appearance requirements and limitations at the heart of the NCAA plan thus served a desirable and procompetitive function:

> It is undisputed that the extent of television exposure is very important to colleges in recruiting new players and attracting alumni donations. Thus the increase in the number of teams shown on national or regional broadcasts puts the teams on more competitive footing in recruiting new players and financing their programs.
>
> The result is that colleges will be more evenly matched on the field, and more games will be close and exciting. The more close and exciting games there are, the more people will watch college football on TV, where it competes with other entertainments . . . .[117]

The NCAA hinted that if it were required to drop the controls, televised college football as a sport attractive to viewers might cease to exist. It

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[114]*Id.* at 1319. The district judge also held the television plan unlawful as monopolization and a group boycott. *Id.* at 1326.

[115]Board of Regents v. NCAA, 707 F.2d 1147 (10th Cir. 1983). The court of appeals affirmed on the monopolization count, reversed on the group boycott count, and remanded for reconsideration of the decree. *Id.* at 1156, 1160, 1162.

[116]Brief for the Petitioner at 22 nn.11 & 20.

[117]*Id.* at 20.

argued that the decision on how best to package the product ought to be left to members of the NCAA; as the producers of televised college football, they were entitled to the same choice among marketing methods as were the producers of a prime-time soap opera.[118]

By unanimous vote, the Supreme Court declined to hold the NCAA television controls unlawful per se. By a vote of seven to two, however, the Court held the controls unreasonable under the rule of reason.[119]

On its face, the NCAA television plan was plainly anticompetitive.[120] Unlike the ASCAP-BMI blanket licensing arrangements, the NCAA controls not only fixed prices, but restricted output and severely restrained competition in the market for the competitors' products sold separately.[121] Nevertheless, on the per se issue, the Court bypassed these distinctions. Ordinarily, Justice Stevens wrote for the Court, horizontal price-fixing "is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case."[122] The decision

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[118]"Dynasty" was mentioned. *Id.* at 23. Defendant also argued that the controls were procompetitive because they economized on production and transaction costs, discouraged free rides, and increased live attendance at the games. *Id.* at 22-27.

[119]Justice White, joined by Justice Rehnquist, dissented. *NCAA*, 468 U.S. at 120. Arguing that "limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system," the dissenters thought the NCAA plan was defensible both on conventional rule-of-reason grounds and as a means of promoting the organization's non-commercial purposes. *Id.* at 128, 130-31 (White, J., dissenting).

[120]*Id.* at 113.

[121]Justice Stevens in fact emphasized that point: "In *Broadcast Music*, [u]nlike this case, . . . each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced. No individual school is free to televise its own games . . . ." *Id.* at 114-15 (footnote omitted).

The cases were also distinguishable on the ground that in *NCAA*, unlike *Broadcast Music*, the competitors' agreement fixed the prices of the parties' respective products. *See supra* text following note 110. The Court found this to be particularly objectionable. *NCAA*, 468 U.S. at 105-08 & nn.30 & 33. This aspect of the agreement, however, served primarily as a formula for distributing the minimum aggregate fee among the member schools, much like the ASCAP-BMI procedures for the distribution of the proceeds of blanket licensing.

The Court pointed out a third possible distinction:

> The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan. . . . In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music*, 441 U.S. at 23.

Id. at 114 (footnote omitted). The Court's analysis holds, provided that "the product" is college football television rights. If "the product" is viewed as exclusive package licenses of college football television rights, the case suddenly looks a good deal more like *Broadcast Music*. *See id.* at 129-30 (White, J., dissenting).

[122]*Id.* at 100.

was based, he emphasized, not on a lack of judicial experience with the practice, but on the fact that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[123] Many NCAA rules were designed to preserve amateurism in college football—rules restricting payments to athletes, rules requiring them to attend classes, etc. Those rules were procompetitive: they made the sport more attractive to game-goers and television viewers, and differentiated it from sports like minor league baseball. Because, indeed, "the great majority of the NCAA's regulations enhance competition . . ., a fair evaluation of [the television controls'] competitive character requires consideration of the NCAA's justifications . . . ."[124]

Under the rule of reason, a practice like the one before the Court—a "naked restriction on price or output"—was unlawful, absent a procompetitive justification, regardless of whether the parties to it had collective market power.[125] The NCAA controls constituted "horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade."[126] Under the controls in operation, on the undisputed findings of the district court,

> [p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. . . . This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" . . . A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal . . . .[127]

Because the restraints had that effect, the NCAA bore "a heavy burden of establishing an affirmative defense. . . ."[128]

The Court held that the NCAA failed to sustain its burden. To the extent that balancing the strength of NCAA football teams enhanced

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[123]*Id.* at 101.

[124]*Id.* at 103.

[125]*Id.* at 109-10. The cases cited by the Court in support of this proposition shed some light on what the Court meant by "naked restrictions." They included not only cases involving agreements among competitors fixing the prices of their products sold separately, but cases like *Catalano*, *Professional Engineers*, and *Socony*, which involved other practices that necessarily interfered with price competition if they had any effect at all. *Id.* at 110 & nn.40-41.

Because the NCAA had market power, *see id.* at 111-12, the proposition in the text was dictum. Carefully stated and supported by extensive case citations, it was dictum of a fairly high order.

[126]*Id.* at 100.

[127]*Id.* at 107 (footnotes omitted).

[128]*Id.* at 113.

public interest in the games, it was procompetitive, and the NCAA's interest was "legitimate and important."[129] As a means to that end, however, the television controls were ineffectual[130] and overbroad.[131] There was no evidence that they produced any greater measure of team balance than would a variety of other regulations the NCAA apparently had the power to impose,[132] none of which would involve direct horizontal restraints on price and output—"the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[133]

Thus in *NCAA*, unlike *Broadcast Music*, the fact that the arrangement was held to qualify for rule-of-reason rather than per se treatment did not affect the outcome. The question remains: since the NCAA controls were distinguishable on their face from the agreements in *Broadcast Music*, why did the Court withhold per se condemnation? Although some restraints on competition might be essential to the existence of college football and the marketing of college football television rights, how could that justify the fixing of prices, which so clearly was not? Unless the mere fact that such conduct might have procompetitive effects in a particular context exempts it from per se condemnation—which the Court in *Maricopa* held was not the case—how could the fact that other restraints imposed by the same parties were procompetitive have any bearing at all?

