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## 1990 ANNUAL ANTITRUST REVIEW

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### *TRIAL LAWYERS AND ARCO: JURISPRUDENTIALLY INCONSISTENT APPROACHES TO PER SE ILLEGALITY*

by Michael Malina\*

#### INTRODUCTION

THE antitrust history of the past fifteen years has seen a marked—one might even say remarkable—resurgence of the Rule of Reason as the governing criterion of illegality under Section 1 of the Sherman Act.<sup>1</sup> Commencing with its landmark 1977 decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*,<sup>2</sup> the Supreme Court has resuscitated the Rule of Reason from a standard often honored more in the breach than in the application to the flexible and pragmatic doctrine that its authors envisioned. This development was by no means limited to the vertical restraints involved in the *Sylvania* case. Decisions like *Broadcast Music, Inc. v. Columbia Broadcasting System*<sup>3</sup> and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*<sup>4</sup> suggested that the Court intended to apply the newly revitalized Rule of Reason to appropriate horizontal restraints as well—indeed, even to some forms of price fixing. One can well imagine the reactions that Justices Black and Douglas—the champions of the per se approach to most Section 1 restraints—would have had.

This seemingly straight-line expansion of the Rule of Reason at the expense of per se rules appears to have taken a slight detour in the past Supreme Court Term. More particularly, in *FTC v. Superior Court Trial Lawyers Association*,<sup>5</sup> a six-Justice majority applied the per se rule against horizontal price fixing in language reminiscent of Justices Black and Douglas at their most severe, even going so far as to quote approvingly from Douglas' famous—or perhaps infamous—footnote 59 in *United States v. Socony-Vacuum Oil Co.*<sup>6</sup>

Even more interesting is the Court's apparently inconsistent jurispru-

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1. 15 U.S.C. § 1 (1988).

2. 433 U.S. 36 (1977).

3. 441 U.S. 1 (1979).

4. 468 U.S. 85 (1984).

5. 493 U.S. 411 (1990).

6. 310 U.S. 150, 224 n.59 (1940).

dential approach to the question of when per se rules ought to be applied and, more significantly, why. Emerson taught that foolish consistency is the hobgoblin of little minds.<sup>7</sup> While no one would argue that the Supreme Court should strive for consistency when the end result is foolishness, it is certainly not foolish to expect the Court to apply consistent approaches to common issues in the same Term. Yet, for this reader, the two decisions of the past Term that dealt with price fixing defy rationalization.

I refer to the six-to-three decision in *FTC v. Superior Court Trial Lawyers Association*, which held that a boycott by court-appointed attorneys in the District of Columbia constituted a per se unlawful price-fixing agreement because it was intended to increase the price that the District paid for the lawyers' services;<sup>8</sup> I also refer to the seven-to-two decision five months later in *Atlantic Richfield Co. v. USA Petroleum Co.*,<sup>9</sup> which held that a competitor could not, as a matter of law, establish antitrust injury caused by a vertical conspiracy among a supplier and its dealers to charge low, but not predatory, prices in an effort to drive the plaintiff out of business.<sup>10</sup> While at first blush these decisions may not appear to be inconsistent—or even to deal with the same question—upon closer analysis, a jurisprudential inconsistency in the application of the per se rule is readily apparent.

#### A. *FTC v. Superior Court Trial Lawyers Association*

The operative facts of the *Trial Lawyers* case were stated by the Supreme Court in a single sentence: "a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation."<sup>11</sup> That statement may be accurate, but it hardly does justice to the factual context of the Court's ruling. In eighty-five percent of the annual 25,000 criminal cases brought against indigent defendants in the District of Columbia, the accused is represented by a lawyer in private practice appointed and compensated pursuant to the District's Criminal Justice Act. While more than 1,200 attorneys have registered for such appointments, most of the appointments go to a group of some one-hundred "CJA regulars" who "derive almost all of their income from representing indigents."<sup>12</sup>

The compensation paid to these attorneys is set by a Joint Committee on Judicial Administration. The Committee has statutory authority to provide rates not exceeding those established by the Criminal Justice Act

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7. See Emerson, *Self-Reliance*, in *The Complete Works of Ralph Waldo Emerson* 57 (1903).

8. See *Trial Lawyers*, 493 U.S. at 416-17.

9. 494 U.S. 411 (1990).

10. See *id.* at 1891.

11. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 413 (1990).

12. *Id.* at 414.

of 1964—rates that are unquestionably low by current standards of attorney compensation: thirty dollars per hour for court time and twenty dollars per hour for out-of-court time. Under this regulatory scheme, CJA regulars could not get a rate increase unless Congress amended the federal statute or the District's government amended the District Code.<sup>13</sup>

Starting in 1982, the Superior Court Trial Lawyers Association, together with other bar groups, sought unsuccessfully to persuade the District government to increase rates to at least thirty-five dollars per hour. When attempts at persuasion failed, an organized boycott ensued. The lawyers agreed to decline new appointments until the District passed legislation increasing their fees. Unlike the typical Section 1 case, there was no issue as to the existence of an agreement. This one was in writing—almost one hundred lawyers signed a petition stating that “‘unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.’”<sup>14</sup>

Pursuant to that agreement, approximately ninety percent of the CJA regulars refused to accept new assignments. Within a few days, the remaining lawyers were overloaded, and in little more than a week key figures in the District's criminal justice system had concluded that it was “‘on the brink of collapse.’”<sup>15</sup> The mayor agreed, and after meeting with the Association's leaders, offered an immediate temporary increase to thirty-five dollars per hour, to be followed by a permanent increase to fifty-five dollars for court time and forty-five dollars for out-of-court time. The lawyers accepted the proposal. The next day the city council passed a bill embodying the new rates, and the lawyers began to accept new assignments.<sup>16</sup>

Over the dissent of Commissioner Pertschuk,<sup>17</sup> who felt it was an unwise use of the Commission's scarce resources, the FTC filed a complaint against the Association and four of its officers, asserting a violation of Section 5 of the FTC Act by virtue of “a conspiracy to fix prices and to conduct a boycott.”<sup>18</sup> After a three week trial, the Administrative Law Judge found the facts alleged in the complaint proved and rejected all of the Association's legal defenses. He nevertheless dismissed the complaint because the District's officers, who after all represented the boycott's victim, recognized that its net effect was beneficial in that higher rates would attract more lawyers, reduce caseloads and, accordingly, result in better representation for indigent defendants.<sup>19</sup>

That pragmatic conclusion did not fare very well with the Commis-

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13. *See id.*

14. *Id.* at 414-15 (quoting the court it reversed, Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 230 (D.C. Cir. 1988)).

