[Antitrust in the 21st Century]

Casebook

Module 3 – Agreements in restraint of trade

Sherman Act § 1, 15 U.S.C. § 1

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal…"

The Sherman Act § 1 thus involves three basic elements:

1. An agreement
2. Between separate firms or economic entities
3. Which is in restraint of trade

Pleading an Agreement

Conspirators often try to reach anticompetitive agreements without formalities, and without leaving behind much evidence. The courts, however, construe agreements pragmatically. Ignoring formalities, they look at whether firms had a mutual understanding around a course of conduct that violates § 1 and whether they took some action to further that understanding (see, for example, *Interstate Circuit*).

Nonetheless, parallel conduct on its own is insufficient to establish that firms "conspired." Parallel conduct can arise from rational business responses to market developments without any collusion. Thus, there must be some additional evidence that firms communicated with each other (*Theatre Enterprises*).

It's one thing for courts to work out what evidence you need to prove an antitrust violation. It's another thing to *find* that evidence. Even if there are plainly incriminating text messages between corporate executives, learning about those messages can be hard. It might not be a problem for Department of Justice lawyers armed with subpoenas. But U.S. antitrust enforcement relies substantially on private litigants. While private litigants can also demand discovery, they first need to plausibly allege a conspiracy based on information in the public domain. For their complaint to be plausible, it must plead facts which suggest that the defendants are conspiring, and not just engaging in parallel conduct. As you will see from *Twombly*, this can be a substantial barrier to private enforcement. And surviving a motion to dismiss under *Twombly* requires facts that might be obtainable only through discovery, but discovery is mostly not available until after the motion to dismiss is passed.

Required reading

Interstate Circuit v. United States, 306 U.S. 208 (1939)

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954)

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

Recommended reading

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978)

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)

Polygram Holding, Inc. v. Federal Trade Commission, 416 F.3d 29 (D.C. Cir. 2005)

Between Separate Economic Entities

To form an agreement under § 1 of the Sherman Act, at least two separate economic entities must collude. For example, a company cannot collude with its subsidiary (*Copperweld*). Usually it is clear whether an agreement is between more than one economic entity. But the issue can become tricky in cases involving partial control and joint ventures. For example, is the National Football League one economic entity or a venture between 32 separate teams? In *American Needle v. NFL*, you will find out.

What counts as a single firm has serious implications for the substance of antitrust enforcement. Antitrust law is more skeptical of agreements between competitors than it is of unilateral conduct and mergers. In reading these cases, consider whether modern doctrine's relative leniency toward the latter incentivizes economic concentration. And compare the cases to earlier ones (like *Standard Oil*, which you will read next) in which the court may have cared less about the formalities of corporate organization. Finally, think back to these cases later in the semester when we discuss the emerging research on common ownership. Does this research suggest that the rigid doctrinal separation between unliteral and joint conduct is outdated?

Required Reading

Copperweld Corp v. Independence Tube Corp., 467 US 752 (1984)

American Needle v. National Football League, 560 U.S. 183 (2010)

Which is in Restraint of Trade

Development of Per Se, Rule of Reason, and Ancillary Restraints doctrines

In the Sherman Act's early years, courts struggled with how to apply § 1. After all, many perfectly legitimate business arrangements might restrict competition or trade in some way. For example, consider the NFL, which as you just learned, counts as 32 separate economic units. NFL teams need to set a schedule, which means agreeing to play only specific teams on specific dates. This is necessary for the functioning of the league. But it is also literally a "restraint of trade."

The challenge of separating good restraints from the bad led to significant doctrinal innovation. Courts put agreements into various categories that get different levels of scrutiny. Agreements between unrelated horizontal competitors to set prices, share markets, or clearly undermine market competition are treated as violations of § 1 of the Sherman Act regardless of their effects. They are called "per se" illegal (see *Socony-Vacuum*).

But not all agreements are per se illegal. For other agreements that are not as obviously anticompetitive, courts balance their procompetitive and anticompetitive effects under the "Rule of Reason" doctrine. Meanwhile, an intermediate class of agreements gets "quick look" review. These are agreements that are not quite per se illegal, but are so likely to be harmful that a court can condemn them after only a cursory analysis. Finally, other constraints are considered "ancillary" to ordinary commercial agreements and are therefore legal.

These various tests are not hermetically sealed categories, but points on a continuum of scrutiny (*Polygram*). Nonetheless, presumptions and rhetorical standards matter in litigation, and these hotly debated, occasionally shifting categories can greatly alter the strictness of antitrust enforcement. When a court wants to be safe, it often declares an agreement to be per se illegal but then explains why the agreement fails the rule of reason standard anyway.

When reading these cases, consider not only the definitions of these categories, but also the type of evidence that courts use to decide whether agreements are anticompetitive. Over time, have courts adopt a narrower and "more economic" understanding of competition? Should they instead be more concerned with non-economic considerations? (See *Appalachian Coals* and Justice Blackmun's dissent in *National Society of Professional Engineers*.)

Required reading

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

Chicago Board of Trade v. United States, 246 U.S. 231 (1918)

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

National Society of Professional Engineers v. United States 435 U.S. 679 (1978)

California Dental Assn. v. FTC, 526 U.S. 756 (1999)

Polygram Holding, Inc. v. Federal Trade Commission, 416 F.3d 29 (D.C. Cir. 2005)

Recommended reading

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

United States v. American Tobacco Co., 221 U.S. 106 (1911)

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)

Forms of Agreement which violate § 1 of the Sherman Act

Price fixing, bid rigging, dividing markets geographically, and group boycotts are treated as per se cartels. Other agreements which violate § 1 of the Sherman Act under the rule of reason can come in many different forms. Courts tend to structure a rule of reason analysis using four questions: 1) What is the market? 2) Do the defendants have market power? 3) Does the agreement harm competition? 4) Are there efficiencies which justify the agreement?

Recommended reading

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

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)

Palmer et al. v. BRG of Georgia, Inc., et al., 498 U.S. 46 (1990)

United States v. Joyce, 895 F.3d 673, 679 (9th Cir. 2018)

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Case extracts consist of quotes from the court report unless otherwise indicated by italicized text in square brackets. Internal footnotes are removed and page references are indicated in brackets.

Interstate Circuit v. United States, 306 U.S. 208 (1939)

[The appellants were eight separate film distribution companies and two Texas-based cinema chains ("Interstate" and "Consolidated," which were affiliated with each other and under joint leadership). Interstate sought to control the rates and terms on which the distributors sold the rights to show their films to other cinema chains in the regions where Interstate and Consolidated operated.]

On July 11, 1934, following a previous communication on the subject to the eight branch managers of the distributor appellants, O'Donnell, the manager of Interstate and Consolidated, sent to each of them a letter on the letterhead of Interstate, each letter naming all of them as addressees, in which he asked compliance with two demands as a condition of Interstate's continued exhibition of the distributors' films in its 'A' or first-run theatres at a night admission of 40 cents or more. One demand was that the distributors "agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25 cents for adults in the evening." The other was that "on 'A' pictures which are exhibited at a night admission of 40 cents or more -- they shall never be exhibited in conjunction with another feature picture under the so-called policy of double features." The letter added that with respect to the "Rio Grande Valley situation," with which Consolidated alone was concerned, "We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35 cents must also be restricted to subsequent runs in the Valley at 25 cents."

The admission price customarily charged for preferred seats at night in independently operated subsequent-run theatres in Texas at the time of these letters was less than 25 cents. In seventeen of the eighteen independent theatres of this kind whose operations were described by witnesses the admission price was less than 25 cents. In one only was it 25 cents. In most of them the admission was 15 cents or less. It was also the general practice in those theatres to provide double bills either on certain days of the week or with any feature picture which was weak in drawing power. The distributor appellants had generally provided in their license contracts for a minimum admission price of 10 or 15 cents, and three of them had included provisions restricting double-billing. But none was at any time previously subject to contractual compulsion to continue the restrictions. The trial court found that the proposed restrictions constituted an important departure from prior practice.

The local representatives of the distributors, having no authority to enter into the proposed agreements, communicated the proposal to their home offices. Conferences followed between Hoblitzelle and O'Donnell, acting for Interstate and Consolidated, and the representatives of the various distributors. In these conferences each distributor was represented by its local branch manager and by one or more superior officials from outside the state of Texas. In the course of them each distributor agreed with Interstate for the 1934-35 season to impose both the demanded restrictions upon their subsequent-run licensees in the six Texas cities served by Interstate, except Austin and Galveston. While only two of the distributors incorporated the agreement to impose the restrictions in their license contracts with Interstate, the evidence establishes, and it is not denied, that all joined in the agreement, four of them after some delay in negotiating terms other than the restrictions and not now material. These agreements for the restrictions -- with the immaterial exceptions noted -- were carried into effect by each of the distributors' imposing them on their subsequent-run licensees in the four Texas cities during the 1934-35 season. One agreement, that of Metro-Goldwyn-Mayer Distributing Corporation, was for three years. The others were renewed in the two following seasons and all were in force when the present suit was begun. (at 215-219)

…

The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged by appellants because not supported by subsidiary findings or by the evidence. We think this inference of the trial court was rightly drawn from the evidence. In the view we take of the legal effect of the cooperative action of the distributor appellants in carrying into effect the restrictions imposed upon subsequent-run theatres in the four Texas cities and of the legal effect of the separate agreements for the imposition of those restrictions entered into between Interstate and each of the distributors, it is unnecessary to discuss in great detail the evidence concerning this aspect of the case.

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

There was risk, too, that without agreement diversity of action would follow. Compliance with the proposals involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. While as a result of independent negotiations either of the two restrictions without the other could have been put into effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate, the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate.

One distributor, it is true, did not agree to impose the restrictions in Houston, but this was evidently because it did not grant licenses to any subsequent-run exhibitor in that city, where its own affiliate operated a first-run theatre. The proposal was unanimously rejected as to Galveston and Austin, as was the request that the restrictions should be extended to the cities of the Rio Grande Valley served by Consolidated. We may infer that Galveston was omitted because in that city there were no subsequent-run theatres in competition with Interstate. But we are unable to find in the record any persuasive explanation, other than agreed concert of action, of the singular unanimity of action on the part of the distributors by which the proposals were carried into effect as written in four Texas cities but not in a fifth or in the Rio Grande Valley. Numerous variations in the form of the provisions in the distributors' license agreements and the fact that in later years two of them extended the restrictions into all six cities, do not weaken the significance or force of the nature of the response to the proposals made by all the distributor appellants. It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. (at 222-223)

…

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *United States* v. *Schenck*, 253 F. 212, 213, aff'd, 249 U.S. 47;v*Levey* v. *United States*, 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Assn*. v. *United States*, 234 U.S. 600; *Lawlor* v. *Loewe*, 235 U.S. 522, 534; *American Column Co*. v. *United States*, 257 U.S. 377; *United States* v. *American Linseed Oil Co*., 262 U.S. 371. (at 226-227)

Comment

Interstate Circuit established that “hub and spoke” conspiracies count as cartel agreements under §1 of the Sherman Act. All the distributors were parties to a cartel agreement even though the distributors had no direct contact with each other. Note the Court’s emphasis on each distributor’s knowledge that Interstate had approached the other distributors. This is what distinguished this case from mere parallel conduct.