Perhaps, on the per se issue, there was another more persuasive approach to the same result. As the Court noted in *Broadcast Music*, package sales are potentially procompetitive. That is true even where, as in *NCAA*, the sales are exclusive package sales and the contents of the package are products that could otherwise be sold in competition with one another.[134] On its face, the exclusive package licensing in this case had procompetitive potential. Clearly there could be no package

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[129]*Id.* at 117.

[130]Justice Stevens had no difficulty in providing an example: "It seems unlikely . . . that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan." *Id.* at 118 n.62. That though was merely one illustration of the more general problem: "The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a 'power elite' in intercollegiate football." *Id.*; *see* Board of Regents v. NCAA, 546 F. Supp. at 1310-11.

[131]*NCAA*, 468 U.S. at 119.

[132]*Id.*

[133]*Id.* at 107-08. The Court also noted that the controls were "not related to any neutral standard"—a comment, apparently, on the fact that the NCAA had suggested no criterion by which a court could determine whether its members had abused their collective power over price and output, but was instead essentially requesting complete discretion—and that if the controls were lifted, on the findings of the district court, consumption of the product (televised college football) would increase. *Id.* at 118, 119-20.

[134]*See, e.g.*, C. Kaysen & D. Turner, Antitrust Policy—An Economic and Legal

sale of the competing products, exclusive or otherwise, without an agreement among the competitors on the price. Though there were plainly other techniques available by which the NCAA member schools could apportion television revenues and balance teams, the relationships involved were quite complex—far more complex than those in *Maricopa*, where it was clear on the pretrial record that an alternative arrangement which did not involve an explicit horizontal agreement on price would yield comparable benefits at far less risk. On the record before it, the Court could reasonably conclude that the circumstances warranted a full inquiry into the reasonableness of the restraint—and that the district judge, having conducted such an inquiry, had reached the right result.

III. Policy and Doctrine

To get a good sense of what is happening to the law of "price-fixing," these cases must be read at two levels. At the policy level, the opinions start from the premise that the law's primary objective is to protect consumers' economic interests in competition in the marketplace. This is a conservative premise, which has strong support in both the legislative history of the Sherman Act and the leading cases applying section 1 to horizontal agreements on price. What is new in the recent cases is the Court's receptivity to the argument that competitive benefits to consumers from horizontal agreements on prices are in some instances substantial and worth preserving. In *Broadcast Music* and *NCAA*, but not in *Maricopa*, that argument prevailed. The result is a change in doctrine—the express recognition of exceptions to the general rule of per se illegality.

A. Policy

At the heart of these opinions are two premises: (1) the first concern of the Sherman Act is to protect the economic interests of consumers in competition among producers and distributors; (2) the curtailment of competition by agreement among producers or distributors runs contrary to the law's objectives unless it in some way enhances or promotes competition, thereby increasing the economic well-being of consumers.

The Sherman Act, Justice Stevens wrote for the Court in *Professional Engineers*,

> reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method

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Analysis 152-53 (1959); L. Sullivan, Handbook of the Law of Antitrust §§ 77, 104 (1977).

> of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability— . . . are favorably affected by the free opportunity to select among alternative offers.[135]

Competition is the free market's means of applying constant pressure to producers and distributors to satisfy consumers' desires. Competition in the medical profession creates incentives for doctors to employ innovative and challenging procedures and to experiment with new techniques.[136] Competition in the market for college football television rights ensures that televised games are the ones viewers really want to see.[137] Price competition is more than just a device for making products more affordable; it is an important mechanism for communicating consumer preferences to producers and distributors who, in turn, are rewarded for satisfying them; it is "the central nervous system of the economy."[138]

The thrust of the cases is neatly summarized in a phrase which recurs in the opinions: the Sherman Act was intended by Congress to be a "consumer welfare prescription." The phrase comes from the writings of Prof. (now Judge) Robert Bork, a leading exponent of the Chicago school of antitrust analysis.[139] Adherents of the Chicago school—proponents of the view that the objective of the antitrust laws is to promote economic efficiency—have commended the Court for adopting the phrase.[140] As the Court uses it, however, in the context of a horizontal restraint on price competition, the phrase does not refer, as it generally does in the literature of the Chicago school,[141] to the welfare of everyone potentially affected by the restraint, including the owners of participating firms and purchasers of goods and services in remote markets. The Court uses the phrase to refer specifically to the welfare of consumers of the product subject to the restraint: i.e., purchasers of consumer

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[135]435 U.S. 679, 695 (1978).

[136]Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982).

[137]*NCAA*, 468 U.S. at 105-06, 107 n.34.

[138]United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), *quoted in Professional Engineers*, 435 U.S. at 692, *and Broadcast Music*, 441 U.S. at 23.

[139]"The legislative histories of the antitrust statutes, therefore, do not support any claim that Congress intended the courts to sacrifice consumer welfare to any other goal. The Sherman Act was clearly presented and debated as a consumer welfare prescription." R. Bork, *supra* note 22, at 66.

[140]*See, e.g.*, R. Posner & F. Easterbrook, Antitrust Cases, Economic Notes and Other Materials 154 (2d ed. 1981); Baxter, *Responding to the Reaction: The Draftsman's View*, 71 Calif. L. Rev. 618, 619 n.6 (1983).

[141]*See, e.g.*, sources cited *supra* notes 139-40; Gerhart, *supra* note 22, at 330-32; Liebeler, *supra* note 22, at 13-16; Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 Case W. Res. L. Rev. 381, 384-86 (1980); Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968).

goods who have paid inflated prices as a result of a conspiracy among manufacturers to fix prices;[142] television viewers who are prevented from watching those football games they would most like to see by an agreement among colleges that restrains competition in the sale of broadcasting rights;[143] and purchasers of health insurance whose premiums might or might not be reduced if the maximum fees for physicians' services were set by the method claimed to be the most economical, *viz.*, explicit agreement among the physicians themselves.[144] As a "consumer welfare prescription"—"a law designed to benefit consumers"[145]—the Act's first concern in a case involving price-fixing by competitors is the welfare of consumers who stood to benefit from competition among the fixers and who may now be injured by its curtailment.