15. *Id.* at 415 (quoting *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 544 (1986)).

16. *See id.* at 415.

17. *In re Superior Court Trial Lawyers Association*, 107 F.T.C. 510, 512-13 (1986).

18. *Id.* at 511.

19. “I see no point in striving resolutely for an antitrust triumph in this sensitive area

sion, which reversed the ALJ's dismissal, holding that the lawyers' concerted refusal to deal had the "purpose and effect of raising prices" and was therefore per se illegal.<sup>20</sup> On appeal, however, the D.C. Circuit vacated the Commission's order.<sup>21</sup>

While the court of appeals agreed that the boycott was a classic restraint of trade, it concluded that the agreement contained an element of expression warranting first amendment protection.<sup>22</sup> Once first amendment values appeared in the decisional calculus, expression could be restricted only to the extent necessary to protect an important governmental interest.<sup>23</sup> Under that rubric, the court of appeals held that the lawyers' boycott could not be condemned by application of a per se rule.<sup>24</sup> Rather, the Commission would have to prove "that the evil against which the Sherman Act is directed looms in the conduct"<sup>25</sup> under challenge. Accordingly, the D.C. Circuit remanded the case to the Commission to determine whether the boycotting lawyers possessed sufficient market power to produce a substantial anticompetitive effect—in other words, for a determination of legality under the Rule of Reason.<sup>26</sup>

In an opinion by Justice Stevens, a six-Justice majority of the Supreme Court reversed.<sup>27</sup> For Justice Stevens, the issue before the Court was a simple one: does the per se rule against horizontal price fixing apply when the agreement is implemented by organizing a seller's boycott against a buyer that happens to be an organ of government? His answer was equally simple: a resounding affirmative in language quite familiar to those who learned normative antitrust doctrine in the 1960s. The opinion reads like a primer in the per se illegality of horizontal price fixing arrangements. In a nutshell, the majority held that an agreement among sellers of a service to withhold their services from the marketplace until the buyer pays a higher price for them is a classic price-fixing agreement condemned by the per se rule ever since *United States v. Trenton Potteries Co.*<sup>28</sup> more than sixty years ago.

For the three dissenters—Justices Brennan, Marshall and Blackmun—the issue in *Trial Lawyers* was more closely related to first amendment principles than to the jurisprudence of the Sherman Act.<sup>29</sup> Because the

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when the particular case can be disposed of on a more pragmatic basis—there was no harm done." *Id.* at 561.

20. *See id.* at 573.

21. *See* Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 253 (D.C. Cir. 1988), *rev'd*, 493 U.S. 411 (1990).

22. *See id.* at 248.

23. *See* *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

24. *See* *Trial Lawyers Ass'n*, 856 F.2d at 248-50.

25. *Id.* at 250-53.

26. *See id.* at 250.

27. *See* *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 770 (1990). Joining Justice Stevens were Chief Justice Rehnquist and Justices White, O'Connor, Scalia and Kennedy.

28. 273 U.S. 392 (1927).

29. *See* *Trial Lawyers*, 493 U.S. at 430-34.

boycotted party was the government of the District of Columbia and the direct objective of the conspirators was to persuade that governmental organ to make a legislative decision to increase lawyers' rates, the boycott was a form of expression implicating freedom of speech concerns. As the dissenters saw it, a per se rule of illegality was inappropriate in those circumstances. Rather, Justice Brennan argued, the court of appeals' solution to the apparent conflict between first amendment concerns and Sherman Act doctrine was a fair compromise: apply the Rule of Reason and condemn the expressive political boycott only if it is proved that the lawyers actually exercised market power to coerce a higher price, rather than merely to persuade the District government to change its mind as a political matter.<sup>30</sup>

Because all nine Justices agreed on all but one section of the majority opinion—and that disagreement turned on the interplay between the Sherman Act and the first amendment, *not* on the substance of antitrust doctrine—analysis of the decision's doctrinal importance must commence with an examination of Justice Stevens' opinion, focusing first on those portions of the opinion that the entire Court endorsed.

Justice Stevens begins with a preface noting that the wisdom of the Commission's proceeding against the lawyers was open to substantial question. "Reasonable lawyers," he writes, "may differ about the wisdom of this enforcement proceeding. . . . Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants."<sup>31</sup> He goes on, however, to state that these "assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements."<sup>32</sup> That statement, by a unanimous Supreme Court, is hardly news. It has been the view of the Court since *Trenton Potteries* that the legislative judgment condemning price fixing takes the issue of such conduct's potential social desirability out of the judicial ambit. The question, rather, has been just what conduct should be labeled as price fixing.

On that question—whether the lawyers' boycott constituted price fixing—the Court was also unanimous. Justice Stevens writes that the boycott was "'a classic restraint of trade within the meaning of Section 1 of the Sherman Act,'"<sup>33</sup> quoting the court of appeals for that uncontroversial proposition. Continuing in that vein, the opinion states: "Prior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services

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30. *See id.* at 433-34.

31. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 417 (1990).