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954)

Petitioner brought this suit for treble damages and an injunction under §§ 4 and 16 of the Clayton Act, alleging that respondent motion picture producers and distributors had violated the antitrust laws by conspiring to restrict "first-run" pictures to downtown Baltimore theatres, thus confining its suburban theatre to subsequent runs and unreasonable "clearances." After hearing the evidence a jury returned a general verdict for respondents. The Court of Appeals for the Fourth Circuit affirmed the judgment based on the verdict. 201 F.2d 306. We granted certiorari. 345 U.S. 963. (at 539)

…

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. *Interstate Circuit, Inc*. v. *United States*, 306 U.S. 208 (1939); *United States* v. *Masonite Corp*., 316 U.S. 265 (1942); *United States* v. *Bausch & Lomb Optical Co*., 321 U.S. 707 (1944); *American Tobacco Co*. v. *United States*, 328 U.S. 781 (1946); *United States* v. *Paramount Pictures, Inc*., 334 U.S. 131 (1948). But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. Realizing this, petitioner attempts to bolster its argument for a directed verdict by urging that the conscious unanimity of action by respondents should be "measured against the background and findings in the *Paramount* case." In other words, since the same respondents had conspired in the *Paramount* case to impose a uniform system of runs and clearances without adequate explanation to sustain them as reasonable restraints of trade, use of the same device in the present case should be legally equated to conspiracy. But the *Paramount* decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved. Alone or in conjunction with the other proof of the petitioner, they would form no basis for a directed verdict. Here each of the respondents had denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house. They also attacked the good faith of the guaranteed offers of the petitioner for first-run pictures and attributed uniform action to individual business judgment motivated by the desire for maximum revenue. This evidence, together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury. (at 540-542)

Comment

Paramount decided that conscious parallelism alone does not amount to a conspiracy under the Sherman Act. An offence requires evidence of conscious parallelism plus some other communication between the parties.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U.S.C. § 271. (at 549)

…

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs, plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, [2]15 U.S.C. § 1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. Complaint P 47, App. 23-26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . ., the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, P 50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, PP 40-41, App. 21-22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, P 42, App. 22. (at 550-551)

…

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." 425 F.3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.* (at 551)

…

While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540-541, 74 S. Ct. 257, 98 L. Ed. 273. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful."…

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market….

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)…. (at 553-555)

In applying these general standards to a § 1 claim, we hold that [6] stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." Cf. *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 56 (CA1 1999) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint"). (at 557)

…

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive….

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises, Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley* v. *Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F.3d at 106, 114 (invoking *Conley*'s "no set of facts" language in describing the standard for dismissal). (at 561)

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement… (at 562)

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. … *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. (at 563)

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 550-551, 167 L. Ed. 2d, at 937-938. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint P 51, App. 27.[10] The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. (at 565)

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.,* P 47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing. (at 566)

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the "'hop[e] that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as

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[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred (*i.e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present," *id.,* P 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post*, at 576, 167 L. Ed. 2d, at 953. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

they are the best situated to do so.'" Complaint P 38, App. 20 (quoting Consumer Federation of America, Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster, p 12 (Feb. 2000)). Contrary to hope, the ILECs declined "'to enter each other's service territories in any significant way,'" Complaint P 38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.,* P 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 477-478, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing. (at 567-568)

Dissent (Justice Stevens)

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion to dismiss a complaint "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); see *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 127, 63 S. Ct. 494, 87 L. Ed. 656 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery--and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement--the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante*, at 566, 167 L. Ed. 2d, at 947; that "there was just no need for joint encouragement to resist the 1996 Act," *ibid.*; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante,* at 568, 167 L. Ed. 2d, at 948.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante*, at 564, 167 L. Ed. 2d, at 946; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency. (at 572-3)

…

I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar--among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante*, at 559, 167 L. Ed. 2d, at 942--should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules--not our interpretation of them. See *Swierkiewicz*, 534 U.S., at 515, 122 S. Ct. 992, 152 L. Ed. 2d 1; *Crawford-El* v. *Britton*, 523 U.S. 574, 595, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); *Leatherman*, 507 U.S., at 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517.

Comment

The requirement to plead facts suggesting an agreement, rather than merely conscious parallelism, has placed significant hurdles on plaintiffs who wish to bring private cartel enforcement suits. The necessary facts are rarely in the public domain prior to litigation discovery. Note the Court's comment in footnote 10 that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." This type of detailed factual evidence of illegal conduct will often be hard to find.

United States v. U.S. Gypsum Co., 438 U.S. 422 (1978)

This case presents the following questions:… (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act *[that prohibits price discrimination]* is exempt from Sherman Act scrutiny…

The gypsum board industry is highly concentrated, with the number of producers ranging from 9 to 15 in the period 1960-1973. The eight largest companies accounted for some 94% of the national sales with the seven "single plant producers" accounting for the remaining 6%. Most of the major producers and a large number of the single-plant producers are members of the Gypsum Association which since 1930 has served as a trade association of gypsum board manufacturers…

[The government] alleged that the conspirators "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations therefrom."…

In *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588 (1925), the Court held exempt from Sherman Act § 1 liability an exchange of price information among competitors because the exchange of information was necessary to protect the cement manufacturers from fraudulent behavior by contractors. … *[This exception is]* not necessarily limited to the special circumstances of that case, although the exact scope of the exception remained largely undefined.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, embodies a general prohibition of price discrimination between buyers when an injury to competition is the consequence. The primary exception to the § 2(a) bar is the meeting-competition defense which is incorporated as a proviso to the burden-of-proof requirements set out in § 2(b):

"*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense… *[N]*othing in the language of § 2(b)… indicates that direct discussions of price between competitors are required. Nor has any court, so far as we are aware, ever imposed such a requirement…

The so-called problem of the untruthful buyer… does not in our view call for a different approach to the § 2(b) defense. The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated… *[T]*his standard can be satisfied by efforts falling short of interseller verification… Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances…

As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.

Both economic theory and common human experience suggest that interseller verification—if undertaken on an isolated and infrequent basis with no provision for reciprocity or cooperation—will not serve its putative function of corroborating the representations of unreliable buyers regarding the existence of competing offers. Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process.

Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. Instead, such a seller would appear to have at least as great an incentive to misrepresent the existence or size of the discount as would the buyer who received it. Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2(b) defense, does not hold out much promise as a means of shoring up buyers' representations.

The other variety of interseller verification is, like the conduct charged in the instant case, undertaken pursuant to an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price information. Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants under § 2(b). For in such circumstances, each seller would know that his price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry… Instead of facilitating use of the § 2(b) defense, such an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense.

Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions…

Comment

The Court addressed how an exchange of information can lead to a finding of an agreement under the Sherman Act. Note that the industry was highly concentrated and involved a standardized product. These factors help facilitate collusion.

Copperweld Corp v Independence Tube Corp., 467 US 752 (1984)

In 1972 petitioner Copperweld Corp. purchased the Regal division from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's non-competition agreement would thwart the new competitor. Although their lawyer advised them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates entering the structural tube market . . . in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company. (at 756-7)

B

In 1976 respondent filed this action in the District Court against petitioners and Yoder. The jury found that Copperweld and Regal had conspired to violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, but that Yoder was not part of the conspiracy….

C

The United States Court of Appeals for the Seventh Circuit affirmed. 691 F.2d 310 (1982). It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated division would escape liability for lack of the requisite two legal persons. However, relying on its decision in *Photovest Corp*. v. *Fotomat Corp*., 606 F.2d 704 (1979), cert. denied, 445 U.S. 917 (1980), the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F.2d, at 318. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses. It also held that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, 462 U.S. 1131 (1983), and we reverse. (at 758-9)

II

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy. The so-called "intra-enterprise conspiracy" doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions.

…

As we shall see, *infra*, at 771-774, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

…

[Discussing relevant authority, the court concluded] In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

III

The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise. (at 767)

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

The Sherman Act contains a "basic distinction between concerted and independent action." *Monsanto Co*. v. *Spray-Rite Service Corp*., 465 U.S. 752, 761 (1984). The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." *Albrecht* v. *Herald Co*., 390 U.S. 145, 149 (1968); accord, *Monsanto Co*. v. *Spray-Rite Corp., supra*, at 761. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally *Northern Pacific R. Co*. v. *United States*, 356 U.S. 1, 5 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. See, *e. g., Continental T. V., Inc*. v. *GTE Sylvania Inc*., 433 U.S. 36 (1977); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918). Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly. (at 768-9)

The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. Although this Court has not previously addressed the question, there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests. (at 770-772)

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine "[imposes] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc*. v. *Winckler & Smith Citrus Products Co*., 370 U.S. 19, 29 (1962).

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in *Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc*., 340 U.S. 211 (1951). Such an incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[realities] must dominate the judgment." *Appalachian Coals, Inc*. v. *United States*, 288 U.S., at 360. (at 773-774)

D

Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See *post*, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such -- but only restraints effected by a contract, combination, or conspiracy -- it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See *supra*, at 767-769. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2. Indeed, this Court has recognized that § 1 is limited to concerted conduct at least since the days of *United States* v. *Colgate & Co*., 250 U.S. 300 (1919). Accord, *post*, at 789.

The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, *supra*. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under § 1. Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

IV

We hold that Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed. (at 775-777)

Dissent (Justice Stevens)

There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an actual or potential competitor of one of them; such a threat might be more potent coming from both corporations than from only one.

…

In sum, the question that the Court should ask is… why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can be easily fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent. (at 794-795)

Comment

The Court's reasoning suggests that entities under common control cannot agree with each other under § 1 of the Sherman Act. On the one hand, it is hard to imagine how the traditional substance of a § 1 claim (e.g. fixing prices or output) is relevant to a conglomerate with a single center of control. Note that the substance of this case (where one company harasses a competitor by threatening its suppliers with a spurious legal action) more closely resembles an economic tort action than a typical antitrust cartel claim. On the other hand, commentators have suggested that antitrust law's comparatively permissive attitude towards unilateral conduct and mergers means that antitrust favors centralized economic decisionmakers over dispersed economic actors, which organize through trade associations and collective bargaining (consider that the artists' associations in *Broadcast Music*, in the recommended readings, had to justify their agreements through efficiencies). This limitation on intra-firm agreements may also present greater difficulties in minority ownership cases and for emerging research on the impacts of common ownership on competition.