The second recurring theme in the cases concerns the kinds of effects that will justify a competitive restraint. The traditional formulation of the rule of reason in *Chicago Board of Trade* is vague and open-ended.[146] The cases discussed here narrow the range of inquiry to the impact of the challenged practice on "competitive conditions."[147] A practice unreasonably restrains trade if it suppresses competition and does not promote it.[148] The virtues that can redeem a competitive restraint are "redeeming competitive virtues;"[149] the efficiencies that count are "procompetitive efficiencies."[150] A restraint that "enhance[s] the competitiveness" of a product may be defensible.[151] A restraint whose defense rests on the proposition that in a particular commercial context "competition itself is unreasonable," however, is doomed.[152]

Under these formulations, the critical question becomes: What effects of a competitive restraint are "procompetitive" effects? The opinions leave the answer to inference. From the Court's initial premise, it would seem to follow that if an agreement restrains competition, its defense under the Act must be on the ground that in some way it also stimulates

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[142]Reiter v. Sonotone Corp., 442 U.S. 330, 343-44 (1979).

[143]*NCAA*, 468 U.S. at 107 n.34. *See supra* text accompanying note 127.

[144]*Maricopa*, 457 U.S. at 367 (Powell, J., dissenting). *See supra* notes 106-09 and accompanying text.

[145]*Maricopa*, 457 U.S. at 360 (Powell, J., dissenting) (italics deleted).

[146]*See* Board of Trade v. United States, 246 U.S. 231, 238 (1918), *quoted in part*, *supra* note 42, *criticized*, R. Bork, *supra* note 22, at 41-47.

[147]*Professional Engineers*, 435 U.S. at 690 & n.15 (quoting Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911)); *see* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-56 (1977) (discussed *supra*, text accompanying notes 34-48).

[148]*Professional Engineers*, 435 U.S. at 691 (citing *Sylvania*, 433 U.S. at 49 n.15.).

[149]*Broadcast Music*, 441 U.S. at 13.

[150]*NCAA*, 468 U.S. at 114; *Maricopa*, 457 U.S. at 362, 363, 366 (Powell, J., dissenting) (discussed *supra* notes 106-09 and accompanying text).

[151]*NCAA*, 468 U.S. at 114.

[152]*Id.* at 117 (quoting *Professional Engineers*, 435 U.S. at 696).

competition, thereby increasing the benefits to consumers from the competitive process.

On the whole, the cases support that proposition. Restraints that in some way also facilitate competition and enhance the overall benefits to consumers are "procompetitive;" restraints that do not, are not. In *Professional Engineers*, the defendants' ban on competitive bidding proved to be designed not to help the suppliers of engineering services satisfy consumers' desires, but to make it more difficult for price-conscious buyers to get what they wanted without increasing in any way the alternatives available to buyers willing to pay for high quality. It failed the test.[153] In *Broadcast Music,* the Court praised blanket licensing for its efficiency in general; the opinion also emphasized that the practice enabled individual and bulk licenses to be sold in competition with one another, giving buyers "a real choice."[154] In *Maricopa*, the plurality and the dissenters apparently agreed that the fixing of medical fees by explicit agreement among physicians in connection with the provision of a new form of health insurance would be procompetitive if it were essential to make the insurance marketable on competitive terms, or if it introduced efficiencies that resulted in lower premiums to consumers; they disagreed on whether the potential procompetitive effects of the specific practice involved were sufficient to justify an exception to the general rule.[155] In *NCAA*, the Court indicated that it would regard the defendant's restraints on the sale of college football television rights by member schools as procompetitive to the extent that they increased consumption of the product by making it more attractive to consumers; the Court held, however, that the defendant had failed to satisfy the burden of justification on that ground.[156]

In its emphasis in these cases on the economic interests of consumers in competition, the Court has been paying tribute to a very old tradition. To the proponents of vigorous antitrust legislation in the Congress that passed the Sherman Act, injury to consumers resulting from the suppression of competition by powerful combinations of competitors was a central concern.[157] The most frequent and ardent complaint against the trusts was that they used their power to restrict output and raise prices to consumers. Senator Sherman himself never wavered from his position

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[153]*See supra* text accompanying notes 49-58.

[154]*See supra* text accompanying notes 75-80.

[155]*See supra* text accompanying notes 93-109.

[156]*See supra* text accompanying notes 129-33.

[157]The evidence is marshalled in Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 82-96 (1982). *See also* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. Law & Econ. 7, 14-20 (1966).

that all combinations "designed, or which tend, to advance the cost of the consumer" of articles of commerce should be unlawful.[158] Other spokesmen in both houses were harsh and unsparing in their condemnation of combinations of potential competitors who, by eliminating competition among themselves, raised prices and rates and "ble[d] and fleece[d] the people."[159] In the course of debate, Senator Sherman and others emphasized that they were not opposed in principle to combinations of capital and labor in the form of corporations, partnerships, and the like, because such combinations tended to "lessen the cost of production, and bring within the reach of millions comforts and luxuries formerly enjoyed by thousands."[160] It was combinations that stifled competition and raised prices to consumers that were objectionable—and they remained objectionable even if they lowered production costs.[161] Senator Sherman observed of the trusts:

> It is sometimes said of these combinations . . . that they reduce prices to consumers by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination.[162]

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[158]*See* Bork, *supra* note 157, at 15-16 (quoting S. 1, 51st Cong., 1st Sess. § 1, 21 Cong. Rec. 1765 (1890)). Though the bill that ultimately passed Congress as the Sherman Act was drafted by others, Sherman was a central figure in the debate. Sherman's views, Judge Bork has stated in his classic study of the legislative history, "are crucial to an understanding of the intent underlying the law that bears his name." Bork, *supra*, at 14.

[159]The quotation is from the speech of Rep. Anderson of Kansas, 21 Cong. Rec. 5959 (1890).

> [D]uring the debates Senator Sherman termed monopolistic overcharges . . . "extorted wealth" . . . . Congressman Wilson complained that the beef trust "robs the farmer on the one hand and the consumer on the other." Representative Fithian declared that the trusts were "impoverishing" the people through "robbery." Senator Hoar declared that monopolistic pricing was "a transaction the direct purpose of which is to extort from the community . . . wealth which ought to be generally diffused over the whole community."

Lande, *supra* note 157, at 94-95 (footnotes omitted).

[160]21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman).