32. *Id.*

33. *Id.* (quoting *Superior Court Trial Lawyers Ass'n v. FTC* 856 F.2d 226, 234 (D.C. Cir. 1988)).

to the District at CJA rates."<sup>34</sup> That sentence leaves substantial room for controversy. To be sure, before the boycott was organized each of the CJA lawyers made his own decision as to whether and when to accept appointments to represent indigent defendants. But is it really accurate to describe the situation as "competition"? The lawyers certainly were not competitors in the every-day sense of the term. The price was set by law by a governmental monopsonist. This was not competition in the traditional sense of a marketplace where one seller tries to persuade a buyer to purchase from him rather than from his competitor by offering a better price, a better product or a better service. This was a take-it-or-leave-it situation for the attorneys. In many respects the market bore a greater resemblance to a regulated industry than to a competitive model, in that the price was set by governmental decision rather than by market forces of supply and demand. Given the case's unusual context, it seems somewhat bizarre for the Court to speak of "competition" among the lawyers and then to decide the case on the basis of principles applicable to competitive markets and of marginal utility in analyzing markets subject to regulation.<sup>35</sup>

Justice Stevens, still for a unanimous Court, goes on to tell us that the boycott agreement "was designed to obtain higher prices for [the attorneys'] services and was implemented by a concerted refusal to serve an important customer."<sup>36</sup> Such conduct, he writes, is a "constriction of supply [which] is 'the essence of "price-fixing," whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.'"<sup>37</sup> Quoting his 1978 opinion in *National Society of Professional Engineers v. United States*,<sup>38</sup> Stevens concludes that the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."<sup>39</sup> While that is certainly a fair statement of the theory underlying the competitive marketplace (and hence the antitrust regime designed to protect it), its relevance in the context of this case is highly questionable.

As noted above, it was not competition among the Association lawyers that kept the price of their services low; it was statutory mandate. These sellers of legal services were price *takers*, not price *makers*; and it was legislative fiat, not the marketplace, that set the price they could accept or reject. Justice Stevens' very next sentence—also quoted from *Professional Engineers*—seemingly compounds his error in perception. The

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34. *Id.*

35. *See, e.g.,* *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22, 25-29 (1st Cir. 1990) (price squeeze did not violate Sherman Act when electrical utility's prices were subject to primary and secondary regulation), *cert. denied*, 111 S. Ct. 1337 (1991).

36. *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 775 (1990).

37. *Id.* at 775 (quoting the court it reversed, *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 234 (D.C. Cir. 1988), *rev'd*, 493 U.S. 411 (1990)).

38. 435 U.S. 679 (1978).

39. *Trial Lawyers*, 110 S. Ct. at 775 (quoting *Professional Eng'rs*, 435 U.S. at 695).

legislative judgment in favor of competition, he writes, "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."<sup>40</sup> One might well ask "what alternative offers?" The Court's statement is axiomatic in the normal competitive situation where sellers compete with one another on the basis of price, quality and service. But here, there was a substantial demand for the lawyers' services and not enough lawyers to satisfy it.<sup>41</sup> The District government set the price that the sellers of those services had to accept or leave the market. There simply were no alternative offers, nor could there be under the applicable regulatory regime.

In his zeal to reaffirm the vitality of per se price-fixing principles, Justice Stevens applied them to this extraordinary set of facts by engaging in what Karl Llewellyn labeled "lump concept" thinking.<sup>42</sup> It does not do justice to antitrust doctrines—even one as basic as the inherently anticompetitive nature of horizontal price fixing agreements—to apply them full blown and without discriminating analysis to unique circumstances. Given the admittedly questionable wisdom of bringing the case in the first place as well as the concrete public benefits that unquestionably flowed from the defendants' conduct, the rigidity of per se treatment appears out of keeping with a mature and flexible jurisprudence. This is not, however, to suggest that the legality of this boycott cannot sensibly be assessed under a per se rule. The point is that whatever one's view of the matter may be, it is not appropriate to treat this case as merely a routine example of garden variety cartelization.

Still speaking for a unanimous Court, the majority opinion proceeds to dispose of the attorneys' contention that their conduct constituted political petitioning beyond the scope of the Sherman Act under the *Noerr-Pennington* doctrine.<sup>43</sup> As Justice Stevens explained,<sup>44</sup> that issue was controlled by the 1988 decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*<sup>45</sup> *Indianhead* made it clear that the *Noerr-Pennington* doctrine protects otherwise unlawful concerted conduct only where the restraint that lessens competition is the consequence of governmental action and the private conspiracy is merely a means of seeking a

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40. *Id.*

41. Indeed, this market's anticipated behavior appears to be the antithesis of the competitive model, in that an increase in price would *not* be likely to result in a diminution of output, and might well produce an increase by inducing more attorneys to accept appointments to represent indigents.

42. See, e.g., K. Llewellyn, *Cases and Materials On The Law Of Sales* xiv (1930) (referring to treatment of the concept of title "as a lump").

43. The doctrine derives from a trio of Supreme Court decisions: *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

44. See *Trial Lawyers*, 493 U.S. 411, 419 (1990).

45. 486 U.S. 492 (1988).



favorable governmental response.<sup>46</sup> Because the lawyers' boycott directly restrained the market for lawyers' services, the *Trial Lawyers Court* reasoned, *Noerr* simply did not apply.<sup>47</sup>