American Needle v National Football League, 560 U.S. 183 (2010)

[The National Football League (NFL) formed respondent National Football League Properties (NFLP) to develop, license, and market the intellectual property of its teams. At first, NFLP granted nonexclusive licenses to petitioner and other vendors to manufacture and sell team-labeled apparel. In December 2000, however, the teams authorized NFLP to grant exclusive licenses. NFLP granted an exclusive license to respondent Reebok International Ltd. [***953] to produce and sell trademarked headwear for all 32 teams. A former producer of branded clothing filed this action challenging the grant of an exclusive license]

…

[W]e have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . . , or conspiracy" as defined by § 1 of the Sherman Act, 15 U.S.C. § 1, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of § 1." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

…

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id.*, at 352-353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. The Government alleged that the licensees and Sealy were conspiring in violation of § 1, and we agreed. *Id.*, at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. We explained that "[w]e seek the central substance of the situation" and therefore "we are moved by the identity of the persons who act, rather than the label of their hats." *Id.*, at 353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. We thus held that Sealy was not a "separate entity, but . . . an instrumentality of the individual manufacturers." *Id.*, at 356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. In similar circumstances, we have found other formally distinct business organizations covered by § 1. See, *e.g., Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985); *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) *(NCAA);United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); *Associated Press* v. *United States*, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945); *id.*, [1678] at 26, 65 S. Ct. 1416, 89 L. Ed. 2013 (Frankfurter, J., concurring); *United States* v. *Terminal R. Ass'n*, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912); see also Rock, Corporate Law Through an Antitrust Lens, 92 Colum. L. Rev. 497, 506-510 (1992) (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional organization or trade groups.

Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by § 1, we now embark on a more functional analysis.

…

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking." *Id.*, at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one. (at 191-192)

V

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld*, 467 U.S., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628; see also *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1252 (CA2 1982) (discussing ways that "the financial performance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. See *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 249, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996); *Sullivan* v. *NFL*, 34 F.3d 1091, 1098 (CA1 1994); *Mid-South Grizzlies* v. *NFL*, 720 F.2d 772, 787 (CA3 1983); cf. *NCAA*, 468 U.S., at 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself," *Copperweld*, 467 U.S., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id.*, at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of actual or potential competition. See *NCAA*, 468 U.S., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (observing a possible § 1 violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp P1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled." *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951).

The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum. Bus. L. Rev. 1, 52-61 (1995); Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, 39 Hastings L. J. 63, 69-81 (1987). Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially competing interests.

It may be, as respondents argue, that NFLP "has served as the 'single driver' " of the teams' "promotional vehicle, 'pursu[ing] the common interests of the whole.' " Brief for NFL Respondents 28 (quoting *Copperweld*, 467 U.S., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time marketed their trademarks jointly. But a history of concerted activity does not immunize conduct from § 1 scrutiny. "Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself." *Freeman*, 322 F.3d, at 1149.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown*, 518 U.S., at 248, 116 S. Ct. 2116, 135 l. Ed. 2d 521. But the Court of Appeals' reasoning is unpersuasive.

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. A "contract, combination . . . , or conspiracy," § 1, that is necessary or useful to a joint venture is still a "contract, combination . . . , or conspiracy" if it "deprives the marketplace of independent centers of decisionmaking," *Copperweld*, 467 U.S., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628. See *NCAA,* 468 U.S., at 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 ("[J]oint ventures [1681] have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.

The question whether NFLP decisions can constitute concerted activity covered by § 1 is closer than whether decisions made directly by the 32 teams are covered by § 1. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by § 1, NFLP's actions also are subject to § 1, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Cf. *Sealy*, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action. See, *e.g.*, *Topco Associates, Inc.*, 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515; *Sealy,* 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238.

For that reason, decisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, 1995 Colum. Bus. L. Rev., at 52-61. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido*,* 39 Hastings L. J., at 69-71. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. "Although the business interests of" the teams "will *often* coincide with those of " NFLP "as an entity in itself, that commonality of interest exists in every cartel." *Los Angeles Memorial [1682] Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1389 (CA9 1984) (emphasis added). In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams. *Sealy,* 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238; see also *Topco Associates, Inc.*, 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515.

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel "could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products." *Major League Baseball Properties, Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 335 (CA2 2008) (Sotomayor, J., concurring in judgment). "So long as no agreement," other than one made by the cartelists sitting on the board of the joint venture, "explicitly listed the prices to be charged, the companies could act as monopolies through the 'joint venture.' " *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement). However, competitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or 'joint venture'." *Id.*, at 336. (at 197-202)

VI

Football teams that need to cooperate are not trapped by antitrust law. “[T]he special characteristics of this industry may provide a justification” for many kinds of agreements. *Brown*, 518 U.S., at 252, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (Stevens, J., dissenting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.

When “restraints on competition are essential if the product is to be available at all,” *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason. *NCAA*, 468 U.S., at 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70; see *id.*, at 117 (“Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved”); see also *Dagher*, 547 U.S., at 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) (“Joint ventures and other cooperative arrangements are also not usually unlawful. . . where the agreement . . . is necessary to market the product at all”). And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it “can sometimes be applied in the twinkling of an eye.” *NCAA*, 468 U.S., at 110, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70.

Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, “that the interest in maintaining a competitive balance” among “athletic teams is legitimate and important,” *id.* at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand. (at 202-204)

Comment

The NFL involves complex horizontal and vertical agreements between the competing sports teams and the companies which want to license their IP rights. The Court’s discussion is a good example of nuanced treatment around the intricate relationship between collaboration and competition in a healthy marketplace. Compare the facts of this case to *Broadcast Music*, which took place against the backdrop of a 1950 consent decree between the DOJ and an artists’ cooperative, under which the cooperative agreed to issue only non-exclusive licenses to its members’ music.

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898)

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices...

Now, the restraint thus imposed on themesleves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. (at 292-293)

…

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe[e] of the confidential knowledge acquired in such business.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. …

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. …

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation. (at 280-282)

…

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

…

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder. (at 302)

Comments

Addyson Pipe is the leading authority for the distinction between “naked” restraints of competition and ancillary restraints, which limit competition to facilitate some broader benign agreement.

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)

The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill…

…

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870, a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination and either transferred property to the corporation or to individuals to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question the following results were brought about: a. That the combination, in addition to the refineries in Cleveland which it had acquired as previously stated, and which it had either dismantled to limit production or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners who had become stockholders in the Standard Oil Company of Ohio and thus members of the alleged illegal combination. b. That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey.c. That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement, by which various independent firms, corporations, limited partnerships and individuals engaged in purchasing, transporting, refining, shipping and selling oil and the products thereof among the various States turned over the management of their said business, corporations and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. (at 33-34)

…

The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in 64 of the companies which it controlled to some of the remaining 20 companies, it having controlled before the decree 84 in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the Attorney-General of Ohio instituted contempt proceedings in the quo warranto case based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time also proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows: (at 38-41)

"That during the third period of said conspiracy and in pursuance thereof the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; "so that the business and objects of said company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and to hold, purchase, mortgage, and convey real estate and personal property outside the State of New Jersey.'"

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of $97,250,000. The bill contained allegations referring to the development of new oil fields, for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practises in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practises against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief. (at 41-43)

…

First. The text of the act and its meaning.

…

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States v. Trans-Missouri Freight Association, 166 U.S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, c. 85.)"

Hawkins thus defined them:

"'A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before.' (Hawk. P.C. bk. 1, c. 29.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 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 which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI, ch. 14, as follows:

"Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in East India Company v. Sandys, Skin. 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F.B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing;' and that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84.The sole trade of anything is 'engrossing' ex rei natura, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and whosoever hath the sole trade to any country, hath the sole trade of buying and selling the produce of that country, at his own price, which is an 'engrossing.'"

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C.J., in Mitchel v. Reynolds (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price. 3. That to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in Mogul Steamship Co. v. McGregor (1892), A.C. 25.While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-trust Act, it serves reflexly to show the exact state of the law in England at the time the Antitrust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778-1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices -- in other words, to monopolize -- came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject or many judicial decisions which illustrate it would unnecessarily prolong this opinion. We append in the margin a note to treatises, &c., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.

It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in National

Cotton Oil Co. v. Texas, 197 U.S. 115, and Shawnee Compress Co. v. Anderson, 209 U.S. 423; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an allembracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, . . ." By reference to the terms of § 8 it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions. (at 50-63)

…

Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by the proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons: (at 72-75)

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the prima facie presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, 1, the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; 2, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects. (at 75-77)

…

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. Swift v. United States, 196 U.S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property. (at 77)

…

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership in the New Jersey corporation of the stocks which were ordered to be retransferred. (at 79-80)

Comment

Standard Oil represents a crossroads between earlier common law economic torts and the modern regulation of competition under the Sherman Act. The facts of the case demonstrate the Court’s effort to parse a host of conduct which infringed competition through a combination of related unilateral action, mergers, and agreements. The majority opinion’s discussion of the meaning of the Sherman Act is often cited as the source of the “rule of reason.”

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)

[After a period of volatile pricing which caused serious difficulties for oil producers, a group of oil companies agreed with each other to raise the spot price of petroleum products in midwestern markets in the US by buying up excess gasoline. The companies coordinated through various "Stabilization Committees."]

It was estimated that there would be between 600 and 700 tank cars of distress gasoline produced in the Mid-Continent oil field every month by about 17 independent refiners. These refiners, not having regular outlets for the gasoline, would be unable to dispose of it except at distress prices. Accordingly, it was proposed and decided that certain major companies (including the corporate respondents) would purchase gasoline from these refiners. The Committee would assemble each month information as to the quantity and location of this distress gasoline. Each of the major companies was to select one (or more) of the independent refiners having distress gasoline as its "dancing partner," and would assume responsibility for purchasing its distress supply. In this manner buying power would be coordinated, purchases would be effectively placed, and the results would be much superior to the previous haphazard purchasing. There were to be no formal contractual commitments to purchase this gasoline, either between the major companies or between the majors and the independents. Rather it was an informal gentlemen's agreement or understanding whereby each undertook to perform his share of the joint undertaking. Purchases were to be made at the "fair going market price." (at 178-180)

…

As a result of these buying programs it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end, to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area. Their agreement or plan embraced not only buying on the spot markets but also, at least by clear implication, an understanding to maintain such improvements in Mid-Western prices as would result from those purchases of distress gasoline. The latter obviously would be achieved by selling at the increased prices, not by price cutting. Any other understanding would have been wholly inconsistent with and contrary to the philosophy of the broad stabilization efforts which were under way. In essence the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers. The broad sweep of the agreement was indicated by Arnott before a group of the industry on March 13, 1935. He described the plan as one "whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines. . . ." Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan. (at 190)

…

In *United States* v. *Trenton Potteries Co*., 273 U.S. 392, this Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units. There the combination was composed of those who controlled some 82 per cent of the business of manufacturing and distributing in the United States vitreous pottery. Their object was to fix the prices for the sale of that commodity. In that case the trial court refused various requests to charge that the agreement to fix prices did not itself constitute a violation of law unless the jury also found that it unreasonably restrained interstate commerce. This Court reviewed the various price-fixing cases under the Sherman Act beginning with *United States* v. *Trans-Missouri Freight Assn*., 166 U.S. 290, and *United States* v. *Joint Traffic Assn*., 171 U.S. 505, and said ". . . it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." (p. 398.) This Court pointed out that the so-called "rule of reason" announced in *Standard Oil Co*. v. *United States*, 221 U.S. 1, and in *United States* v. *American Tobacco Co*., 221 U.S. 106, had not affected this view of the illegality of price-fixing agreements. And in holding that agreements "to fix or maintain prices" are not reasonable restraints of trade under the statute merely because the prices themselves are reasonable, it said (pp. 397-398):

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable -- a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."… (at 212-214)

As clearly indicated in the *Trenton Potteries* case, the *American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on prices or price structures.