[161]Judge Bork concluded that Congress intended to condemn all mergers resulting in monopoly. Bork, *supra* note 157, at 11, 25. Lande in his more recent study similarly concluded:

> [T]he evidence suggests that Congress was unwilling to subordinate its . . . distaste for trusts and monopolists to the goal of corporate efficiency when the efficiency gains would be retained by the monopolist.
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> . . . .
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> . . . [C]ongressional endorsement of trusts' efficient operations stopped when consumer prices rose, and the legislature withheld approval from combinations that, while yielding more efficient methods of competition, also produced higher consumer prices.

Lande, *supra* note 157, at 83, 90-91.

[162]21 Cong. Rec. 2460 (1890). Senator Sherman, Judge Bork has noted, "stressed

These arguments substantially shaped the law of "contract, combination [and] conspiracy . . . in restraint of trade"[163] as applied to horizontal price-fixing. In the seminal price-fixing decisions of the 1890's, the Court, noting that price-fixing by powerful firms in combination tended to raise prices to consumers by eliminating competition in much the same fashion as the trusts, concluded that Congress had intended the same principles to apply to both and held the price-fixing agreements unlawful without regard to the reasonableness of the prices.[164] In the 1911 *Standard Oil* case, the Court, summarizing the concerns that had prompted the passage of the Sherman Act, emphasized "the dread of enhancement of prices and of other wrongs which it was thought would flow from [any] undue limitation on competitive conditions . . . ,"[165] i.e., the classic evils of monopoly from the consumer's standpoint: "1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article. . . ."[166] In *Standard Oil*, the Court expressly approved its holdings in the early price-fixing cases: "[C]onsidering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute. . . ."[167]

The proposition that the law's first concern in price-fixing cases is to protect the interests of consumers in competition is far from new. The novelty in the recent cases lies in the fact that the Court has reopened the question of what rule will best protect those interests.

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the legality of efficiency repeatedly . . . . The only limit he urged to the creation of efficiency by combination was justified explicitly in terms of consumers welfare. He thought combinations of monopolistic size would not pass their efficiencies on to consumers." Bork, *supra* note 157, at 26-27.

[163]Sherman Act § 1, 15 U.S.C. § 1 (1982).

[164]*See* United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 322-26 (1897); *see also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).

[165]Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911). Compare the following passage from Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), a decision contemporaneous with *Socony*:

> [The Sherman Act] was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services . . . . The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 492-93 (footnote omitted).

[166]*Standard Oil*, 221 U.S. at 52.

[167]*Id.* at 65.

B. The Per Se Rule

An absolute prohibition against agreements among competitors on price would condemn some agreements, such as the blanket licensing agreements in *Broadcast Music*, that have the potential to promote competition. The fact that a rule forbids conduct that may do some good and that may sometimes even do more good than harm is not a conclusive argument against it.[168] When the rule is judicially formulated, that fact tends to invite some tinkering. For a generation after the *Socony* decision in 1940, the Court refused to condone any tinkering with this particular rule. With the decision in *Broadcast Music*, that era ended.

What the cases clearly contemplate is reform, not repeal. "Horizontal price-fixing and output limitation," the Court observed in *NCAA*, "are ordinarily [unlawful] under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high."[169] In a footnote the Court continued: "[w]hile judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules, . . . the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without [further] inquiry. . . ."[170]

The problem, then, is to define those classes of price-fixing agreements that qualify for exceptional treatment. In the case of conventional or "straight" price-fixing agreements—agreements on price unaccompanied by any agreement to collaborate in other potentially procompetitive activity—there is a powerful argument for an absolute prohibition, regardless of purpose or effect. Nothing in the Court's decisions suggests any softening of attitude toward price-fixing of this kind. It is where the agreement on price functions as part of a larger potentially procompetitive undertaking that serious questions about per se illegality arise.

1. Conventional Price-Fixing.—"[I]n characterizing . . . conduct under the *per se* rule," the Court noted in *Broadcast Music*, "our inquiry must focus on . . . whether the practice . . . appears to be one that

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[168]"The per se rule condemns whole categories of practices even though some practices in these categories are beneficial. The Court permits such overbreadth because all *rules* are imprecise. One cannot have the savings of decision by rule without accepting the costs of mistakes." Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14-15 (1984) (footnotes omitted).

[169]468 U.S. at 100.

[170]*Id.* at n.21. Compare Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), in which the Court affirmed two lower-court decisions holding the defendant liable for violation of the per se rule against resale price maintenance, expressly declining the invitation of the Solicitor General and others (*see id.* at 1469 n.7) to reject the rule as unsound.

would always or almost always tend to restrict competition and decrease output . . . .''[171] Per se condemnation of a practice that may promote competition is appropriate, the Court has recently observed, "where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar" involves a reasonable restraint.[172]

On these tests, conventional price-fixing fares badly.[173] Perhaps if the rule of reason were the controlling rule, some firms with little or no collective market power would fix prices solely to reduce uncertainty and lower costs.[174] To distinguish these agreements from agreements of the pernicious kind, the courts would have to define markets and attempt to measure collective market power in every conventional price-fixing case.[175] It seems highly unlikely that the economies from such agreements would be worth pursuing at that price.[176] In cases involving firms with

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[171]441 U.S. at 19-20 (footnote omitted).

[172]Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16 n.25 (1984).

[173]For more thorough statements of the arguments summarized here, see R. Bork, *supra* note 22, at 263-69; F. Scherer, Industrial Structure and Economic Performance 438-40 (1970); L. Sullivan, *supra* note 134, § 67; Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U.L. Rev. 389, 396-400 (1980); Comment, *supra* note 7, at 864-68.

[174]*See* P. Areeda, Antitrust Analysis—Problems, Text, Cases ¶ 307 (3d ed. 1981); Dewey, *Information, Entry and Welfare: The Case for Collusion*, 69 Am. Econ. Rev. 587 (1979); Easterbrook, *supra* note 22, at 901 n.45.

[175]As Professor Sullivan has noted:

> [B]y putting aside [in *Socony*] the question whether defendants possessed or had acquired through the concerted agreements sufficient market power to impose prices higher than competition would yield, the Court vastly simplified cartel litigation. If power had to be proved, virtually all of the structural and behavioral evidence which is canvassed in a monopoly case could be brought to bear . . . . A court would in the end be forced to delve nearly as fully into the power issue as in a monopoly case.

L. Sullivan, *supra* note 134, § 67, at 186.

[176]*See* Easterbrook, *supra* note 22, at 901; *see also* W. Liebeler, *supra* note 90, at 29-31.