That brought Justice Stevens to the first amendment issue. Significantly, the core of that discussion—including his distinction of *NAACP v. Claiborne Hardware Co.*<sup>48</sup>—continues to speak for a unanimous Court. *Claiborne*, decided in 1982, held that the first amendment protected a boycott by black citizens of white merchants in a Mississippi county against challenge under state law. The Court in *Claiborne* reasoned as follows: the “‘right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.’”<sup>49</sup> The boycotting lawyers argued that their case fell within *Claiborne* because their conduct was politically motivated and sought to vindicate the Constitutional rights of accused indigents to the assistance of counsel.<sup>50</sup> The Court disagreed. The fundamental distinction, Justice Stevens stated, was that the lawyers' objective “was an economic advantage for those who agreed to participate”<sup>51</sup>—higher prices for their services. In *Claiborne*, on the other hand, the persons who joined the boycott of white merchants “sought no special advantage for themselves.”<sup>52</sup> As for the claim that the purpose of the lawyers' boycott was the vindication of indigent defendants' rights, the Court declared that *Claiborne* “does not, and could not, establish a rule immunizing from prosecution any boycott based upon sincere constitutional concerns.”<sup>53</sup> A rule of constitutional law that would protect so-called expressive boycotts from economic regulation when the boycotted parties do not seek anything for themselves raises a number of interesting first amendment questions. Insofar as anti-trust is concerned, however, and with the possible exception of issues concerning the applicability of the Sherman Act in such situations to non-profit institutions, the holding in *Trial Lawyers* is not likely to have great doctrinal significance.

That brings us to the section of Justice Stevens' opinion that produced the split in the Court and an impassioned dissent from Justice Brennan

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46. *See id.* at 502-07.

47. *See Trial Lawyers*, 493 U.S. at 419. As Justice Stevens put it:

The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

*Id.*

48. 458 U.S. 886 (1982).

49. *Trial Lawyers*, 493 U.S. 411, 419-20 (1990) (quoting *Claiborne*, 458 U.S. at 914).

50. *See id.* at 419-20.

51. *Id.* at 420.

52. *Id.*

53. *Id.* 420 n.11.

on first amendment grounds. At this stage of the analysis, the entire Court had agreed that the boycott was a classic horizontal restraint of trade that would ordinarily violate Section 1; that the *Noerr-Pennington* doctrine was inapplicable; and that the expressive qualities of the concerted action did not give rise to a complete first amendment shield against antitrust liability. The only remaining issue was whether the court of appeals was correct in rejecting the applicability of a per se rule on a theory that Justice Stevens himself deemed "creative."<sup>54</sup>

In its 1968 decision in *United States v. O'Brien*,<sup>55</sup> the Supreme Court clarified the standard for government regulation of expressive conduct. *O'Brien* held that the government may regulate expressive conduct—in that case, the burning of the defendant's draft card—consonant with the first amendment only if the restriction on freedom of expression is no greater than necessary to further the governmental interest in regulation. Applying that rule to the lawyers' boycott, the D.C. Circuit held that the expressive component of the boycott compelled the court to apply the Sherman Act "with a special solicitude for" the attorneys' first amendment rights.<sup>56</sup> According to Judge Ginsburg, it followed that the government's interest in prohibiting anticompetitive boycotts did not justify restricting the communicative element of this conduct unless it was proved that the boycotters in fact possessed market power—in other words, that the first amendment itself prohibited application of a per se rule. As Justice Stevens paraphrased the court of appeals' holding, the lower court "ruled that per se antitrust analysis was inapplicable to boycotts having an expressive component."<sup>57</sup>

The majority rejected that approach out of hand, finding "two critical flaws in the Court of Appeals' antitrust analysis."<sup>58</sup> First, the Court concluded that Judge Ginsburg had exaggerated the expressive component of the boycott by assuming that most economic boycotts do not have an expressive component; and second, the Court found that he had denigrated the importance of the per se rule against price fixing by assuming that it is merely a rule of administrative convenience serving no meaningful governmental purpose in the absence of market power.<sup>59</sup>

On the first point, the majority stated categorically that "[e]very concerted refusal to do business with a potential customer or supplier has an expressive component."<sup>60</sup> The Court noted that all conspiracies in restraint of trade, including the "most blatant, naked price-fixing agreement[s]," are the product of communication and that boycotts in particular always convey an expressive message: "we will not do busi-

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54. See *id.* at 417.

55. 391 U.S. 367 (1968).

56. See *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 233-34 (D.C. Cir. 1988), *rev'd*, 493 U.S. 411 (1990).

57. *Trial Lawyers*, 493 U.S. 411, 421 (1990).

58. *Id.*

59. See *id.*

60. *Id.*

ness [with you] until you do what we ask.' ”<sup>61</sup> According to the majority, because all boycotts have this expressive element, an exception that affords special treatment to those with expressive components would swallow the rule,<sup>62</sup> creating what Justice Stevens called a “gaping hole in the fabric” of the antitrust laws.<sup>63</sup>

This analysis, however, disregards a significant difference between the boycott in question and the typical economic boycott. In this case, the boycotted party was the government of the District of Columbia, and the desired result of the attorneys’ efforts was the legislation needed to raise their rates of pay. That made the conspiracy here a political act, a point not lost on the dissenters.<sup>64</sup> For Justice Stevens to conclude blithely that there is “nothing unique about the ‘expressive component’ of respondents’ boycott”<sup>65</sup> ignores the special character of this case in the name of reaffirming the Court’s intention to apply the *per se* rule against all horizontal cartelization with full force. But it does not follow necessarily that courts must treat boycotts designed to generate a political response in the identical manner as those without that special feature. Nor does it advance the inquiry to avoid the question by asserting that a political element in the boycott is not present.

It is in Justice Stevens’ discussion of what he perceives as the second flaw in the court of appeals’ decision that the case’s future impact on antitrust jurisprudence will most likely lie. The court of appeals had assumed, he writes, that “‘the antitrust laws permit, but do not require, the condemnation of price fixing [and boycotts] without proof of market power;’ ”<sup>66</sup> and that even “‘the *per se* rule . . . ‘is only a rule of administrative convenience and efficiency, not a statutory command.’ ”<sup>67</sup> According to the Supreme Court majority, this statement is wrong on both counts.