And we are of the opinion that *Appalachian Coals, Inc*. v. *United States, supra*, is not in point.

In that case certain producers of bituminous coal created an exclusive selling agency for their coal. The agency was to establish standard classifications and sell the coal of its principals at the best prices obtainable. The occasion for the formation of the agency was the existence of certain so-called injurious practices and conditions in the industry. One of these was the problem of "distress coal" -- coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand. The agency was to promote the systematic study of the marketing and distribution of coal, its demand and consumption; to maintain an inspection and an engineering department to demonstrate to customers the advantages of this type of coal and to promote an extensive advertising campaign; to provide a research department to demonstrate proper and efficient methods of burning coal and thus to aid producers in their competition with substitute fuels; to operate a credit department dealing with the reliability of purchasers; and to make the sale of coal more economical. That agency was also to sell all the coal of its principals at the best prices obtainable and, if all could not be sold, to apportion orders upon a stated basis. And, save for certain stated exceptions, it was to determine the prices at which sales would be made without consultation with its principals. This Court concluded that so far as actual purpose was concerned, the defendant producers were engaged in a "fair and open endeavor to aid the industry in a measurable recovery from its plight." And it observed that the plan did not either contemplate or involve "the fixing of market prices"; that defendants would not be able to fix the price of coal in the consuming markets; that their coal would continue to be subject to "active competition." To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied (p. 374):

"The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may be properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result."

In distinguishing the *Trenton Potteries* case this Court said (p. 375):

"In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."

Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. (at 214-216)

…

Therefore the sole remaining question on this phase of the case is the applicability of the rule of the *Trenton Potteries* case to these facts.

Respondents seek to distinguish the *Trenton Potteries* case from the instant one. They assert that in that case the parties substituted an agreed-on price for one determined by competition; that the defendants there had the power and purpose to suppress the play of competition in the determination of the market price; and therefore that the controlling factor in that decision was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. Respondents contend that in the instant case there was no elimination in the spot tank car market of competition which prevented the prices in that market from being made by the play of competition in sales between independent refiners and their jobber and consumer customers; that during the buying programs those prices were in fact determined by such competition; that the purchases under those programs were closely related to or dependent on the spot market prices; that there was no evidence that the purchases of distress gasoline under those programs had any effect on the competitive market price beyond that flowing from the removal of a competitive evil; and that if respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary non-competitive price through their purchases, they would have been without power to do so.

But we do not deem those distinctions material.

In the first place, there was abundant evidence that the combination had the purpose to raise prices. And likewise, there was ample evidence that the buying programs at least contributed to the price rise and the stability of the spot markets, and to increases in the price of gasoline sold in the Mid-Western area during the indictment period. … Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act.

Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. … Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. There was accordingly no error in the refusal to charge that in order to convict the jury must find that the resultant prices were raised and maintained at "high, arbitrary and noncompetitive levels." The charge in the indictment to that effect was surplusage. (at 218-222)

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the *Trenton Potteries* case itself, where this Court noted with approval *Swift & Co*. v. *United States*, 196 U.S. 375, in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market -- a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. Respondents, however, argue that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot markets. They point to the fact that such purchasing was lightest during the period of the market rise in the spring of 1935, and heaviest in the summer and early fall of 1936 when the prices declined; and that it decreased later in 1936 when the prices rose. But those facts do not militate against the conclusion that these buying programs were a species of price-fixing or manipulation. Rather they are wholly consistent with the maintenance of a floor under the market or a stablization operation of this type, since the need for purchases under such a program might well decrease as prices rose and increase as prices declined.

As we have indicated, the machinery employed by a combination for price-fixing is immaterial.

Under the Sherman Act 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 foreign commerce is illegal *per se*. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power (*United States* v. *Patten*, 226 U.S. 525) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices. (at 222-223)

As to knowledge or acquiescence of officers of the Federal Government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2 (c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in *United States* v. *Borden Co*., 308 U.S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto. The fact that the buying programs may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondents' activities either prior to or after June 1935. For as we have seen price-fixing combinations which lack congressional sanction are illegal *per se*; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event that they were, would such considerations have been relevant.

Accordingly we conclude that the Circuit Court of Appeals erred in reversing the judgments on this ground. *A fortiori* the position taken by respondents in their cross petition that they were entitled to directed verdicts of acquittal is untenable. (at 225-227)

Comment

Socony-Vacuum confirmed that agreements to fix prices were illegal per se, even in times of economic crisis. It is also cited as the leading authority for the rule that some core antitrust abuses are per se illegal, and not subject to the rule of reason. The court was not sympathetic to the argument that a cartel was needed to defend against ruinous competition or economic crisis.

And for good reason: every industry will conveniently think that *it* is the one domain where price fixing serves an immediate public good. Courts are right to be skeptical.

National Society of Professional Engineers v. United States 435 U.S. 679 (1978)

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq*. (1976 ed.), because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association. The Court of Appeals affirmed. We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it. 434 U.S. 815. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

…

This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the engineer for a particular project. Evidence of this agreement is found in § 11 (c) of the Society's Code of Ethics, adopted in July 1964. (at 683)

…

II

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, the Court held that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act. In that opinion the Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. The Court said:

"The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U.S., at 788-789, n. 17.

Relying heavily on this footnote, and on some of the major cases applying a Rule of Reason -- principally *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Standard Oil Co*. v. *United States*, 221 U.S. 1; *Chicago Board of Trade* v. *United States*, 246 U.S. 231; and *Continental T. V., Inc*. v. *GTE Sylvania Inc*., 433 U.S. 36 -- petitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner.

A. The Rule of Reason.

One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets -- indeed, a competitive economy -- to function effectively.

Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. 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.

This principle is apparent in even the earliest of cases applying the Rule of Reason, *Mitchel* v. *Reynolds, supra. Mitchel* involved the enforceability of a promise by the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable, even though it deprived the public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself -- and thereby providing incentives to develop such an enterprise -- outweighed the temporary and limited loss of competition.

The Rule of Reason suggested by *Mitchel* v. *Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States* v. *Addyston Pipe & Steel Co*., 85 F. 271, 282-283 (CA6 1898), aff'd, 175 U.S. 211. That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.

The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States* v. *Trans-Missouri Freight Assn*., 166 U.S. 290; *United States* v. *Joint Traffic Assn*., 171 U.S. 505, 573-577. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co*. v. *United States*, 221 U.S., at 65, "restraints of trade within the purview of the statute . . . [cannot] be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made."

The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by MR. JUSTICE POWELL in *Continental T. V., Inc*., 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. "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." 246 U.S., at 238, quoted in 433 U.S., at 49 n. 15.

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis 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, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

B. The Ban on Competitive Bidding.

Price is the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co*., 310 U.S. 150, 226 n. 59, and an agreement that "[interferes] with the setting of price by free market forces" is illegal on its face. *United States* v. *Container Corp*., 393 U.S. 333, 337. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." 404 F.Supp. 457, 460. On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health. The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.

It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project. Based on these considerations, a purchaser might conclude that his interest in quality -- which may embrace the safety of the end product -- outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack.

The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co*. v. *FTC*, 340 U.S. 231, 248. 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. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless -- automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

By the same token, the cautionary footnote in *Goldfarb*, 421 U.S., at 788-789, n. 17, quoted *supra*, cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston*, 85 F., at 284, and which this Court has firmly avoided ever since.

III

The judgment entered by the District Court, as modified by the Court of Appeals, prohibits the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical. Petitioner argues that this judgment abridges its First Amendment rights. We find no merit in this contention.

Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. See, *e. g., International Salt Co*. v. *United States*, 332 U.S. 392, 400-401;*United States* v. *Glaxo Group, Ltd*., 410 U.S. 52, 64.While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." *Giboney* v. *Empire Storage & Ice Co*., 336 U.S. 490, 502. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. We agree with the Court of Appeals that the injunction, as modified, meets this standard. While it goes beyond a simple proscription against the precise conduct previously pursued, that is entirely appropriate.

"The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co., supra*, at 400.

The Society apparently fears that the District Court's injunction, if broadly read, will block legitimate paths of expression on all ethical matters relating to bidding. But the answer to these fears is, as the Court held in *International Salt*, that the burden is upon the proved transgressor "to bring any proper claims for relief to the court's attention." *Ibid*. In this case, the Court of

Appeals specifically stated that "[if] the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree." 181 U. S. App. D. C., at 46, 555 F.2d, at 983. This is, we believe, a proper approach, adequately protecting the Society's interests. We therefore reject petitioner's attack on the District Court's order.

Dissent (Justice Blackmun)

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante*, at 696, and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-789, n. 17 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49-50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral Arg. 47-48, § 11 (c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11 (c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. Then, too, the Society's rule is overbroad in the aspect noted by Judge Leventhal, when it prevents any dissemination of competitive price information in regard to real property improvements prior to the engagement of a single engineer regardless of "the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information." 181 U. S. App. D. C. 41, 45, 555 F.2d 978, 982 (1977).

My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last as does the majority, arises from the fact that there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of entrants. A bar association's regulation of the permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation, see *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), may also have the effect of reducing price competition. In acknowledging that "professional services may differ significantly from other business services" and that the "nature of the competition in such services may vary," *ante*, at 696, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services. (at 687-701)

Comment

Although the majority appeared to decide the case under the rule of reason, it is arguable that the per se standard applied (see the Court's comment that "On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act."). The Court emphasized that antitrust considers "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost" and thereby adopts the economic concept of consumer welfare. Nonetheless, the Court assumes that competition promotes quality without engaging with economic literature around adverse selection and information asymmetries. (A court might assume that society has already regulated the marketplace to control externalities as desired, e.g. the FTC's Funeral Rule.) Justice Blackmun's dissent was more sympathetic to countervailing social interests other than impact on competition (such as ethical standards in professions). Consider whether antitrust law should have a broader scope in a world where many believe markets to create social, environmental, and other noneconomic harms. But also consider this: If courts *do* consider these nontraditional harms, who gets to decide which ones count, and should we trust those people to make a decision a democracy would often give to elected decision-makers?