It has been argued that agreements fixing *maximum* prices are distinguishable in this regard from other forms of price fixing, and should be judged under the rule of reason. *See, e.g.*, Easterbrook, *supra* note 22. In *Maricopa*, the Court declined to recognize any distinction:

> Our decisions . . . place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. The *per se* rule "is grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." . . . Such a restraint . . . may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

457 U.S. at 348 (footnote omitted). *See generally* L. Sullivan, *supra* note 134, § 78.

substantial power, harm to consumers in the form of higher prices and reduced output would be virtually guaranteed. Benefits typically would be conjectural and difficult to quantify.[177] Defendants in such circumstances would find it hard to satisfy a conscientious court that the economic interests of consumers in competition would not be better served by some lesser restraint or by no restraint at all. In many instances, the suspicion that the firms had entered into the agreement primarily "to make all the money possible"[178] at the consumers' expense, with procompetitive purposes secondary at best, would be impossible to dispel.

Where the parties did succeed in dispelling that suspicion, and established that their fixed prices were reasonable in light of the justification advanced for the price-fixing, there would be a further consideration. As the Court noted long ago, "[t]he power to fix prices, whether reasonably exercised or not, involves [the] power . . . to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."[179] To sustain the agreement, the court would have to find that the potential benefits from the restraint were large enough to justify assuming a burden of continuing supervision.

The prospect of a regime of price-fixing agreements throughout the economy, administered by courts with the aid of enforcement authorities on a cumbersome variation of the public-utility model, is not attractive. It is small wonder then that ever since the rate-bureau cases of the 1890's, the Court has consistently held in straight price-fixing cases that this is not what the Congress that passed the Sherman Act had in mind.[180]

Reinforcing these arguments for an unequivocal prohibition against straight price-fixing is the deterrent value of a clear, simple rule backed by the credible threat of severe sanctions. Although this aspect is often overlooked in the cases, its importance becomes obvious once the manner of the rule's use is analyzed.

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[177]A classic illustration is the defendants' argument in the rate-bureau cases that their agreement was necessary to prevent "ruinous" or "destructive" competition, which if left unchecked would extinguish otherwise viable railroads one by one, to the detriment of all but the survivor(s). *See* United States v. Joint-Traffic Ass'n, 171 U.S. 505, 576 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 329-30, 338 (1897).

[178]*See* United States v. American Column & Lumber Co., 257 U.S. 377, 399 (1921).

[179]United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[180]*See* cases cited *supra* notes 2 & 7. *Chicago Board of Trade* and *Appalachian Coals*, *see supra* note 13, are not to the contrary; neither dealt with conventional price-fixing. *Chicago Board of Trade* involved a commodity exchange rule regulating the price of grain in isolated sales occurring after trading hours; there was no agreement among competing sellers on the price of what they sold. 246 U.S. at 237. In *Appalachian Coals*, the competing coal producers' agreement on the price of sale accompanied an agreement to collaborate on matters other than price—i.e., the formation of a joint selling agency. 288 U.S. at 357-58.

As a deterrent to unreasonably anticompetitive activity, the rule of reason has serious inadequacies. The risk of criminal sanctions for its violation is virtually nil. Though the constitutionality of criminal proceedings under the rule has been upheld, the leading case[181] on the issue is old, and doubts have been expressed that the issue would be resolved the same way today.[182] As a practical matter, the question is all but moot, since the government, in the exercise of its discretion, rarely prosecutes rule-of-reason violations as crimes. On the civil side, the risk of treble damages is attenuated by several factors. Rule-of-reason litigation tends to be complex and expensive. Despite the fact that the rule has been in existence since 1911, in most contexts what the plaintiff must prove in order to prevail is still far from clear. Courts frequently hold that market definition—a miserable process which is often both costly and inconclusive—is an essential aspect of proof.[183] The prevailing impression at the bar is that plaintiffs lose most rule-of-reason cases[184]—if not at trial, then on appeal, in part because the long and involved proceedings at trial provide so much opportunity for error. These factors combine to discourage private litigation under the rule of reason and to encourage settlement on modest terms of suits that are actually brought.

From the standpoint of deterrence, the general rule of per se illegality for agreements among competitors to fix prices is everything that the rule of reason is not. The threat of criminal sanctions for its violation

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[181]Nash v. United States, 229 U.S. 373 (1913) (Sherman Antitrust Act not unconstitutional on grounds of vagueness as to prohibited activities).

[182]*See, e.g.*, Mercurio, *Antitrust Crimes: Time for Legislative Definition*, 51 Notre Dame L. Rev. 437, 443 (1976). Others have suggested that *Nash* was not a strong test of the constitutionality of the rule of reason as a rule of criminal liability because the case involved horizontal price-fixing, which by then was a well-established § 1 violation. *See* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405, 409 n.23 (1978); Note, *Is the Sherman Act Unconstitutionally Vague as a Criminal Statute? A Re-evaluation after* Gypsum, 13 Suffolk U.L. Rev. 1284, 1289 (1979).

[183]*See, e.g.*, Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1018 (5th Cir. 1984); L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 422-23 (11th Cir. 1984); Fine v. Berry & Enright Prods., 731 F.2d 1394, 1399 (9th Cir. 1984), *cert. denied*, 468 U.S. 881 (1985); Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69-70 (2d Cir. 1984); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822, 831 (N.D. Cal. 1984). In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984), the Supreme Court implied that an inquiry into market power is essential in every rule-of-reason case. More recently, however, in FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009, 2018-19 (1986), the Court appeared to hold that detailed market definition in rule-of-reason cases is not invariably required.

[184]A prominent antitrust attorney has characterized the rule of reason as "a euphemism for an endless economic inquiry resulting in a defense verdict." Blecher, Schwinn—*An Example of a Genuine Commitment to Antitrust Law*, 44 Antitrust L.J. 550, 553 (1975).

is real, and the potential criminal sanctions are severe.[185] The rule can scarcely be said to be unconstitutionally vague.[186] Its simplicity shortens trial in cases actually brought, thus enabling the government to prosecute more cases. It also increases the predictability of the result in any given case. In cases that do not terminate in pleas of guilty, convictions after trial are relatively frequent. Where the elements of a criminal violation are proven,[187] neither the trier of fact nor the judge imposing sentence need be concerned very often that the defendant honestly did not know of the rule or misunderstood it. The per se rule's deterrent effect is also enhanced by an increased risk of treble damages, particularly in suits filed in the wake of criminal prosecutions by private plaintiffs hoping to capitalize on the government's success.[188]

"[W]ithout doubt," Judge Bork has written, "thousands of cartels have been made less effective and other thousands have never been broached because of the overhanging threat" of the per se rules that forbid competitors to fix prices or divide markets.[189] Nothing in the Court's recent decisions implies any tolerance for conventional price-fixing. The agreements on price in these cases have not been conventional; rather, they have been accompanied by potentially procompetitive collaboration in production or distribution or both.