Justice Stevens views the *per se* rules as if they had been expressly included in the statute that Congress passed and the President signed in 1890: “[t]he *per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands.”<sup>68</sup> Justice Douglas or Justice Black could not have said it in any stronger words. Justice Stevens rejects with equal fervor the idea that administrative convenience, while

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61. *Id.*

62. *See id.*

63. *Id.* at 421-22.

64. As stated by Justice Brennan, “[w]hen a boycott seeks to generate public support for the passage of legislation, it may operate on a *political* rather than *economic* level, especially when the Government is the target.” *Id.* at 427 (Brennan, J., dissenting) (emphasis in original).

65. *Id.* at 421-22.

66. *Id.* at 422.

67. *Id.* (quoting the court it reversed, Superior Court Trial Lawyers Ass’n v. FTC, 856 F.2d 226, 249 (D.C. Cir. 1988)).

68. *Id.* at 422.

admittedly *one* of the reasons underlying the development of per se rules, is their *sole* justification. He notes that “[e]very [boycott and price fixing arrangement] among competitors poses some threat to the free market”;<sup>69</sup> and, he continues, a “small conspirator may be able to impede competition over some period of time”—a period that “*can* be long enough to inflict real injury upon particular consumers or competitors.”<sup>70</sup>

Taking this statement at face value, the Court maintains that the mere *possibility* that a price-fixing agreement among small competitors with no market power might ultimately have an anticompetitive effect is sufficient justification to condemn all such agreements, even if there is no proof that the agreement in question is likely to produce the prohibited result. Then, to put the icing on the cake, Justice Stevens quotes at length from footnote 59 of Justice Douglas’ opinion in *Socony-Vacuum*, perhaps the strongest statement of the per se rule in all of the United States Reports:

Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.<sup>71</sup>

Having just proscribed all horizontal price fixing, regardless of who the price fixers may be or how negligible their power to influence the market, the opinion proceeds, in its final paragraph, to raise a troubling question as to whether the majority really meant what it had just said. Justice Stevens tells us that one cannot assume that “absent proof of market power, the boycott disclosed by this record was totally harmless . . . . Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power *any greater than that already disclosed by this record*, to warrant condemnation under the antitrust laws.”<sup>72</sup> If “market power” means enough power to affect prices in the marketplace, this very last sentence suggests that there might be cases in which the price fixers’ market power is so small—less market power than disclosed by the record in the case before the Court—that per se condemnation would not be warranted. And that, with due respect to Justice Stevens, is precisely what the rest of the opinion has gone to extraordinary lengths to tell us will never be the case. Put another way, the opinion’s final paragraph suggests that there was, in fact, a sufficient showing that the boycotting lawyers had enough market power to coerce the desired result—exactly what the Court had just concluded was unnecessary for condemnation

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69. *Id.* at 423.

70. *Id.* (emphasis added).

71. *Id.* at 423-24 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26 n.59 (1940)).

72. *Id.* at 424 (emphasis added).

under the per se rule.<sup>73</sup>

What does all this add up to? To begin with, the Court has reaffirmed its long-standing adherence to the per se illegality of horizontal price fixing. That alone is hardly surprising, although there were indications in cases like *BMI* and *NCAA* that the traditional breadth of the rule might some day be constricted. It suffices to note that, at least as to horizontal price fixing arrangements, we are squarely alongside *Socony-Vacuum*, if indeed we ever left it. Thus, an agreement between two corner grocery stores to raise the price of coffee by five cents a pound continues to be a per se violation of Section 1 of the Sherman Act, even if all the shoppers in the area can go to any of a dozen neighboring supermarkets and buy their coffee at the pre-conspiracy lower price. Whatever the extent of the Chicago School's influence on antitrust doctrine may be, it now seems clear that this fundamental principle remains steadfast. Nor does there appear to be any room for a "defensive combination" or "countervailing power" defense to a horizontal price fixing agreement. If the Court is saying anything in *Trial Lawyers*, it surely is announcing that the law remains as it has been for decades: price fixing among sellers is unlawful no matter how insignificant the conspirators' position in the marketplace.

One might well ask whether the same broad-brush approach would be applied to an arrangement among *buyers* to limit the price they are willing to pay for goods or services. For example, would Justice Stevens and the Supreme Court majority apply the per se rule to a consumer boycott designed to drive prices down? Suppose two homemakers decide that they are fed up with the high price of coffee at the A&P and agree not to buy that product there until the store's management lowers the price by five cents a pound. Would the *Trial Lawyers* Court condemn that agreement as per se illegal price fixing without regard to the conspirators' manifest inability to produce a significant market impact? A number of cases do appear to treat buyer price fixing less harshly than the seller variety.<sup>74</sup> As a matter of theory, however, it is hard to see why there should be any great difference—unless one concludes, with our friends

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73. Interestingly, in his separate dissent Justice Blackmun takes a diametrically opposing view. As he sees it, the attorneys had no market power at all because, in the exercise of its supervisory powers over the bar, the Superior Court could have ordered them to take the cases pro bono. Because he agreed with Justices Brennan and Marshall that there should be no illegality without a showing of market power, he would have remanded the case with instructions that the Commission's complaint be dismissed. See *id.* at 433-34 (Blackmun, J., dissenting).

74. See, e.g., *Webster County Memorial Hosp., Inc. v. United Mine Workers of America Welfare & Retirement Fund of 1950*, 536 F.2d 419, 420 (D.C. Cir. 1976) (fund's decision to restrict beneficiaries to emergency cases did not violate antitrust laws); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289, 292-93 (9th Cir. 1971) (agreement between Ford and car dealers' association to deal with only one corporation did not violate antitrust laws), *cert. denied*, 405 U.S. 997 (1972). But see *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The Act is comprehensive . . . protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

from Chicago, that antitrust is concerned only with conduct that is likely to increase prices and thus injure consumers. That, I suggest, is precisely what Justice Stevens' opinion in *Trial Lawyers* tells us is *not* the case. Price fixing is bad because it tampers with the "central nervous system" of the economy. It is the market, not the conspirators, that must set the price; thus it matters not whether prices will necessarily be raised, thereby injuring consumers. If that is the case, the per se rule should apply with equal force whether the conspirators are buyers or sellers.