California Dental Assn. v. FTC, 526 U.S. 756 (1999)

There are two issues in this case: whether the jurisdiction of the Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.

…

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following § 10:

"Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect." App. 33.

…

The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of the FTC Act, 38 Stat. 717, 15 U.S.C. § 45. The complaint alleged that the CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. Complaint P7. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $ 22,739 and $ 65,127," 121 F.T.C. at 207. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988), since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services. He accordingly found a violation of § 5 of the FTC Act. 121 F.T.C. at 272-273.

…

The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion.

In *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.,* 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984), we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." Id. at 110.

Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of " horizontal agreements among competitors to refuse to discuss prices, *National Soc. of Professional Engineers* v. *United States,* 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978), or to withhold a particular desired service, *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) (quoting *National Soc. of Professional Engineers*, *supra*, at 692). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. 468 U.S. at 99-100. In *National Soc. of Professional Engineers*, the restraint was "an absolute ban on competitive bidding." 435 U.S. at 692. In *Indiana Federation of Dentists*, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U.S. at 459. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. See *Law* v. *National Collegiate Athletic Assn.*, 134 F.3d 1010, 1020 (CA10 1998) (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); *Chicago Professional Sports Limited Partnership* v. *National Basketball Assn.*, 961 F.2d 667, 674-676 (CA7 1992) (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications); cf. *United States* v. *Brown University*, 5 F.3d 658, 677-678 (CA3 1993) (finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agreements in *National Soc. of Professional Engineers* and *Indiana Federation of Dentists* "embodied a strong economic self-interest of the parties to them"). (at 769-771)

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on JUSTICE BREYER's view that bars on truthful and verifiable price and quality advertising are *prima facie* anticompetitive, see *post*, at 4-5 (opinion concurring in part and dissenting in part), and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with JUSTICE BREYER turns on our different responses to this issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, see, *e.g., post*, at 5, 7, 10, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. Cf. Carr & Mathewson, The Economics of Law Firms: A Study in the Legal Organization of the Firm, 33 J. Law & Econ. 307, 309 (1990) (explaining that in a market for complex professional services, "inherent asymmetry of knowledge about the product" arises because "professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed"); Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (pointing out quality problems in market characterized by asymmetrical information). In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth-filling) or to something else (like a very tough walnut). See Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1330 (1979); 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law § 3-1, p. 86 (1995) (describing the common view that "the lay public is incapable of adequately evaluating the quality of medical services"). Patients' attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further. Cf. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 235-236 (S. Rottenberg ed. 1980) (describing long-term relationship between professional and client not as "a series of spot contracts" but rather as "a long-term agreement, often implicit, to deal with each other in a set of future unspecified or incompletely specified circumstances according to certain rules," and adding that "it is not clear how or if these [implicit contracts] can be reconciled with the promotion of effective price competition in individual spot markets for particular services"). The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," 128 F.3d at 727, and that "restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," *ibid*. (citing *Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 364, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977); *Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 388, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992)). The court then acknowledged that, according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." 128 F.3d at 728. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising. Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," *ib*id. followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid*. (at 771-774)

But these observations brush over the professional context and describe no anticompetitive effects. Assuming that the record in fact supports the conclusion that the CDA disclosure rules essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not *a priori* analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.

In theory, it is true, the Court of Appeals neither ruled out the plausibility of some procompetitive support for the CDA's requirements nor foreclosed the utility of an evidentiary discussion on the point. The court indirectly acknowledged the plausibility of procompetitive justifications for the CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," 128 F.3d at 728. But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden-shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.

The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. The court began with the argument that "these restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid*. (citing P. Areeda & H. Hovenkamp, Antitrust Law P1505, pp. 693-694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," 128 F.3d at 728, adding that "the restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so," *ibid.* This suggestion about output is also puzzling. If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices, see *General Leaseways, Inc.* v. *National Truck Leasing Assn*., 744 F.2d 588, 594-595 (CA7 1984) ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects").

Although the Court of Appeals acknowledged the CDA's view that "claims about quality are inherently unverifiable and therefore misleading," 128 F.3d at 728, it responded that this concern "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading," *ibid*. As a result, the court said, "the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid*. The court assumed, in these words, that some dental quality claims may escape justifiable censure, because they are both verifiable and true. But its implicit assumption fails to explain why it gave no weight to the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market. It is, indeed, entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery, cf. *Bates*, 433 U.S. at 366 (claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false"); 433 U.S. at 383-384 ("Advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction"), notwithstanding JUSTICE BREYER's citation (to a Commission discussion that never faces the issue of the unverifiability of professional quality claims, raised in *Bates*), *post*, at 5.

The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

In light of our focus on the adequacy of the Court of Appeals's analysis, JUSTICE BREYER's thorough-going, *de novo* antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with JUSTICE BREYER's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly JUSTICE BREYER's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed JUSTICE

BREYER, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "require some competitive justification," *National Collegiate Athletic Assn.*, 468 U.S. at 110, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified. 468 U.S. at 104, n. 26. "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." 468 U.S. at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . . Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, Antitrust Law P1507, p. 402 (1986). At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future." 433 U.S. at 364. As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue. (at 776-781)

Dissent (Justice Breyer)

I agree with the Court that the Federal Trade Commission has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "what is required . . . is an enquiry meet for the case," and that the object is a "confident conclusion about the principal tendency of a restriction." *Ante*, at 23-24 (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission -- just as the Court of Appeals did below.

…

I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious?
To restrain truthful advertising about lower prices is likely to restrict competition in respect to price -- "the central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 226, n. 59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940); cf., *e.g., Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 364, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) (price advertising plays an "indispensable role in the allocation of resources in a free enterprise system"); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 765, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions were unlawful *per se*. See 121 F.T.C. at 307; cf. *Socony-Vacuum,* 310 U.S. at 222-228 (finding agreement among competitors to buy "spot-market oil" unlawful *per se* because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying a *per se* rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints. (at 784)

…

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other procompetitive tendencies or redeeming virtues. See 7 Areeda, P1504, at 377-383. This is a closer question -- at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even *made* the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges *only* advertising that is false or misleading." 121 F.T.C. at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." 128 F.3d at 728. With respect to quality advertising, the Commission stressed that the Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts." 121 F.T.C. at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." 128 F.3d at 728.

With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see 121 F.T.C. at 316-317, that fact does not make out a valid antitrust defense. See *NCAA*, 468 U.S. at 119; 7 Areeda, P1505, at 383-384. (at 786-788)

Comment

This case demonstrates the difficulties in applying “quick look” and “rule of reason” analyses, which can involve finely grained judgement calls around empirical questions. Note that it took place in a professional licensing context in which courts are frequently deferential.

Polygram Holding, Inc. v. Federal Trade Commission, 416 F.3d 29 (D.C. Cir. 2005)

The Three Tenors -- Jose Carreras, Placido Domingo, and Luciano Pavarotti -- put on spectacular concerts coinciding with the World Cup soccer finals in 1990, 1994, and 1998. PolyGram distributed the recording of the 1990 concert, which became one of the best-selling classical albums of all time. FTC Op. at 5-6. Warner distributed the 1994 concert album, which also met with great success. Both albums remained on the top-ten classical list throughout 1994, 1995, and 1996. *Id*. at 6.

In late 1997 PolyGram and Warner agreed jointly to distribute the recording of The Three Tenors' July 1998 concert. Warner, which had the worldwide rights, retained the United States rights but licensed to PolyGram the exclusive right to distribute the 1998 album outside the United States, and the companies agreed to share equally the worldwide profit or loss on the project. FTC Op. at 8. The agreement also obligated PolyGram and Warner to consult with one another on all "marketing and promotional activities" for the 1998 concert album, but each company was free ultimately to pursue its own marketing strategy and to continue exploiting its earlier Three Tenors concert album without limitation. The agreement also provided that PolyGram and Warner would collaborate on the distribution of any future Three Tenors album released through August 2002. *Id*.

Representatives of PolyGram and Warner first met in January 1998 to discuss "marketing and operational issues." One of PolyGram's representatives voiced concern about the effect of marketing the earlier Three Tenors albums upon the prospects for the 1998 concert album and suggested the two companies impose an "advertising moratorium" surrounding the 1998 release, which was scheduled for August 1. According to notes of their next meeting (in March) PolyGram and Warner representatives agreed that "a big push" on the earlier albums "shouldn't take place before November 15." After that meeting, each company instructed its affiliates to cease all promotion of the 1990 and 1994 Three Tenors albums for approximately six weeks, beginning in late July or early August. FTC Op. at 8.

Apparently Warner's overseas division did not get the message because in May it announced an aggressive marketing campaign, scheduled to run through December, to discount and to promote the 1994 album throughout Europe. When PolyGram learned of this, it threatened to "retaliate" by cutting the price of its 1990 album. Accusations then flew between the two companies about which had started the imminent price war. Meanwhile, in June the promoter of The Three Tenors concert informed PolyGram and Warner that the repertoire for the 1998 concert would substantially overlap those of the 1990 and 1994 concerts, which in the view of both PolyGram and Warner executives jeopardized the commercial viability of the forthcoming concert album. FTC Op. at 8-9.

By the time The Three Tenors performed in Paris on July 10, PolyGram and Warner had exchanged letters reaffirming their commitment to suspend advertising and discounting the 1990 and 1994 concert albums and agreeing the moratorium would run from August 1 through October 15. About a week later, however, PolyGram's Senior Marketing Director, who had passed on the details of the agreement to PolyGram's General Counsel, sent a memorandum around the company stating, "Contrary to any previous suggestion, there has been no agreement with [Warner] in relation to the pricing and marketing of the previous Three Tenors albums." Warner followed suit on August 10, sending a letter to PolyGram repudiating any pricing or advertising restrictions relative to its 1994 album. At the same time, however, PolyGram and

Warner executives privately assured one another their respective companies intended to honor the agreement, and in fact the companies did substantially comply with the agreement through October 15, 1998. FTC Op. at 9.

In 2001 the Commission issued complaints against PolyGram and Warner charging that, by entering into the moratorium agreement, the companies had engaged in an unfair method of competition in violation of § 5 of the FTC Act. Warner soon consented to an order barring it from making any similar agreement in the future. FTC Op. at 3 n.3. PolyGram contested the charge and, after a trial, an Administrative Law Judge ruled that PolyGram had violated § 5 and ordered PolyGram, like Warner, to refrain from making any similar agreement in the future.