2. *Price-Fixing Accompanied by Potentially Procompetitive Collaboration.*—As Justice White noted in *Broadcast Music*, "Mergers . . .

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[185]Section 1 of the Sherman Act was amended in 1974 by the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708. As amended, it provides that every violator "shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1 (1982).

[186]Defendants in criminal cases have argued unsuccessfully that the rule is objectionable for the opposite reason, i.e., that it deprives them of a jury trial on the issue of "reasonableness." *See, e.g.*, United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus., 462 F.2d 49 (9th Cir. 1972).

[187]To establish a criminal violation of the Sherman Act, it must be shown that the defendant acted either with the purpose of causing anticompetitive effects or with knowledge that anticompetitive effects would probably result. United States v. United States Gypsum Co., 438 U.S. 422, 443-46 (1978). In cases involving horizontal agreements on price, courts have held that the requisite intent may be inferred from the fact of entry into the agreement. *See, e.g.*, United States v. Foley, 598 F.2d 1323, 1331 (4th Cir.), *cert. denied*, 444 U.S. 1043 (1979); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979). *See generally* Conway, *The Per Se Rule and* Gypsum: *Presuming the Element of Intent*, 10 Mem. St. U.L. Rev. 485, 492-97 (1980), and cases cited; Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 Cath. U.L. Rev. 389, 396-400 (1980).

[188]*See* R. Posner & F. Easterbrook, *supra* note 140, at 151-52.

[189]R. Bork, *supra* note 22, at 263.

eliminate . . . price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard."[190] It is generally understood that restraints on competition that are "ancillary" to the formation of partnerships among competitors are defensible under the rule of reason.[191]

The critical difference, from the antitrust standpoint, between straight price-fixing on the one hand and horizontal mergers and partnerships on the other is that the latter are far more likely to be entered into for procompetitive or competitively neutral purposes by firms with little or no market power. Applying a per se rule to such arrangements would condemn not only monopolistic mergers, which the Congress that passed the Sherman Act clearly intended to forbid,[192] but also a great many "combinations in aid of production where there is free and fair competition,"[193] which it clearly wished not to impede.[194]

Like horizontal mergers and partnerships, some forms of horizontal price-fixing involve potentially procompetitive collaboration on matters other than price, such as production or distribution. *Broadcast Music*, *Maricopa*, and *NCAA* all dealt with this type of price-fixing, involving agreements quite different from simple cartels. Arguably, at least, a refusal to recognize any distinctions here among horizontal price-fixing agreements would constitute exactly the kind of "formalistic line drawing" that the Court foreswore in *Sylvania*.[195]

After *Broadcast Music* and *NCAA*, the question is not whether exceptions to the general prohibition against agreements among competitors on price will be recognized, but rather when. Potentially procompetitive collaboration among competitors is to be encouraged, within limits, even if it involves agreement on prices. The task is to define those limits, in terms sufficiently clear that exceptions to the general prohibition do not swallow the rule or significantly impair its effectiveness as a deterrent to "plainly anticompetitive" price-fixing.

It has been suggested, in the wake of *Sylvania* and *Broadcast Music*, that no practice should be held unlawful per se if it has the potential to create significant efficiencies.[196] Recast in terms of *procompetitive* efficiencies, that suggestion would reflect fairly closely the spirit of Justice

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[190]441 U.S. at 23.

[191]*See* R. BORK, *supra* note 22, at 264-67; *cf.* Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music?, 66 VA. L. REV. 879, 881-82, 902-05 (1980).

[192]*See supra* note 161.

[193]21 CONG. REC. 2457 (1890) (remarks of Senator Sherman).

[194]*See supra* text accompanying note 160.

[195]433 U.S. at 58-59; *see Maricopa*, 457 U.S. at 362 (Powell, J., dissenting).

[196]Easterbrook, *supra* note 22, at 901; *see also* W. LIEBELER, *supra* note 90, at 32.

Powell's dissent in *Maricopa*.[197] The difficulty with the suggestion, as applied to horizontal agreements fixing prices, lies in the vagueness of the term "significant." It seems clear that in almost any case in which the exception was claimed, the outcome would depend greatly on the court's ad hoc evaluation of expert testimony about "significance." The weight to be assigned to conflicting opinions on the nature and extent of any efficiencies attributable to the arrangement, as well as opinions on the ultimate issue, would have to be assessed. The result would be a thoroughly ambiguous exception to a rule that presently serves the purposes of the law in large part because of the credible threat of criminal sanctions for its violation. Whether such a rule would pass constitutional muster as a rule of criminal liability is open to question. Whatever the answer, the consensus at least in the past has been that in any case involving legitimate uncertainty as to whether specific conduct is forbidden by the Sherman Act, criminal prosecution is inappropriate.[198] The effect of recognizing an exception to the general prohibition for agreements with "significant" procompetitive efficiencies would be to enlarge the realm of legitimate uncertainty to the point that the rule's utility as a rule of criminal law and a deterrent to unreasonably anticompetitive activity would be seriously undermined.

When the problem is viewed in that light, a much simpler solution suggests itself: straight price-fixing should be unlawful per se; price-fixing accompanied by collaboration on matters other than price should not. Such a rule would be clear in most of its applications and would encourage procompetitive collaboration. Unfortunately, however, it would be far too permissive. It would exempt from per se condemnation agreements that are indistinguishable on the merits from straight price-fixing—agreements in which the price-fixing and the collaboration are wholly independent of one another in practical terms.[199] It would also make the per se rule ridiculously easy to evade.[200] Nothing in the Court's decisions suggests any disposition to relax the rule this far.

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[197]*See supra* text accompanying notes 99-102 and 107-09.

[198]*See, e.g.*, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact — An Assessment 110 (1967); Report of the Attorney General's National Committee to Study the Antitrust Laws 349-51 (1955) [hereinafter Attorney General's Committee Report]; Baker, *supra* note 182, at 412-14.