There is another noteworthy point. Justice Brennan's dissent, while focusing primarily on the first amendment issue he and his colleagues see raised by the antitrust condemnation of a political boycott, questions the majority decision on another ground. Justice Brennan argues that per se treatment runs counter to a recent line of decisions applying the Rule of Reason to boycotts<sup>75</sup>—principally his own ruling in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*<sup>76</sup>

Just as the majority paid insufficient attention to the dissent's stress on the political nature of the boycott, here the dissenters carefully disregard Justice Stevens' principal point: that the action by the Trial Lawyers Association was not simply a horizontal boycott, but a concerted refusal to deal for the purpose of raising the price, a refusal that implicates the rule against price fixing. Neither *Northwest Wholesale Stationers* nor any of the other boycott cases cited by the dissent involved price fixing concerns, a point that the majority opinion notes in a footnote to which the dissenters do not respond.<sup>77</sup>

In the final analysis, probably the most significant attribute of the *Trial Lawyers* opinion is its rhetoric. The absolutism of Justice Stevens' affirmation of the per se rule against price fixing heralds a departure from the tone of recent Supreme Court antitrust opinions. Perhaps, as Eleanor Fox has recently suggested,<sup>78</sup> the Court is in the process of resolving a conflict between two opposing views of the per se approach to Section 1. If the Court is indeed reassessing its approach to the per se rule under Section 1, *Trial Lawyers* would certainly appear to signal a return to the black letter approach that reached its zenith in the Court's pro-enforcement decisions of the 1940s, 1950s and 1960s.<sup>79</sup>

## B. Atlantic Richfield Co. v. USA Petroleum Co.

A resurgence of the per se rule, however, may be somewhat questiona-

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75. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-33 (1990) (Brennan, J. dissenting).

76. 472 U.S. 284 (1985).

77. See *Trial Lawyers*, 493 U.S. at 424 n.19.

78. Fox, *The Future Of The Per Se Rule: Two Visions At War With One Another*, 29 Washburn L.J. 200, 201 (1990).

79. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 151-52 (1968) (maximum price fixing is per se illegal); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (boycotts and refusals to trade violate antitrust laws).

ble, especially in light of *Atlantic Richfield Co. v. USA Petroleum Co.*<sup>80</sup> Here the tables are turned, with Justice Brennan writing for the majority and Justice Stevens filing an impassioned dissent.<sup>81</sup> At first blush, *ARCO* appears to deal with a different issue, one that has fascinated the Court in recent years: the contours of the requirement that a private plaintiff prove "antitrust injury" caused by defendant's violation. Established in *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.*<sup>82</sup> and reaffirmed in other decisions,<sup>83</sup> the antitrust injury doctrine requires a private plaintiff to show that his injury (or threatened injury in an injunctive case) is "of the type the antitrust laws were intended to prevent and that [it] flow[ed] from that which makes [the] defendants' acts unlawful."<sup>84</sup> Even though *ARCO* primarily concerns "antitrust injury," the case's theoretical underpinning raises the significant question of whether, and if so, what degree of credence can be given to *Trial Lawyers* as an expression of the Court's current attitude towards the per se rule against price fixing.

*ARCO* was a private damage action brought by USA Petroleum, an independent operator of discount gasoline stations in California.<sup>85</sup> The claim was that in an effort to increase its dealers' sales in the face of competition with discounters like the plaintiff, ARCO entered into a vertical conspiracy with its dealers setting a maximum resale price for ARCO gasoline.<sup>86</sup> As the case reached the Supreme Court, it was assumed as a fact that the agreed-upon price, while lower than what would have prevailed in an unrestrained market, was not "predatory"—that is, it was not so low as to give rise to liability under Section 2 of the Sherman Act if the seller possessed or had a dangerous probability of acquiring monopoly power.<sup>87</sup> The complaint alleged that the purpose of this vertical maximum price-fixing conspiracy was to drive independents like the plaintiff out of the California market.<sup>88</sup>

The district court granted summary judgment for the defendant, holding that even if the plaintiff could prove an unlawful conspiracy to drive prices down, in the absence of predation, the plaintiff could not establish that it suffered antitrust injury as a result of the defendants' violation of Section 1.<sup>89</sup> The Ninth Circuit reversed, ruling that injuries resulting

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80. 110 S. Ct. 1884 (1990).

81. Joining the majority opinion were Chief Justice Rehnquist and Justices Marshall, Blackmun, O'Connor, Scalia and Kennedy. Justice Stevens was joined in his dissent by Justice White.

82. 429 U.S. 477 (1977).

83. The most notable case is *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). In *Cargill*, the Court extended the *Brunswick* rule, which had been established in a treble-damage action, to actions seeking only injunctive relief. *See id.* at 113.

84. *Brunswick*, 429 U.S. at 489.

85. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1887-88 (1990).

86. *See id.* at 1888.