…

After first observing (correctly) that the analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act, 15 U.S.C. § 1, FTC Op. at 13 n.11,

…

The Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry. In 1978, just before the transition began, the Court summarized its doctrine as follows:

There are … two complimentary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts particular to the business, the history of the restraint, and the reasons why it was imposed. (at 33-34)

...Courts and commentators have recognized the trade-offs inherent in each category. *Per se* analysis, which requires courts to generalize about the utility of a challenged practice, reduces the cost of decision-making but correspondingly raises the total cost of error by making it more likely some practices will be held unlawful in circumstances where they are harmless or even procompetitive. *See*, *e.g.*, *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982) ("For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable"); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, P1509c (2d ed. 2003) (observing that *per se* analysis "dispenses with costly proof requirements, such as proof of market power," but consequently "produces a certain number of false positives"). The converse -- increased litigation cost but reduced cost of error -- obtains under the rule of reason, which requires an exhaustive inquiry into all the myriad factors "bearing on whether the conduct is on balance anticompetitive or procompetitive." Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 800 (1987); *see* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12-13 (1984) ("When everything is relevant, nothing is dispositive …. Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason").

Since *Professional Engineers* the Supreme Court has steadily moved away from the dichotomous approach -- under which every restraint of trade is either unlawful *per se,* and hence not susceptible to a procompetitive justification, or subject to full-blown rule-of-reason analysis -- toward one in which the extent of the inquiry is tailored to the suspect conduct in each particular case. For instance, the Court did not hold unlawful *per se* an agreement limiting the number of football games each participating college could sell to television, which agreement was challenged in *NCAA v. Board of Regents*, 468 U.S. 85, 100, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984) (recognizing but declining to apply doctrine that "horizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach"); or the refusal of an organization of dentists to provide x-rays to dental insurers, which was at issue in *IFD*, 476 U.S. at 458 ("Although this Court has in the past stated that group boycotts are unlawful *per se*, we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule") (citations omitted). *Compare*, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) (price-fixing *per se* unlawful); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (group boycott *per se* unlawful).

At the same time, however, in *NCAA* and *IFD* the Court did not insist upon the elaborate market analysis ordinarily required under the rule of reason to prove the defendant had market power and the restraint it imposed had an anticompetitive effect. *See NCAA*, 468 U.S. at 109-10 (rule of reason analysis unnecessary in light of district court's finding price and output not responsive to demand); *IFD*, 476 U.S. at 459 ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement"). The Court instead adopted an intermediate inquiry, since dubbed the "quick look," to evaluate horizontal restraints of trade. *See, e.g.*, Areeda & Hovenkamp, *Antitrust Law*, P1911a.

It would be somewhat misleading, however, to say the "quick look" is just a new category of analysis intermediate in complexity between "*per se*" condemnation and full-blown "rule of reason" treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum. The Court said as much in *California Dental Association v. FTC*:

The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that there is often no bright line separating *per se* from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called "*per-se*" condemnation is justified.

Rather than focusing upon the category to which a particular restraint should be assigned, therefore, the Court emphasized the basic point that under § 1 the essential inquiry is "whether … the challenged restraint enhances competition." *Id*. at 779-80 (quoting *NCAA*, 468 U.S. at 104). In order to make that determination, a court must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," *id*. at 781, which in some cases may not require a full-blown market analysis. The Court continued:

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

Id.; *cf. United States v. Microsoft*, 346 U.S. App. D.C. 330, 253 F.3d 34, 84 (D.C. Cir. 2001) (declining to condemn *per se* tying arrangements involving platform software products because there was "no close parallel in prior antitrust cases" and "simplistic application of per se tying rules carries a serious risk of harm").

In this case, as we have said, the Commission analyzed PolyGram's conduct under the legal framework it had devised in *Mass. Board* (1988), which it maintains is consistent with the Supreme Court's teaching of more than a decade later in *California Dental* (1999). FTC Op. at 28-29. The *Mass. Board* analysis proceeds in several distinct steps: First, the Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed "inherently suspect" and, unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, summarily condemned. "Such justifications," the Commission explained, "may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question, or they may consist of reasons why the practices are likely to have beneficial effects for consumers." *Id*. at 29.

If the defendant does offer such an explanation, then the Commission "must address the justification" in one of two ways. First, the Commission may explain why it can confidently conclude, without adducing evidence, that the restraint very likely harmed consumers. *Id*. at 33-34. Alternatively, the Commission may provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. *Id*. at 33. If the Commission succeeds in either way, then the evidentiary burden shifts to the defendant to show the restraint in fact does not harm consumers or has "procompetitive virtues" that outweigh its burden upon consumers. *Id*. at 34 n.45.

PolyGram argues the Commission's framework conflicts with Supreme Court precedent by condemning a restraint that is not *per se* illegal without the Commission having to prove the restraint actually harms competition. According to PolyGram, "proof of actual anticompetitive effect (or market power as its surrogate) is required in *any* Rule of Reason case."

For reasons we have already explained, we reject PolyGram's attempt to locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line separating *per se* analysis from the rule of reason. *See* Areeda & Hovenkamp, *Antitrust Law*, P1511a ("judges and litigants too often assume erroneously that the classification, per se or rule of reason, necessarily determines what must or may be alleged and proved, made the subject of detailed findings, or submitted to the jury"). At bottom, the Sherman Act requires the court to ascertain whether the challenged restraint hinders competition; the Commission's framework, at least as the Commission applied it in this case, does just that.

We therefore accept the Commission's analytical framework. If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm. That much follows from the caselaw; for instance, in *NCAA* the Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 110. Similarly, in *IFD*, the Supreme Court ruled a horizontal agreement to withhold services could not be sustained because the dentists failed to advance any "credible argument" that "some countervailing procompetitive virtue … [redeemed] an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place.'" 476 U.S. at 459; *see also California Dental*, 526 U.S. at 771 (remanding for closer look at challenged advertising restrictions after concluding they "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

Although the Commission uses the term "inherently suspect" to describe those restraints that judicial experience and economic learning have shown to be likely to harm consumers, *see* FTC Op. at 29, we note that, under the Commission's own framework, the rebuttable presumption of illegality arises not necessarily from anything "inherent" in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare. The Commission appears to acknowledge, as it must, that as economic learning and market experience evolve, so too will the class of restraints subject to summary adjudication. *See California Dental*, 526 U.S. at 781 (the ability of a court to draw "a confident conclusion about the principal tendency of a restraint … may vary over time, if rule-of-reason analyses in case after case reach identical conclusions); *see also Broad. Music, Inc. v. CBS*, 441 U.S. 1, 9, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979) ("it is only after considerable experience with certain business relationships that courts classify them as *per se* violations"). *See generally* INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, H. Michael Mann, J. Fred Weston, eds., 1974).

That said, we have no difficulty with the Commission's conclusion that PolyGram's agreement with Warner in all likelihood had a deleterious effect upon consumers -- unless, that is, PolyGram comes forward with some plausible explanation to the contrary. An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful. The Supreme Court has recognized time and again that agreements restraining autonomy in pricing and advertising impede the "ordinary give and take of the market place." *IFD*, 476 U.S. at 459; *see also NCAA*, 468 U.S. at 107 ("restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit"); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) (advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system").

PolyGram's fate in this case therefore rests upon the plausibility of the sole competitive justification it proffered for the moratorium agreement, namely, that the restrictions on discounting and advertising enhanced the long-term profitability of all three concert albums and promoted the "Three Tenors" brand. According to PolyGram, each company was concerned the other would "free ride" on the promotional activities of the joint venture by promoting its own earlier concert album; as a result fewer Three Tenors albums would be sold overall and the joint venture would be less likely to create future products, such as a "greatest hits" album or a boxed set. Thus, PolyGram likens the moratorium agreement here to the restraint at issue in *Polk Brothers, Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985), where two potential retail competitors collaborated to build a store offering some of each company's products but agreed not to sell competing products [***22] at the new store. Because the restraint arguably promoted productivity and output by controlling each participant's ability to free-ride on the other's promotional efforts, the court, rather than condemning the restraint summarily, went on to evaluate it under the rule of reason. *Id*. at 190.

At first glance PolyGram's contention has some force; the moratorium appears likely to have mitigated the "spillover" effects that could be expected to follow an aggressive launch of the 1998 album. Absent the moratorium, that is, a consumer, after learning of the new album through the joint venture's advertising, might decide that he would be just as happy with an older concert album, especially if the older album were then available at a discount. The "free-riding" to be eliminated by the moratorium agreement, however, was nothing more than the competition of products that were not part of the joint undertaking. Why not an agreement by which PolyGram and Warner would eliminate advertising and price competition on all their records for a time while they focused exclusively upon promoting the new Three Tenors album? The "procompetitive" justification PolyGram offers is "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Engineers*, 435 U.S. at 695.

To take the Commission's example, if General Motors were vigorously to advertise the release of a new model SUV, other SUV manufacturers would no doubt reap some of the benefit of GM's efforts. FTC Op. at 43. But that would not mean General Motors and its competitors could lawfully agree to restrict prices and advertising on existing SUV models in return for General Motors giving its rivals a share of its profit on the new model. Nor would an agreement to restrain prices and advertising on existing SUVs be lawful if General Motors were to release the new model SUV as a joint venture with one of its competitors. *Id.* at 45. A restraint cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product, regardless whether that enterprise is a joint venture or a solo undertaking. And it simply does not matter whether the new SUV would have been profitable absent the restraint; if the only way a new product can profitably be introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product. As the Supreme Court said in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980),

in any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

See also Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998) ("While increasing output, creating operating efficiencies, making a new product available, enhancing service or quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws").

In sum, because PolyGram has failed to identify any competitive justification for its agreement with Warner to refrain from advertising or discounting their competitive Three Tenors products, we hold it violated § 5 of the FTC Act. Hence, we need not go on to determine whether the Commission's findings of fact concerning actual competitive harm are supported by substantial evidence. (at 34-37)

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

[A group of railroad companies formed the 'Trans Missouri Freight Association' which set rates for freight traffic in their networks. They agreed rates at monthly meetings, and the rates were meant to be 'reasonable'.]