[199]Consider, for example, an agreement among local dry-cleaning firms to buy chemicals jointly in order to avail themselves of manufacturers' bulk discounts, accompanied by an agreement to fix the price of dry-cleaning services. The joint purchasing agreement might be procompetitive in that it might reduce the firms' costs and enable them to reduce prices. The price-fixing agreement would add nothing. No purpose would be served by exempting the price-fixing agreement in such a case from the operation of the per se rule.

[200]All that would be necessary would be to attach some wholly collateral potentially procompetitive agreement to the agreement on price. *See, e.g.*, the joint undertaking described *supra* note 199.

To qualify for an exception, therefore, the agreement fixing prices must do more than "accompany" procompetitive collaboration; it must promote or facilitate it in some way. The price-fixing agreement must somehow contribute to the success of the collaboration.

The recent decisions are in full accord with that proposition. Each involved an agreement on price that performed an essential function in a larger potentially procompetitive scheme. In *Broadcast Music*, the competing copyright owners' agreement on price "accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use;"[201] it enabled the copyright owners to offer an attractive product, a blanket copyright license, in competition with individual licenses.[202] The agreement on price was a "necessary consequence" of the procompetitive collaboration; without it, blanket licenses could not be sold.[203] In *NCAA*, as the Court noted, the defendant's rules and regulations "play[ed] a vital role in enabling college football to preserve its character, and as a result enable[d] a product to be marketed which might otherwise be unavailable."[204] The sale of college football television rights in exclusive package form allowed the NCAA members to extract commitments from the networks that resulted in a wider distribution of revenues among NCAA member schools, and potentially in a more competitive product in the market for televised entertainment.[205] Once again, if package licenses were to be sold, there had to be an agreement among competitors on the price. *Maricopa* involved cooperation by competing physicians in the provision of an attractive form of health insurance that apparently could not be provided without a procedure for setting maximum fees. The physicians' practice of developing maximum fee schedules collectively and then submitting them to insurers performed that essential function.[206]

An exception to the general prohibition against horizontal price-fixing for agreements on price that perform an essential function in a larger procompetitive undertaking promotes the interest of consumers in competition without seriously threatening the enforceability of the general prohibition as a rule of criminal law and a deterrent to price-fixing in its most pernicious forms. It is consistent with the law's tolerance in general for horizontal mergers and partnerships and with the long-standing doctrine that restraints ancillary to an agreement with a lawful main purpose are to be judged under the rule of reason, not a per se rule.[207]

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[201]441 U.S. at 20.

[202]*Id.* at 21-23; *see supra* text accompanying notes 78-80.

[203]441 U.S. at 21.

[204]468 U.S. at 102.

[205]*See id.* at 94, 117, and *supra* text accompanying notes 116-17.

[206]457 U.S. at 339-41, 352; *see supra* text accompanying notes 85-86, 90.

[207]*See Professional Engineers*, 435 U.S. at 688-89; United States v. Addyston Pipe

The exception as formulated leaves two important questions to be resolved. The first concerns the use of price-fixing by competitors for the purpose of raising prices, in order to finance potentially procompetitive collaboration. The second concerns the ultimate disposition in *Maricopa.*

If price-fixing that performs an essential function in a larger procompetitive scheme is ordinarily spared from per se condemnation, what about price-fixing that enables competitors to finance joint procompetitive activity which they otherwise would not undertake? The Court's decisions do not directly address this question. Recognition of a defense on this ground would probably stimulate some joint procompetitive activity. It would almost certainly be unwise, however, for two reasons. First, recognition of such a defense would encourage agreements on price by firms with collective market power. (Firms raising the defense would be conceding, in effect, that collectively they have the power to raise prices profitably by fixing them.) This type of price-fixing, defended on this ground, would confront the courts with all of the intractable problems involved in straight price-fixing—the power to charge unreasonable as well as reasonable prices, the burden of continuing supervision, etc.[208] Second, recognition of the defense, like recognition of a general defense for agreements with "significant" procompetitive potential, would seriously cloud the question of per se illegality in a great many cases. An agreement among pipe manufacturers to rig bids on municipal contracts for cast-iron pipe would be transformed from "clearly unlawful"[209] to "potentially defensible" by the addition of an agreement to conduct joint research into new product development. Uniform price-fixing by the makers of eighty-two percent of the vitreous pottery bathroom fixtures sold in the United States, plainly unlawful when standing alone,[210] would shift into the twilight zone if the firms simultaneously agreed to mount a joint national campaign to inform consumers of the advantages of vitreous pottery in the home. Whether the agreement on price really was essential to the collaboration would be an issue in every case. The result would be the creation of a large gray area, which firms with collective market power would have every incentive to exploit.

All things considered, price-fixing that accompanies potentially procompetitive collaboration should be exempt from per se condemnation only when it performs some essential function in that collaboration *other than* raising prices. That would be entirely consistent with the recent

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and Steel Co., 85 F. 271, 282-83 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899); Louis, *supra* note 191.

[208] *See supra* text accompanying notes 177-79.

[209] *See* Addyston Pipe & Steel Co., 85 F. at 282-83.

[210] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

decisions. The parties to the price-fixing in these cases defended the practice as an incident of the *type* of collaboration in which they were engaged; they did not defend it, nor did the Court condone it, on the ground that it enabled them to charge more for the product and benefit the public thereby.[211]

There, perhaps, the analysis would end, but for *Maricopa*. In *Maricopa*, the physicians' agreements on maximum prices served the useful function of capping fees in a cooperative insurance scheme, which had to be done, apparently, to make the scheme work. What, then, distinguished that case from *Broadcast Music* and *NCAA* so as to justify the entry of summary judgment for the plaintiff on the issue of per se illegality?