87. *See id.*

88. *See id.*

89. *See id.*

from non-predatory maximum price-fixing agreements *could* constitute antitrust injury.<sup>90</sup> The court of appeals reasoned that price fixing, whatever its form, violates the Sherman Act because it was Congress' intent that "market forces alone determine what goods and services are offered, at what price these goods and services are sold, and whether particular sellers succeed or fail."<sup>91</sup> It followed that the plaintiff could show injury flowing from that which made the conduct unlawful—and thus establish antitrust injury—if it could establish that its loss resulted from a disruption in market forces caused by the conspiracy: that is, that below-market prices resulted from a maximum price-fixing agreement.<sup>92</sup>

One would expect that a Court that had just decided *Trial Lawyers* on the same theory—that price fixing is always detrimental because it interferes with the market's price-setting function—would not have very much difficulty affirming that holding. And that is precisely how the author of *Trial Lawyers*, Justice Stevens, viewed the matter:

Unlike the prohibitions against monopolizing or underselling in violation of § 2 or [§ 2(a) of the Robinson-Patman Act], the gravamen of the price-fixing conspiracy condemned by § 1 is unrelated to the level of the administered price at any particular point in time. . . . [T]he reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal.<sup>93</sup>

When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of protecting competition.<sup>94</sup>

That, of course, is language from Justice Stevens' *dissent*. It was Justice Brennan, the minority spokesman in *Trial Lawyers*, who wrote for the seven-Justice majority that reversed the Ninth Circuit and held that USA Petroleum could not, as a matter of law, establish antitrust injury.

The majority opinion commences with a brief restatement of the antitrust injury principle: it is insufficient for a private plaintiff to establish causation-in-fact between his injury and the defendant's violation; a plaintiff must go further and show injury resulting from that which made the defendants' conduct unlawful.<sup>95</sup> To determine whether USA Petroleum could satisfy that requirement, Justice Brennan turned to the sub-

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90. *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 688 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1884 (1990).

91. *Id.* at 693.

92. "USA's claimed injuries were the direct result, and, indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." *Id.*

93. *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1899 (1990) (Stevens, J., dissenting).

94. *Id.*

95. *See id.* at 1889.



stance of the underlying claim in the case: a vertical conspiracy to set maximum resale prices.

As the law stood when *ARCO* was briefed and argued, vertical maximum price fixing, like its minimum price-fixing cousin, was per se unlawful. That was the Supreme Court's holding in 1968 in *Albrecht v. Herald Co.*,<sup>96</sup> and neither party in *ARCO* asked the Court to overrule it. So Justice Brennan turned to Justice White's opinion in *Albrecht* to see just why it was that *maximum* price fixing had been declared categorically anticompetitive and hence subject to a per se rule. He found three reasons: (1) impeding the buyer's ability to charge more than the seller wants him to might intrude on the buyer's ability to survive in the market, thus lessening the number of competitors; (2) maximum prices might be set at a level too low to permit the buyer to provide services that consumers want and are willing to pay for; and (3) the maximum price, if actually charged by all dealers, is likely to become an established price throughout the market, with the same anticompetitive consequences as a minimum price-fixing agreement.<sup>97</sup> Because USA Petroleum was *ARCO*'s competitor, not a dealer or a consumer, its injury bore no relation to any of these underlying reasons for the *Albrecht* rule. Accordingly, USA Petroleum could not show antitrust injury. As Justice Brennan explained, the plaintiff's losses did not "flow from the aspects of vertical, maximum price fixing that render it illegal."<sup>98</sup>

The opinion nowhere suggests that the alleged vertical price fixing conspiracy, if proved at trial, would not be per se illegal. To the contrary, per se illegality is presumed.<sup>99</sup> But the majority goes out of its way to state that such arrangements cannot cause antitrust injury to a competitor if the agreement on a maximum price does not result in a price that is predatory (which we can safely assume means, at the very least, a price below some measure of cost).<sup>100</sup>

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96. 390 U.S. 145, 152 (1968).

97. *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1890 (1990).

98. *Id.* at 1891. Justice Brennan's analysis of *Albrecht* omits a critical point. Justice White—who, significantly, joined Justice Stevens' dissent in *ARCO*—commenced his discussion of the maximum price-fixing charge by quoting the following language from *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951): "agreements to fix maximum prices 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." *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (quoting *Kiefer-Stewart*, 340 U.S. at 213). The *Albrecht* Court then added: "[w]e think *Kiefer-Stewart* was correctly decided and we adhere to it." *Id.* To the extent that *Albrecht* is grounded upon the inherently illegal nature of any restraint crippling the freedom of a trader to sell as he sees fit, its rationale is surely not limited to the three elements identified by Justice Brennan in *ARCO*.

99. See *ARCO*, 110 S. Ct. at 1889 n.5.

100. The opinion states that "[w]hen prices are not predatory, any losses flowing from them cannot be said to stem from an *anti-competitive* aspect of the defendant's conduct." *Id.* at 1892 (emphasis in original). Then following up in a footnote, the Court notes that

[w]e did not reach a contrary conclusion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* where we declined to define precisely the term 'predatory

Justice Brennan was unimpressed by the plaintiff's quotation from the *Maricopa* case that the per se rule—which everyone agreed applied to the defendant's conduct—is grounded “‘on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.’”<sup>101</sup> Instead, Justice Brennan wrote that “[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, *they do not threaten competition*. Hence, they cannot give rise to antitrust injury.”<sup>102</sup>

If the issue before the Court had been whether a maximum price-fixing agreement should be per se unlawful, that would strike me as a rational argument. One could sensibly maintain that the purpose of antitrust is consumer welfare; that economic efficiency resulting in low prices is what the competitive system should produce; and that unless a low price is predatory and might ultimately lead to monopoly and *high* supra-competitive prices, it ought not be illegal to require a buyer to resell at no higher than a specified maximum. Indeed, a number of scholars have said as much.<sup>103</sup>

But if we start, as did the majority in *ARCO*, with the premise that maximum price-fixing arrangements are per se illegal, it is difficult to fathom how the Court could state that such arrangements “do not threaten competition.” Indeed, in attempting to explain his rejection of the plaintiff's argument that injuries caused in fact by per se offenses always constitute “antitrust injury,” Justice Brennan restates the time-honored justification for per se rules in language that, on its very face, belies his earlier conclusion: the per se rule

represents a “long-standing judgment that the prohibited practices by their nature have a ‘substantial potential for impact on competition.’” “Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.”<sup>104</sup>

If we apply this language, culled from a number of prior Supreme Court decisions, to the *ARCO* facts, it appears that the Court has gained enough experience to predict with confidence that a non-predatory verti-

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pricing’ but stated instead that ‘[f]or purposes of this case it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost.’