…The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoke of for hundreds of years both ok England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

…

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments it must be confessed bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least, Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641, 657; that many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community -- the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation and prevents the deadly competition so liable to result in the ruin of the roads and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to defend its interests both in and out of Congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates. (at 331-333)

…

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.;

one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature. (at 340-341)

…

Although the case is heard on bill and answer, thus making in necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it. (at 342)

Dissent (Justice White)

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year-books instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy; for as said by Sir G. Jessel, Master of the Rolls, in Printing &c. Company v. Sampson, L.R. 19 Eq. 462, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combination by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. In re Debs, 64 Fed. Rep. 724, 745-755; 158 U.S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. If follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute tend to an end never contemplated, and against the accomplishment of which its provisions were enacted. (at 355-356)

United States v. American Tobacco Co., 221 U.S. 106 (1911)

Before January, 1890, five distinct concerns -- Allen & Ginter, with factory at Richmond, Va.; W. Duke, Sons & Co., with factories at Durham, North Carolina, and New York City; Kinney Tobacco Company, with factory at New York City; W.S. Kimball & Company, with factory at Rochester, New York; Goodwin & Company, with factory at Brooklyn, New York -- manufactured, distributed and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 8 per cent of the smoking tobacco produced in the United States. There is no doubt that these factories were competitors in the purchase of the raw product which they manufactured and in the distribution and sale of the manufactured products. Indeed it is shown that prior to 1890 not only had normal and ordinary competition existed between the factories in question, but that the competition had been fierce and abnormal. In January, 1890, having agreed upon a capital stock of $25,000,000, all to be divided amongst them, and who should be directors, the concerns referred to organized the American Tobacco Company in New Jersey, "for trading and manufacturing," with broad powers, and conveyed to it the assets and businesses, including good will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all…

The new corporation in 1890, the first year of its operation, manufactured about two and one half billion cigarettes, that is, about 96 or 97 per cent of the total domestic output, and about five and one-half million pounds of smoking tobacco out of a total domestic product of nearly seventy million pounds. (at 157-158)

…

[The new corporation continued to buy out competitors in adjacent industries such as cigars, snuff, and plug tobacco. The company reorganized and increased its capital to form the American Tobacco Corporation, and the affiliated Continental Tobacco Company. They also merged with a UK company, and formed a market-sharing arrangement with another UK company.]

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company were merged into one corporation, under the name of The American Tobacco Company, the principal defendant here. The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote).

…

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied. (at 174-175)

…

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the Standard Oil Case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Considering then the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: a. By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. b. Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination -- a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued. c. By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. d. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. e. By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. f. By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employes, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions. (at 181-183)

Justice Harlan (Dissent)

…The case is to go back to the Circuit Court in order that out of the elements of the old combination a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us -- as it undoubtedly does -- warrants the characterization which the court has made of this monster combination, why cannot all necessary directions be now given as to the terms of the decree? In my judgment, there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such directions would not only end this litigation, but would serve to protect the public against any more conscious wrong-doing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress. … (at 191)

Comment

American Tobacco shares with *Standard Oil* many of the features which define the early Sherman Act case law. These include a defendant who seems to have violated both prohibitions of the Sherman Act at once, through unilateral action, cartel agreements, and strings of horizontal mergers pursued under the target's duress. The Court does not delineate clearly between unilateral and coordinated conduct, and grapples with the open-textured standards for assessing which agreements are "in restraint of trade."

Chicago Board of Trade v. United States, 246 U.S. 231 (1918)

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grains is done. … Special sessions, termed the "Call," are held immediately after the close of the regular session, at which sales "to arrive" are made. …

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the reult of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers offers to buy, at the prices named, any number of carloads, subject to acceptance before 9.30 A.M. on the next business day.

In 1906 the Board adopted what is known as the "Call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the Call. The Call was over, with rare exceptions, by two o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session. (at 237)

…

The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law. (at 238-9)

First: The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the Call until 9.30 A.M. the next business day: but there was no restriction upon the sending out of bids after close of the Call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the Call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the Call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second: The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales: members were left free to purchase grain already in Chicago from anyone at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from non-members anywhere except on the premises of the Board. It applied only to grain shipped to Chicago: members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third: The affects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(b) It brought into the regular market hours of the Board sessions more of the trading in grain "to arrive."

(c) It brought buyers and sellers into more direct relations; because on the Call they gathered together for a free and open interchange of bids and offers.

(d) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(e) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

(g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(h) It enabled those grain merchants of Chicago who sell to millers and exporters to trade on a smaller margin and, by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(i) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfil their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in Anderson v. United States, 171 U.S. 604. Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill. (at 239-241)

Comment

Justice Brandeis's opinion in *Chicago Board of Trade* represents the classic description of how the courts approach a rule of reason analysis. The facts of *Chicago Board of Trade* draw attention to the role of rules required to "create" a market and ensure its effective operation. The rules here are created through a private body, and directly restrict price competition, even though their main objective is to make the general market for trading grain work better.

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)

Defendants, other than Appalachian Coals, Inc., are 137 producers of bituminous coal in eight districts (called for convenience Appalachian territory)… In the so-called Appalachian territory and the immediately surrounding area, the total production was 107,008,209 tons, of which defendants' production was 54.21 per cent, or 64 per cent if the output of 'captive' mines (16,455,001 tons) be deducted…

The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. This agency is the defendant Appalachian Coals, Inc., which may be designated as the Company. Defendant producers own all its capital stock, their holdings being in proportion to their production. The majority of the common stock, which has exclusive voting right, is held by seventeen defendants. By uniform contracts, separately made, each defendant producer constitutes the Company an exclusive agent for the sale of all coal (with certain exceptions) which the producer mines in Appalachian territory….

The Government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act, -- in the view that it eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets…. (at 356-358)

First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.

In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States, supra*. The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Second. The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, "for many years has been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, "the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons" to meet a demand "of less than 500,000,000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. … (at 359-362)

In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, "constitute unfavorable forces." "The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

It also appears that the "unprofitable condition" of the industry has existed particularly in the Appalachian territory where there is little local consumption, as the region is not industrialized. "The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate which imposes an unfavorable differential from 35 cents to 50 cents per ton." And in a graphic summary of the economic situation, the court found that "numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the States in which coal producing companies are located have found it increasingly difficult to collect taxes."

Third. The findings also fully disclose the proceedings of the defendants in formulating their plan and the reasons for its adoption. The serious economic conditions had led to discussions among coal operators and state and national officials, seeking improvement of the industry. Governors of States had held meetings with coal producers. The limits of official authority were apparent…. (at 364)

Defendants refer to the statement of purposes in their published plan of organization, -- that it was intended to bring about "a better and more orderly marketing of the coals from the region to be served by this company (the selling agency) and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business."… The court also found that "Defendants believe that the result of all these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the selling agent is perfected and developed." But in view of the designation of sub-agents, economies in selling expenses would be attained "only after a year or so of operation."

No attempt was made to limit production. The producers decided that it could not legally be limited and, in any event, it could not be limited practically. The finding is that "it was designed that the producer should produce and the selling agent should sell as much coal as possible." The importance of increasing sales is said to lie in the fact that the cost of production is directly related to the actual running time of the mines.

Fourth. Voluminous evidence was received with respect to the effect of defendants' plan upon market prices. As the plan has not gone into operation, there are no actual results upon which to base conclusions. The question is necessarily one of prediction. The court below found that, as between defendants themselves, competition would be eliminated. This was deemed to be the necessary consequence of a common selling agency with power to fix the prices at which it would make sales for its principals. Defendants insist that the finding is too broad and that the differences in grades of coal of the same sizes, and the market demands at different times, would induce competition between the coals sold by the agency "depending upon the use and the quality of the coals."

We think that the evidence requires the following conclusions:

(1). With respect to defendant's purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Chicago Board of Trade* v. *United States, supra*. The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself, -- practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

(2). The question thus presented chiefly concerns the effect upon prices. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets. The ultimate finding of the District Court is that the defendants "will not have monopoly control of any market, nor the power to fix monopoly prices"; and in its opinion the court stated that "the selling agency will not be able, we think, to fix the market price of coal." Defendants' coal will continue to be subject to active competition. In addition to the coal actually produced and seeking markets in competition with defendants' coal, enormous additional quantities will be within reach and can readily be turned into the channels of trade if an advance of price invites that course. While conditions are more favorable to the position of defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or to involve the fixing of market prices.

The contention is, and the court below found, that while defendants could not fix market prices, the concerted action would "affect" them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. *Maple Flooring Association* v. *United States, supra; Cement Manufacturers Association* v. *United States*, 268 U.S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices. (at 372-374)

…

(3). The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it. Emphasis is placed upon defendants' control of about 73 per cent of the commercial production in Appalachian territory. But only a small percentage of that production is sold in that territory. The finding of the court below is that "these coals are mined in a region where there is very little consumption." Defendants must go elsewhere to dispose of their products, and the extent of their production is to be considered in the light of the market conditions already described. Even in Appalachian territory it appears that the developed and potential capacity of other producers will afford effective competition. Defendants insist that on the evidence adduced as to their competitive position in the consuming markets, and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States* v. *U.S. Steel Corp*., 251 U.S. 417; *United States* v. *International Harvester Co*., 274 U.S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal -- that one is a legitimate enterprise and the other is not -- makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Chicago Board of Trade* v. *United States, supra; United States* v. *Terminal Association*, 224 U.S. 383; *Window Glass Manufacturers* v. *United States, supra; Standard Oil Co*. v. *United States*, 283 U.S. 163, 169, 179. (at 376-377)

Comment

Even though the competitors had agreed to coordinate on price—usually a per se violation—the court subjected the case to a "rule of reason" standard of review. Why? It is unlikely that a court today would do the same. But note that the case took place during the Great Depression, and involved a politically salient community of coal miners. What if instead of selling their coal jointly, the miners had tried to merge?

Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979)

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates. The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses…

BMI, a nonprofit corporation owned by members of the broadcasting industry, was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP…

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used… (at 4-5)

…

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978);*Continental T. V., Inc*. v. *GTE Sylvania Inc*., 433 U.S. 36, 50 (1977), and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co*. v. *United States*, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services 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.

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. 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 the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co*., 85 F. 271, 280 (CA6 1898), aff'd, 175 U.S. 211 (1899). 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." That will often, but not always, be a simple matter. (at 7-9)

…

Under [a 1950 consent decree between ASCAP and the US Department of Justice's Antitrust Division], which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness. (at 12)

…

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue blanket licenses to individual radio or television stations or to other users who perform copyrighted music for profit? Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for copyrighted music and setting a standard fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability.

CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. 400 F.Supp., at 747 n. 7. But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works. Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the *per se* rule does not require any such holding. (at 16-17)

More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States* v. *United States*

Gypsum Co., 438 U.S. 422, 436 n. 13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id*., at 441 n. 16; see *National Society of Professional Engineers* v. *United States*, 435 U.S., at 688; *Continental T. V., Inc*. v. *GTE Sylvania Inc*., 433 U.S., at 50 n. 16; *Northern Pac. R. Co*. v. *United States*, 356 U.S., at 4.

The blanket license, as we see it, is not a "naked [restraint] of trade with no purpose except stifling of competition," *White Motor Co*. v. *United States*, 372 U.S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. 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. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F.2d, at 140 n. 26, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But 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, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, 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.