It has been suggested that the answer is that *Broadcast Music* and *Maricopa* are not genuinely distinguishable and that *Maricopa* was wrongly decided.[212] A contrary view, which has much to recommend it, is that *Maricopa* represents a sound ad hoc application of the general criteria for per se illegality stated by the Court in *Sylvania* and restated in one form or another in virtually every subsequent per se decision:

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time or expense necessary to identify them.[213]

Because the agreement on price in *Maricopa* facilitated procompetitive collaboration among the doctors and insurers in the way it did, it could not appropriately be condemned per se without further inquiry. On

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[211]In *Broadcast Music*, the parties to the price-fixing apparently had substantial collective market power. *See* 441 U.S. at 5; *see supra* text accompanying note 62; Cirace, CBS v. ASCAP: *An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277, 281 (1978). In *NCAA*, they clearly did. 468 U.S. at 111-12. In *NCAA*, the only case in which the Court reached the merits under the rule of reason, the Court held that the fact that the defendants controlled the sale of a product with no close substitutes weighed against a finding in their favor. *Id.* at 115. At no point in these opinions did the Court intimate that the exercise of market power through price-fixing could be defended on the ground that the parties had put their monopoly profits to beneficial use.

[212]*See, e.g.*, W. LIEBELER, *supra* note 90, at 31-32.

[213]*Sylvania*, 433 U.S. at 50 n.16; *see* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-90 (1985); *NCAA*, 468 U.S. at 103-04; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16 & n.25 (1984); *Maricopa*, 457 U.S. at 343-45 & n.16; Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 648-49 (1980); *Broadcast Music*, 441 U.S. at 19-20; *Professional Engineers*, 435 U.S. at 692.

further inquiry, the probability that anticompetitive consequences would result from the practice was high.[214] Its function could be performed another way at significantly less competitive risk: The maximum fee schedules could be developed in the first instance by the insurers, who would have derived no benefit from setting fees above the then prevailing levels. The alternative procedure would have its costs; it would be less efficient. The question, then, came down to whether there was "reason to believe," on the record before the Court, "that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans" or otherwise to justify the competitive risks inherent in the practice.[215] The Court concluded that there was none. That conclusion, it appears, was well founded. The only economies possible from the arrangement were those that might result from having the doctors canvassed concerning fees by their own foundations rather than by the insurers. Had the Court decided the per se issue the other way, the plaintiff in *Maricopa* (and subsequent plaintiffs in similar cases) would have faced lengthy and difficult burdens of proof on the issues of power and effect, simply to preserve very small gains from a practice with very large anticompetitive potential.

Given the nature of the inquiry under the *Sylvania* test and the uncertainty of the outcome, even where the result is per se condemnation, considerations of fairness militate against the imposition of criminal sanctions. In general, then, horizontal agreements on price that accompany potentially procompetitive collaboration and perform some essential function other than raising prices are inappropriate for felony prosecution and punishment. There are, arguably, two exceptions: agreements entered into for the primary purpose of raising prices above competitive levels, where the agreement to collaborate on something potentially procompetitive is a pretext;[216] and practices that have previously been authoritatively held (as the maximum fee arrangements in *Maricopa* have now been held) to be unlawful per se.[217]

IV. Conclusion

For many years it has served the law's purpose to state flatly that "price-fixing" is unlawful wherever found, without precisely defining

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[214] *See supra* text accompanying notes 103-05.

[215] 457 U.S. at 352-54; *see supra* note 98.

[216] *See* Attorney General's Committee Report, *supra* note 198, at 350-51 (criminal prosecution appropriate where there is proof of a "specific intent to restrain trade"); *cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940) (defendants sought "[t]he elimination of so-called competitive evils . . . primarily for its effect on the price structures;" criminal convictions for "price-fixing" affirmed).

[217] *See, e.g.*, President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Crime and Its Impact — An Assessment 110 (1967)

the term. Under this rubric, a great many horizontal agreements on price have been condemned without regard to purpose, power, or effect. Agreements among competitors fixing the prices of their products would appear to be "price-fixing," if anything is. Nevertheless—because old cases sustaining such agreements have never been squarely overruled, because lower courts have occasionally recognized exceptions without being chastised, because even statutes allow for interpretation contrary to their "plain meaning" where a literal interpretation would produce an anomalous result, because antitrust law lends itself so poorly to absolutes—there has always been some reluctance to declare that the fixing of prices by competitors in combination offends section 1 of the Sherman Act no matter what form it takes. Now it is clear that it does not.

The decisions in *Broadcast Music*, *Maricopa*, and *NCAA* all proceed from the same basic premise: when competitors combine to fix the price of what they sell, the law's first concern is to protect the economic interests of consumers in competition. Ordinarily the competitive risks of such combinations sufficiently outweigh the competitive benefits to justify a flat prohibition, backed by severe sanctions. The exceptional cases—the cases in which the Court has recognized exceptions—are those in which the competitors' agreement on price accompanies potentially procompetitive collaboration on matters other than price and performs an essential function in that collaboration other than raising prices. Ordinarily, the cases suggest, where those conditions are met, as they were in *Broadcast Music* and *NCAA*, the applicable standard under section 1 is the rule of reason. Such practices are unlawful per se only if, as in *Maricopa*, further inquiry discloses that the competitive benefits are so slight in relation to the competitive risks that recognition of an exception to the general rule of per se illegality for horizontal price-fixing agreements would do more harm than good.

These principles have potentially wider application. The per se rule against "price-fixing" has been applied to a variety of horizontal restraints on price competition other than agreements among competitors on price.[218] *Catalano*[219] is the Court's most recent decision in this line. Like most of the agreements in these cases, the arrangement struck down in *Catalano*—a compact among wholesalers to discontinue the extension of trade credit to retailers—involved no agreement to engage in procompetitive collaboration on matters other than price. Arguably, at least,

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(criminal prosecution appropriate in antitrust cases where "it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct . . . .").

[218] *See supra* note 4.

[219] 446 U.S. 643 (1980); *see supra* text accompanying notes 81-83.

when a horizontal price restraint of any type performs an essential function (other than raising prices) in a larger procompetitive scheme, on the principles of *Broadcast Music*, *Maricopa*, and *NCAA*, it ought not be held unlawful per se without further inquiry into the availability of less restrictive alternatives and a comparison of the risks and benefits.

Horizontal restraints on price and output, the Court affirmed in *NCAA*, are "the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[220] So long as protection of the economic interests of consumers in competition remains the primary objective, a per se prohibition against agreements among competitors on the price of what they sell is sound as a general rule. The problem is to frame the exceptions so as to encourage procompetitive collaboration among competitors, without imposing an untenable burden of supervision upon the courts or blunting the force of the per se rule as a deterrent to pernicious price-fixing agreements. Though the Court's decisions and opinions in *Broadcast Music*, *Maricopa*, and *NCAA* do not supply a complete solution, they do point the way.

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[220]468 U.S. at 107-08.