*Id.* at 1892-93 n.10 (citation omitted).

101. *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1891 (1990) (quoting *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 348 (1982)).

102. *Id.* at 1892 (emphasis added).

103. See, e.g., Page, *The Scope Of Liability For Antitrust Violations*, 37 *Stan. L. Rev.* 1445, 1469-70 (1985) (arguing that maximum price fixing, whether vertical or horizontal, should not give rise to antitrust injury because it does not result from inefficiency).

104. *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1893 (1990) (citations omitted).

cal maximum price-fixing agreement will be condemned by the Rule of Reason because of its substantial potential for impact on competition. Otherwise, the Court could not properly apply a per se rule, which it is clearly doing. How, then, can the majority conceivably hold that so long as prices are above predatory levels, they "do not threaten competition"?

While this conclusion may be somewhat puzzling, I think it is also clear that the Court does not really mean what it says. The opinion, in its exegesis of *Albrecht*, explains that maximum price-fixing arrangements between seller and buyer *can* be anticompetitive in the three ways Justice Brennan outlined. Nonetheless, it does not follow, as a matter of logic, that a per se illegal offense—which admittedly can cause antitrust injury to dealers and possibly to consumers—cannot cause such injury to a competitor who is driven out of business as a result and, indeed, is alleged to have been the target of the arrangement. I could well understand a rule that Section 1 is not violated by a conspiracy to charge low but not predatory prices for the purpose of injuring a competitor—or, at the very least, that the Rule of Reason should apply to such an arrangement. It is quite a different matter, however, for the Court to declare that such conduct is inevitably anticompetitive, and hence unlawful—even if there is no proof that any one of Justice Brennan's three concerns is present—when at the same time it declares that a competitor who is injured as a direct result of the agreed-upon prices has not been harmed by that which made the conspiracy unlawful in the first place. If the rationale of *Socony-Vacuum*, as epitomized in footnote 59, represents the state of the law, then it is the agreement's tampering with the market's price-setting mechanism that makes the conduct violative of the Sherman Act. If that is the case, the competitor injured by the agreed-upon prices is injured by that which makes the conspiracy unlawful. That is the crux of the inconsistency between *Trial Lawyers* and *ARCO*.

Perhaps Justice Brennan is entitled to some leeway for what appears to be a logical difficulty within his opinion. After all, he dissented in *Trial Lawyers* and deliberately avoided aligning himself with Justice Stevens' categorical equation of the per se rule with statutory mandate, the rejection of the idea that per se proscription is only a matter of administrative convenience, and the reaffirmation of *Socony Vacuum*'s rationale for the prohibition of all price fixing as impermissible tampering with the economy's central nervous system. And Justice Stevens, who dissented in *ARCO*, is certainly not guilty of inconsistency. But it is difficult to square the positions of those Justices who joined both majorities—Justices Scalia, O'Connor and Kennedy and Chief Justice Rehnquist. If the price-fixing boycott in *Trial Lawyers* was per se illegal despite the assumed absence of market power because only the unrestrained market may be permitted to set the price of a product or a service, then it should follow that a vertical maximum price-fixing agreement is per se illegal for the same reason, and not merely for those set forth by Justice White in *Albrecht*.

The fact that the *ARCO* conspiracy was vertical while the *Trial Lawyers* case involved a horizontal arrangement is insignificant. As Justice Stevens points out in his *ARCO* dissent, the result in *ARCO* should be the same if the conspiracy not to charge more than a specified maximum price were horizontal among all of the *ARCO* dealers and not vertically imposed by their common supplier.<sup>105</sup> In either case, the competitive injury, or absence thereof, would be the same, and thus they should receive the same treatment from the law. Indeed, Justice Brennan's argument that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition"<sup>106</sup> applies both to horizontal as well as vertical arrangements.

One cannot read *ARCO* without wondering whether the majority of the Justices really believe that, as a matter of substantive law, the per se rule ought to apply to a vertical maximum price-fixing scheme but are unwilling to come right out and say so by overruling *Albrecht*. More significantly, the case may signal acceptance by the Court's majority of an antitrust outlook that focuses on consumer welfare as the Alpha and Omega of Sherman-Act concern and permits restraints that are not likely to injure consumers somewhere down the road. There certainly is enough language in the *ARCO* opinion to support such a conclusion.

#### CONCLUSION

It might be good public policy to limit the ambit of per se antitrust doctrine to anticompetitive conduct that is highly likely to injure consumers. And it might be equally good policy to permit underpaid public defenders to use coercive pressure to persuade their governmental customers to raise their rates of pay—particularly when the D.C. Superior Court lawyers, had they been employees of the Legal Aid Society, could have gone on strike without any antitrust concern. In confronting these troubling policy issues, I fear that *Trial Lawyers* and *ARCO* have produced results that are difficult to rationalize. Whether that is because the Justices do not have small minds and consistency would have been foolish I leave to the reader.

#### FUNCTIONAL DISCOUNTS AFTER *TEXACO V. HASBROUCK*

by Richard M. Steuer<sup>107</sup>

**I**N *Texaco Inc. v. Hasbrouck*,<sup>108</sup> the much-maligned Robinson-Patman Act—that pariah of antitrust—came face to face with the Supreme

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105. *See id.* at 1900 (Stevens, J., dissenting).

106. *Id.* at 1892.

107. Partner, Kaye, Scholer, Fierman, Hays & Handler, New York.

108. 110 S. Ct. 2535 (1990). The author's law firm represented Texaco before the Supreme Court.