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, 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. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. Thus, to the extent the blanket license is a different product, 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. (at 19-23)

Finally, we have some doubt -- enough to counsel against application of the *per se* rule -- about the extent to which this practice threatens the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co*., 310 U.S. 150, 226 n. 59 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets. Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored.

With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today. (at 23-24)

Dissent (Justice Stevens)

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the cases to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

…

The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law. Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act. Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct… (at 34)

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market. Despite its size, CBS itself may not obtain music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the marketwide restraint. (at 36)

…

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders. Indeed, ASCAP itself argues that its blanket license constitutes a product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

Comment

The Court limited the scope of the per se rule. After this case, does the rule blend into the rule of reason analysis? Also, notice how the Court credits efficiencies and decisions by independent content aggregators for creating the market structure—not the collective bargaining or action by artists, or the Department of Justice's 1950 consent decree.

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

Respondents, twenty individuals and twenty-three corporations, were convicted in the district court for southern New York of violating the Sherman Anti-Trust Law, Act of July 2, 1890, c. 647, 26 Stat. 209. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery, in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as "legitimate jobbers." On appeal, the court of appeals for the second circuit reversed the judgment of conviction on both counts on the ground that there were errors in the conduct of the trial. 300 Fed. 550. This Court granted certiorari. 266 U.S. 597. Jud. Code, § 240….

There is no contention here that the verdict was not supported by sufficient evidence that respondents, controlling some 82 per cent. of the business of manufacturing and distributing in the United States vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers. (at 393-394)

…

The question therefore to be considered here is whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged.

That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. See *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *Standard Oil Co*. v. *United States, supra; American Column Co*. v. *United States*, 257 U.S. 377, 400; *United States* v. *Linseed Oil Co*., 262 U.S. 371, 388; *Eastern States Lumber Association* v. *United States*, 234 U.S. 600, 614.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable -- a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States* v. *Cohen Grocery Co*., 255 U.S. 81; *International Harvester Co*. v. *Kentucky*, 234 U.S. 216; *Nash* v. *United States, supra*. Thus viewed, the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It "is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained." *Standard Sanitary Mfg. Co*. v. *United States*, 226 U.S. 20, 49.

That such was the view of this Court in deciding the *Standard Oil* and *Tobacco* cases, and that such is the effect of its decisions both before and after those cases, does not seem fairly open to question. Beginning with *United States* v. *Trans-Missouri Freight Association, supra; United States* v. *Joint Traffic Association*, 171 U.S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon. (at 396-398)

…

Respondents rely upon *Chicago Board of Trade* v. *United States, supra*, in which an agreement by members of the Chicago Board of Trade controlling prices during certain hours of the day in a special class of grain contracts and affecting only a small proportion of the commerce in question was upheld. The purpose and effect of the agreement there was to maintain for a part of each business day the price which had been that day determined by open competition on the floor of the Exchange. That decision, dealing as it did with a regulation of a board of trade, does not sanction a price agreement among competitors in an open market such as is presented here.

The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict. The requested charge which we have quoted, and others of similar tenor, while true as abstract propositions, were inapplicable to the case in hand and rightly refused.

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)

Klor's, Inc., operates a retail store on Mission Street, San Francisco, California; Broadway-Hale Stores, Inc., a chain of department stores, operates one of its stores next door. The two stores compete in the sale of radios, television sets, refrigerators and other household appliances. Claiming that Broadway-Hale and 10 national manufacturers and their distributors have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, Klor's brought this action for treble damages and injunction in the United States District Court.

In support of its claim Klor's made the following allegations: George Klor started an appliance store some years before 1952 and has operated it ever since either individually or as Klor's, Inc. Klor's is as well equipped as Broadway-Hale to handle all brands of appliances. Nevertheless, manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others have conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. Broadway-Hale has used its "monopolistic" buying power to bring about this situation. The business of manufacturing, distributing and selling household appliances is in interstate commerce. The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.

The defendants did not dispute these allegations, but sought summary judgment and dismissal of the complaint for failure to state a cause of action. They submitted unchallenged affidavits which showed that there were hundreds of other household appliance retailers, some within a few blocks of Klor's who sold many competing brands of appliances, including those the defendants refused to sell to Klor's. (at 209-210)

…

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of *Standard Oil Co*. v. *United States*, 221 U.S. 1, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id*., at 59-60. The Court construed § 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . . ." *Id*., at 61. The effect of both sections, the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce. *Id*., at 57, 61; *Eastern States Lumber Assn*. v. *United States*, 234 U.S. 600, 609. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U.S., at 58, 65. As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. *Id*., at 63-68.

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468.Cf. *United States* v. *Trenton Potteries Co*., 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co*. v. *Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States* v. *Patten*, 226 U.S. 525, 542. (at 211-212)

…

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." *International Salt Co*. v. *United States*, 332 U.S. 392, 396. (at 213-214)

Comment

The Court's decision emphasizes traders' freedom to trade. Note the similarities between this case and the fact pattern of the early "robber baron" cases (e.g. *Standard Oil*), in which one company used its power to pressure its competitors' trading partners. The facts in this case bear more resemblance to the old common law economic torts than to other per se violations such as horizontal price fixing.

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)

This case concerns commercial relations among certain Indiana dentists, their patients, and the patients' dental health care insurers. The question presented is whether the Federal Trade Commission correctly concluded that a conspiracy among dentists to refuse to submit x rays to dental insurers for use in benefits determinations constituted an "unfair method of competition" in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (1982 ed. and Supp. II). (at 448-449)

…

As for the second crucial finding -- that competition was actually suppressed -- the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some restraint, compete. Second, the court found that even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x rays along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment." 745 F.2d, at 1143.

Neither of these criticisms of the Commission's findings is well founded. The Commission's finding that "[in] the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . comply with the requests of patients' third-party insurers," 101 F. T. C., at 173, finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply with insurers' requests for x rays. See App. to Pet. for Cert. 289a, 306a-308a. Moreover, there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests. 101 F. T. C., at 172. A "reasonable mind" could conclude on the basis of this evidence that competition for patients, who have obvious incentives for seeking dentists who will cooperate with their insurers, would tend to lead dentists in Indiana (and elsewhere) to cooperate with requests for information by their patients' insurers.

The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette) insurance companies were unable to obtain compliance with their requests for submission of x rays in conjunction with claim forms and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly -- indeed, prohibitively costly -- methods of reviewing treatment decisions is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained. (at 456-457)

…

The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act -- that is, whether the Federation's collective refusal to cooperate with insurers' requests for x rays constitutes an "unreasonable" restraint of trade. Under our precedents, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "*per se*" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "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." *Chicago Board of Trade* v. *United States*, 246 U.S., at 238.

The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co*. v. *Barry*, 438 U.S. 531 (1978);*Paramount Famous Lasky Corp*. v. *United States*, 282 U.S. 30 (1930).Although this Court has in the past stated that group boycotts are unlawful *per se*, see *United States* v. *General Motors Corp*., 384 U.S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc*. 359 U.S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the *per se* rule. As we observed last Term in *Northwest Wholesale Stationers, Inc*. v. *Pacific Stationery & Printing Co*., 472 U.S. 284 (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor -- a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc*. v. *Columbia Broadcasting System, Inc*., 441 U.S. 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.

Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire -- the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers, supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc*. v. *Columbia Broadcasting System, Inc., supra; Chicago Board of Trade, supra*; cf. *National Collegiate Athletic Assn*. v. *Board of Regents of Univ. of Okla*., 468 U.S. 85 (1984) -- such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place," *National Society of Professional Engineers, supra*, at 692, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect. (at 458-459)

…

The factual findings of the Commission regarding the effect of the Federation's policy of withholding x rays are supported by substantial evidence, and those findings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from the claimed impropriety of the finding of a violation, the Commission's order must be sustained. (at 466)

Comment

Despite the Court's conclusion that it did not need to engage in extensive analysis of the case, the Court treated the case under a "rule of reason" standard, without invoking any "quick look" doctrine (at least in form if not substance). The Court structured its rule of reason analysis through four questions: 1) What is the market? 2) Do the defendants have market power? 3) Does the agreement harm competition? 4) Are there efficiencies which justify the agreement?

Palmer et al. v. BRG of Georgia, Inc., et al., 498 U.S. 46 (1990)

HBJ began offering a Georgia bar review course on a limited basis in 1976, and was in direct, and often intense, competition with BRG during the period from 1977 to 1979. BRG and HBJ were the two main providers of bar review courses in Georgia during this time period. In early 1980, they entered into an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name "Bar/Bri." The parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia. Under the agreement, HBJ received $ 100 per student enrolled by BRG and 40% of all revenues over $ 350. Immediately after the 1980 agreement, the price of BRG's course was increased from $ 150 to over $ 400.

…

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "formed for the purpose and with the effect of raising" the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents' favor. Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

United States v. Joyce, 895 F.3d 673, 679 (9th Cir. 2018)

Appellant Thomas Joyce was charged by indictment with conspiring to suppress and restrain competition by rigging bids, in violation of the Sherman Act, 15 U.S.C. § 1. Joyce brought a pretrial motion, arguing the matter should be adjudicated under a rule of reason analysis rather than the per se analysis advocated by the government. The district court ruled against Joyce, concluding the bid-rigging scheme alleged in the indictment was illegal per se under Section 1 of the Sherman Act. Joyce proceeded to trial and was convicted. He challenges his conviction, arguing the district court erred by refusing to apply the rule of reason analysis to the bid-rigging charge.

In this appeal, we are presented with the question of whether bid rigging is a per se violation of Section 1 of the Sherman Act. We conclude it is.

…

Joyce does not contest that the conduct described in the indictment was classic bid rigging or that the evidence presented at trial was insufficient to establish he engaged in bid rigging. *See* Appellant Br. at 11 (referring to his own conduct as a "bid rigging agreement"). Instead, he argues the per se rule should not apply to the scheme in which he participated because that scheme, which he says involved "a few participants in a narrow set of public foreclosure auctions," did not have any "demonstrable effect on the pricing or quantity of the real estate sold." *Id.* When a defendant's conduct falls squarely into a category of economic restraint necessarily prohibited by Section 1 of the Sherman Act, however, the per se rule applies and "the need to study the reasonableness of an individual restraint" on trade is eliminated. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); *Brown*, 936 F.2d at 1045 (holding the "case-by-case analysis is unnecessary when the restraint [on trade] falls into a category of agreements which have been determined to be per se illegal"). Accordingly, Joyce's assertion that the district court erred by not allowing him to present evidence to the jury regarding the actual effect his conduct had on the market for foreclosed properties is misplaced. The per se rule eliminates the need to inquire into the specific effects of certain restraints of trade. *N. Pac. Ry. Co.*, 356 U.S. at 5. The very purpose of the per se rule is to "avoid[] the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Id.* (at 677-678)